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A Sweep As Broad As Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools

Shiwali Patel

Elizabeth X. Tang

Hunter F. Iannucci

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Shiwali Patel, Elizabeth X. Tang, Hunter F. Iannucci[*†]

TABLE OF CONTENTS

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* Shiwali Patel is the Director of Justice for Student Survivors & Senior Counsel at the National Women's Law Center (NWLC) and received her J.D. from the American University Washington College of Law in 2010. Elizabeth X. Tang is a Senior Counsel for Education and Workplace Justice at the National Women's Law Center and received her J.D. from the University of Pennsylvania Carey Law School in 2017. Hunter F. Iannucci is the MARGARET Fund Fellow at the National Women's Law Center and received their J.D. from the George Washington University Law School in 2021. We are grateful to Shruti Kannan, Shelby Dyl, Nicole Steinberg, and Bryan Stockton for their valuable research; to Emily Martin for her insightful review; and to the student editors at the *Louisiana Law Review* for their careful editing. The views in this Article were shaped by the authors' work at the NWLC but do not necessarily reflect the views of the NWLC.

† Content warning: This Article contains numerous descriptions of sex-based harassment (including sexual assault, domestic and dating violence, and stalking) and self-harm.

INTRODUCTION

In August 2017, A.P.[1] was a tenth grade student at Fayette County High School in Georgia when a popular boy in her grade, J.B., coerced her into nonconsensual oral sex on campus after school.[2] When she said no repeatedly and tried to back away from him, he responded by choking her—twice—so aggressively that she fell back against a wall and onto the floor.[3] Afterwards, she felt disgusted, but she was worried that J.B. would ruin her reputation, so she talked to and even hugged him a few times in an attempt to ensure that he would not tell others what had happened.[4]

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1. This Article refers to NWLC clients by the name used in their lawsuits, which are publicly accessible. This means some survivors are referred to by their initials (e.g., A.P.) or first name (e.g., DarbiAnne), and most are referred to by the pseudonym in their lawsuit (e.g., Anne Doe, Jane Doe, Jill Doe, Lisa Doe, Mary Doe, Nancy Doe, Sobia Doe, Susan Doe).

2. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at 1, A.P. v. Fayette Cnty. Sch. Distr., No. 3:19-cv-00109-TCB (N.D. Ga. Mar. 25, 2021), ECF No. 105 [hereinafter A.P. Memo]; Plaintiff's Response to Defendant's Statement of Undisputed Facts at 10–11, *A.P.*, No. 3:19-cv-00109-TCB, ECF No. 105-1 [hereinafter A.P. Response].

3. A.P. Memo, *supra* note 2, at 1.

4. *Id.* at 2; A.P. Response, *supra* note 2, at 10–12.

The next day, in tears, A.P. told a teacher about the sexual assault.[5] She also told two guidance counselors and two assistant principals that she was grabbed by the neck and "made to do something she didn't want to do."[6] Unfortunately, the school's video surveillance footage was inconclusive, as the violent part of their encounter occurred off camera.[7] When interviewed, J.B.—unsurprisingly—claimed the incident was consensual.[8] Without investigating further, school officials decided that A.P. had consented to oral sex, justifying their inaction with the rape myth that A.P. liked J.B. and was only upset later because J.B. rejected her romantically.[9] When A.P. declined to speak with school officials about the assault, the school confiscated her phone, prevented her from doing schoolwork or returning to class, and placed her in an in-school suspension (ISS) for the rest of the day.[10] She was then given a ten-day, out-of-school suspension (OSS) for "sexual impropriety" and referred to a disciplinary tribunal, which voted to expel her for the rest of the 2017–2018 school year and gave her the option of attending an alternative school instead.[11] J.B. received exactly the same discipline.[12] Although A.P. appealed the school district's decision, both the county and state boards of education upheld her expulsion.[13] To make matters even worse, the school refused to tell A.P. whether she and J.B. had been assigned to the same alternative school; in fact, they were.[14] And so, A.P. never went back to school.[15] To this day, more than five years after she was sexually assaulted while in tenth grade, she does not have a high school diploma.[16]

Although she filed a lawsuit against her school, A.P. could not rely on the courts to give her relief. Title IX of the Education Amendments of 1972 (Title IX) is a federal law that requires schools that receive federal

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5. A.P. v. Fayette Cnty. Sch. Dist., No. 3:19-CV-109-TCB, 2021 WL 3399824, at *1 (N.D. Ga. June 28, 2021).

6. A.P. Memo, *supra* note 2, at 2.

7. *A.P.*, 2021 WL 3399824, at *1.

8. A.P. Memo, *supra* note 2, at 2.

9. *A.P.*, 2021 WL 3399824, at *1–2.

10. A.P. Memo, *supra* note 2, at 5.

11. *Id.* at 5–6.

12. *A.P.*, 2021 WL 3399824, at *5 n.6.

13. *Id.* at *2.

14. *Id.* at *2 n.2.

15. Plaintiff's Statement of Additional Material Facts at 31, A.P. v. Fayette Cnty. Sch. Distr., No. 3:19-cv-00109-TCB (N.D. Ga. Mar. 25, 2021), ECF No. 105-2.

16. *Id.* These statements are true as of March 17, 2023. Interview with Cassandra Mensah, Archives Counsel, NAACP Legal Defense Fund (Mar. 17, 2023).

funds to address and prevent sex discrimination, including sexual harassment and assault.[17] When the National Women's Law Center (NWLC) helped A.P. sue her school district for violating her Title IX rights, a federal judge dismissed her claims, holding that the school's actions were not "deliberately indifferent"[18]—the stringent legal standard that all student victims[19] of sex-based harassment must meet.[20] In particular, the judge held that it was legally acceptable for the school to suspend and expel A.P. based on evidence of her pre- and post-assault interactions with J.B.[21]—even though school officials did not see the *assault itself*, as it occurred in an off-camera location of the campus. The judge also ruled that the school district's response was not "deliberately indifferent" because it was not aware of any "prior sexual harassment by J.B. against *other students*" (*other than A.P.*)—even though neither the U.S. Supreme Court nor any appellate court has required such notice for Title IX liability.[22]

Unfortunately, the terrible decision that A.P. received from her judge is all too common for student survivors bringing Title IX claims in federal courts across the United States.[23] The Supreme Court has repeatedly recognized that the courts must accord Title IX "a sweep as broad as its

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17. 20 U.S.C. § 1681; 34 C.F.R. §106.44 (2023); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998).

18. *A.P.*, 2021 WL 3399824, at *4.

19. The terms *victim* and *survivor* are used interchangeably in this Article because many people who have experienced sex-based harassment feel that neither term alone, or even in combination, accurately captures the complexity of their identity or experience. *See* Kate Harding, *I've Been Told I'm a Survivor, Not a Victim. But What's Wrong With Being a Victim?*, TIME (Feb. 27, 2020, 8:20 AM EST), https://time.com/5789032/victim-survivor-sexual-assault [https://perma.cc/D8D3-869W]; Parul Sehgal, *The Forced Heroism of the 'Survivor'*, N.Y. TIMES MAG. (May 3, 2016), https://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html [https://perma.cc/9REH-W5DK].

20. *Davis*, 526 U.S. at 645, 650; *Gebser*, 524 U.S. at 290.

21. *A.P.*, 2021 WL 3399824, at *4.

22. *Id.* (emphasis added). The judge also held that A.P. did not have a retaliation claim under Title IX against her school district despite being suspended, expelled, and referred to an alternative school after reporting sexual assault because "A.P. was punished based on the tribunal's decision that she engaged in consensual oral sex at school, not because she reported a sexual assault." *Id.* at *5. As of this writing, A.P.'s appeal is pending before the Eleventh Circuit.

23. See discussion *infra* Part II.A for a discussion of how difficult it is for Title IX plaintiffs to obtain relief under the current litigation standards.

language."[24] Yet, in two landmark rulings in 1998 and 1999, the Supreme Court created an overly stringent standard for students seeking money damages from their schools under Title IX for failing to respond appropriately to their reports of sex-based harassment. Under what are often known as the *Gebser–Davis* standards, students like A.P. must show that: (1) the sex-based harassment they suffered was "so severe, pervasive, and objectively offensive" that it "deprive[d]" them of access to their school's educational opportunities or benefits; (2) the school exercised "substantial control" over their harasser and the context of the harassment; (3) an "appropriate person" at their school had "actual notice" (often referred to by courts as "actual knowledge") of the harassment; and (4) the school responded with "deliberate indifference."[25] This means that courts hold students, including children, to a harsher litigation standard under Title IX than they hold adult workers to under Title VII of the Civil Rights Act of 1964 (an analogous law prohibiting workplace harassment)[26] when these individuals have suffered sex-based harassment and are mistreated by their respective institutions.

Over the last two decades, the lower federal courts have often exacerbated this problem in two key ways. First, federal appellate and district courts have often zealously applied the *Gebser–Davis* standards such that student survivors are virtually not afforded any relief. For example, courts have frequently found that *any* school response to a report of sex-based harassment—no matter how egregious or bungled—is sufficient to overcome the "deliberate indifference" standard, as seen in A.P.'s case. Second, courts have created *additional* requirements that go well beyond the *Gebser–Davis* standards—like the "prior sexual harassment" requirement created by A.P.'s judge or what some advocates refer to as the "one free rape" rule from the Sixth Circuit[27]—erecting legal barriers which are all but insurmountable for many student survivors to obtain relief after being mistreated by their schools.

This Article will explain why and how Title IX must be strengthened so that student survivors like A.P. are not denied remedies. Part I will explain what sex-based harassment looks like in schools: how prevalent it

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24. N. Haven Bd. Of Educ. V. Bell, 456 U.S. 512, 521 (1982); *see also* Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167, 175 (2005) ("[B]y using such a broad term [as 'discrimination'], Congress gave the statute a broad reach.").

25. *Davis*, 526 U.S. at 633, 645, 650; *Gebser*, 524 U.S. at 290. Plaintiffs must also show that their school district or institution of higher education is a recipient of federal financial assistance. *Davis*, 526 U.S. at 640; *Gebser*, 524 U.S. at 290.

26. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

27. Kollaritsch v. Mich. State Univ. Bd. Of Trustees, 944 F.3d 613 (6th Cir. 2019). *See also* discussion *infra* Part II.A.

is among students; how rarely it is reported to school officials; and how commonly student survivors are ignored, punished, or otherwise pushed out of school when they come forward. Part II will review how Title IX case law, regulations, and sub-regulatory guidances have fallen short of the statute's promise to protect students from sex-based harassment. Part III will explain that, especially in the wake of the 50th anniversary of Title IX's passage in 2022, Congress needs to strengthen Title IX to protect student survivors from unjust outcomes like the one that A.P. faced by passing the Students' Access to Freedom & Educational Rights Act (SAFER Act).

I. SEX-BASED HARASSMENT HARMS STUDENTS, AND SCHOOLS MUST DO BETTER.

Many Title IX attorneys often find themselves answering these familiar questions from others who are not as steeped in Title IX: *Of course, sexual assault is terrible. But why should schools address it? Shouldn't the police handle it?* The answer is that sexual assault, like all sex-based harassment, is a type of sex discrimination.[28] Schools are required by several civil rights laws to address discrimination to protect students' equal access to education. Title IX is one of these laws; it requires schools to address sex discrimination, including sex-based harassment, to ensure that its victims are not deprived of educational benefits and opportunities.

As this Part explains, when schools fail to address sex-based harassment, students suffer serious educational harms, and many end up being pushed out of school altogether. Subpart I.A explains what sex-based harassment is and offers illustrative examples of how students commonly experience these types of harassment. Subparts I.B and I.C discuss, respectively, the prevalence and underreporting of sex-based harassment among students. Finally, Subpart I.D examines the many ways by which schools ignore or punish students who report sex-based harassment instead of supporting them, resulting in dire consequences to victims' educations.

A. What Is Sex-Based Harassment?

Sex-based harassment includes sexual harassment, sexual assault, *quid pro quo* harassment, dating violence, domestic violence, and

28. *See, e.g.*, 34 C.F.R. § 106.30(a)(3) (2023).

stalking.[29] From 1997 to 2020, the U.S. Department of Education defined sexual harassment as "unwelcome conduct of a sexual nature."[30] Sexual harassment often takes the form of verbal harassment. This includes making unwelcome sexual "jokes" or gestures, using sexual slurs, and spreading rumors about a student's body, sexual activity, sexual orientation, or gender identity. For example, after an older boy at a Pennsylvania high school raped National Women's Law Center's (NWLC) former client DarbiAnne, he and three friends spread a rumor at school that she had voluntarily had sex with multiple boys on the night of her rape.[31] Over the next two years, they continued targeting her with slurs

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29. Although not the focus of this Article, sex-based harassment also includes harassment based on pregnancy or related conditions (e.g., childbirth, termination of pregnancy, lactation), sexual orientation, gender identity, sex characteristics (e.g., intersex traits), and sex stereotypes. *See*, *e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,571 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), https://federalregister.gov/d/2022-13734 [https://perma.cc/9GM3-BXSM] [hereinafter 2022 Proposed Rules] (proposed § 106.10).

30. *Dear Colleague Letter: Sexual Violence*, DEP'T OF EDUC., OFF. FOR CIV. RTS. 3 (issued Apr. 4, 2011; rescinded Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/SQV9-NY4D] [hereinafter 2011 Guidance]; Dep't of Educ., Off. for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (issued Jan. 19, 2001; rescinded Aug. 26, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/NU35-2NBH] [hereinafter 2001 Guidance]; Dep't of Educ., Off. for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038, 12,040 (issued Mar. 13, 1997; replaced Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html [https://perma.cc/MMN2-ZD6F] [hereinafter 1997 Guidance] (stating that "[i]n order to be actionable as harassment, sexual conduct must be *unwelcome*" and that sexual harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical *conduct of a sexual nature*").
Subpart II.B.2, *infra*, explains that the Department under the Trump administration has since codified additional requirements in the definition of *sexual harassment*, requiring the harassment to be "severe" and "pervasive" before schools are legally responsible for addressing it. 34 C.F.R. § 106.30 (2023) ("sexual harassment"). In 2022, the Biden administration proposed another definition of *sexual harassment*, which will be codified after this Article is printed. *See* 2022 Proposed Rules, *supra* note 29, at 41568–69 (proposed § 106.2).

31. Goodwin v. Pennridge Sch. Dist., 389 F. Supp. 3d 304, 309 (E.D. Pa. 2019).

in the hallways and via text message, including calling her a "slut" and "hoe."[32]

Sexual harassment also includes behaviors often mischaracterized as "compliments" that the victim is told they should feel "flattered" to receive. For example, many harassers use "promposals"[33] and other public invitations for a date to pressure the victim—usually a girl or woman—into saying yes or by harassing them with repeated invitations after they have already said no.[34] Similarly, many students—again, primarily girls and women—are subject to "catcalling," an unhelpful euphemism for what is more accurately labeled as "street harassment" that minimizes and normalizes the nature and purpose of the harassment: to exert power and control over the target of the harassment.[35]

Another growing trend in both PK–12 schools and institutions of higher education is the use of technology to engage in a type of sexual harassment known colloquially as "revenge porn"[36] and more accurately labeled as "image-based sexual abuse."[37] For example, students—often girls and women—frequently receive unwanted sexual images or videos (e.g., "dick pics"), or they are pestered for or coerced into sending sexual images or videos of themselves (i.e., "nudes"). Or, a student consensually sends a sexual image of themselves to a romantic or sexual interest or partner, and the second student then shares that image with other classmates or online without the first student's consent.[38] In many cases,

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32. *Id.* at 310.

33. A *promposal* refers to a student asking another student to a prom or other school dance in a public and staged manner, sometimes with the use of props like banners, costumes, or choreographed flash mobs. The spectacle and social pressure inherent in a promposal have the effect of coercing the asked student on the spot to say yes to the asker, even when they do not want to.

34. Emanuella Grinberg, *'Promposal' pressure is intense for teens*, CNN (May 1, 2014, 3:18 PM EDT), https://www.cnn.com/2014/05/01/living/promposal-pressure-proms/index.html [https://perma.cc/BB9F-RCQN].

35. *Definitions*, STOP ST. HARASSMENT, https://stopstreetharassment.org/resources/definitions [https://perma.cc/GDD7-V9AM] (last visited May 4, 2022).

36. Carmel Abramov, *Revenge Porn: 21st century love*, L.A. TIMES: HIGH SCH. INSIDER (May 22, 2018), https://highschool.latimes.com/calabasas-high-school/revenge-porn-21st-century-love [https://perma.cc/X9VM-TKFD].

37. *See* Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. LEGAL STUD. 534 (2017), https://doi.org/10.1093/ojls/gqw033 [https://perma.cc/8CGR-LYK5].

38. McGlynn & Rackley, *supra* note 37, at 537–38; Erika Rackley et al., *Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse*, 29 FEMINIST LEGAL STUD. 293, 297 (2021), https://doi.org/10.1007/s10691-021-09460-8 [https://perma.cc/3ERC-29P6].

the harasser does this to coerce the victim into staying in the relationship or humiliate them for leaving.[39] Another common pattern involves the harasser recording a sexual encounter with—or, in some cases, a sexual assault of—the victim without their consent and then distributing the video to other classmates or online.[40] For example, another NWLC client, Nancy Doe, a former college student in Connecticut, was recorded without her knowledge during a consensual sexual encounter; her harassers then distributed the video to the entire men's soccer team via social media.[41] In other cases, the harasser will threaten to post a sexual video of the victim online unless the victim sends additional videos, has "sex" with the harasser (this is actually sexual assault), or remains in a relationship with the harasser (this is actually dating violence).[42]

Sexual assault—or sexual violence—is a subset of sexual harassment that refers to physical conduct of a sexual nature[43] against someone who is incapable of giving consent, whether due to their age, drug or alcohol use, or physical or mental disability.[44] Sexual assault may involve the harasser using their own body or an object to intentionally touch the victim's private body part[45]—over or under the victim's clothing.[46]

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39. Rackley et al., *supra* note 38, at 304–05.

40. McGlynn & Rackley, *supra* note 37, at 539–40; Rackley et al., *supra* note 38, at 297.

41. Declaration of Nancy Doe in Support of Motion to Grant Preliminary Injunction at 3, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv-11104-WGY (D. Mass. July 24, 2020), ECF No. 32-6 [hereinafter Nancy Doe Declaration].

42. Rackley et al., *supra* note 38, at 293–322.

43. The Department of Education's now-rescinded 2001 Title IX Guidance defined *sexual harassment* to include "physical conduct of a sexual nature." 2001 Guidance, *supra* note 30, at 2.

44. In 2020, the Department of Education defined *sexual assault* in the Title IX regulations by referring to its existing definition in the Clery Act: all conduct classified as a "sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." 34 C.F.R. § 106.30(a) (2023) (citing 20 U.S.C. § 1092(f)(6)(A)(v)); *see also* FED. BUREAU OF INVESTIGATION, NIBRS MANUAL (Apr. 15, 2021), https://le.fbi.gov/file-repository/nibrs-user-manual.pdf/view [https://perma.cc/2VKE-BPPN] [hereinafter FBI Manual] (defining *rape*, *sodomy*, *sexual assault with an object*, *fondling*, and *statutory rape*).

45. This is consistent with the FBI's definition of *fondling*, which is part of the current definition of sexual assault in the 2020 Title IX regulations. *See* FBI Manual, *supra* note 44, at 40.

46. In 2020, the Department of Education recognized that the touching of private body parts "over clothing" can constitute sexual assault. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,176 (May 19,

Conversely, sexual assault may also involve the victim being made to touch the harasser's private body part (e.g., a coerced "hand job"). Rape is, of course, a type of sexual assault. It can be penetrative or non-penetrative and can involve survivors and harassers of any gender.[47]

Sexual assault also includes sexual relationships between students and staff. In PK–12 schools, this includes any sexual or "dating" relationship between a minor student and an adult at school, regardless of whether the child submits to or pursues the relationship.[48] Alarmingly, NWLC attorneys have heard from some coalition partners that in their local school district, school police officers—who carry guns—are known to "date" high school girls.[49] In institutions of higher education, staff-on-student sexual assault often occurs in the context of *quid pro quo* harassment, i.e., the conditioning of educational benefits on the victim's submission to sexual conduct and the threat of withholding benefits or inflicting punishment if the victim does not submit.[50] One of NWLC's clients, Sobia Doe, a former Ph.D. student at a California university, experienced such abuse by her male graduate advisor, who was also the chair of her Master's

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2020), https://www.federalregister.gov/d/2020-10512 [https://perma .cc/78Q4-U5XX] [hereinafter 2020 Title IX Rules].

47. For example, rape includes when a victim is made to perform oral sex, when a victim is penetrated by the harasser's body or an object, and when a victim is made to penetrate the harasser. This is consistent with the FBI's definitions of *rape*, *sodomy*, and *sexual assault with an object*, which are part of the current definition of *sexual assault* in the 2020 Title IX regulations. *See* FBI Manual, *supra* note 44, at 39–40. Rape can also be nonpenetrative, including within queer relationships—e.g., when a victim is made to perform nonpenetrative oral sex on the harasser and when a harasser performs nonpenetrative oral sex on the victim.

48. This is similar to the FBI's definition of *statutory rape*, which is part of the current definition of *sexual assault* in the 2020 Title IX regulations. *See* FBI Manual, *supra* note 44, at 40.

49. One policy recommendation for schools to reduce sexual assault against students is to remove all police officers from campus. ELIZABETH TANG & ASHLEY SAWYER, 100 SCHOOL DISTRICTS: A CALL TO ACTION FOR SCHOOL DISTRICTS ACROSS THE COUNTRY TO ADDRESS SEXUAL HARASSMENT THROUGH INCLUSIVE POLICIES AND PRACTICES 4 (2021), https://nwlc.org/100schooldistricts [https://perma.cc/F227-2YV8].

50. The current definition of *sexual harassment* in the 2020 Title IX regulations includes "[a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct." 34 C.F.R. § 106.30(a) (2023).

thesis committee.[51] Over a period of seven years, he forced her not to wear underwear or to wear specific outfits to their advising appointments, forced her to watch sexually explicit films that he insisted she include in new chapters of her thesis, and repeatedly sexually assaulted her.[52]

In many cases, sexual assault is downplayed by language suggesting it is not quite assault. Some sexual assaults are deemed to be merely a "game." One particularly common "game" NWLC has repeatedly heard about—and which reportedly occurs in California,[53] Nevada,[54] Oregon,[55] Pennsylvania,[56] and Washington[57]—is "Slap Ass Fridays," in which students (primarily boys) slap the buttocks of other students (primarily girls). Students have also been victimized by similar "games" like "Ball Tap Tuesdays" and "Titty Touch Wednesdays,"[58] in which the victims' testicles and breasts are touched without their consent. Hazing is another way in which sexual assault is downplayed. It is not uncommon among high school and college athletics teams and fraternities for more senior members to haze new members by "teabagging" them—rubbing their

51. Declaration of Sobia Doe in Support of Motion to Grant Preliminary Injunction at 2, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv-11104-WGY (D. Mass. July 24, 2020), ECF No. 32-4 [hereinafter Sobia Doe Declaration].

52. *Id.*

53. David Sheridan, *Oakland girls shine spotlight on sexual harassment and school board revamps its policy*, NAT'L EDUC. ASS'N (Nov. 9, 2017), https://neaedjustice.org/2017/11/09/oakland-girls-shine-spotlight-sexual-harassment-school-board-revamps-policy [https://perma.cc/NE8K-G4VR].

54. Nate, *Parents Are All In a Tizzy Over "Slap-Ass Fridays" At a Las Vegas Middle School*, BARSTOOL SPORTS (Apr. 4, 2014, 12:50 PM), https://www.barstoolsports.com/blog/17086/parents-are-all-in-a-tizzy-over-slap-ass-fridays-at-a-las-vegas-middle-school [https://perma.cc/2HRQ-AWM4].

55. Jessica Hopson Burbach, Pushing Back on School Pushout: Youth at an Alternative School Advocate for Educational Change Through Youth Participatory Action Research 150, 214 (May 18, 2018) (EdD dissertation, Portland State University), https://doi.org/10.15760/etd.6269 [https://perma.cc/9JSM-T6TW].

56. Carol Reina & Rita Smith-Wade-el, Global Awareness Society International 21st Annual Conference: Crossing the Line in Lancaster County: Adolescents, Sexual Harassment & Cyber-Bullying 5 (May 2012), https://organizations.bloomu.edu/gasi/pdf_documents/2012_Proceedings_pdfs/ReinaCarol%20and%20Rita%20Research%20revised%20.pdf [https://perma.cc/9C49-Z9KR].

57. Washington v. D.S., No. 71010-9-1 (Wash. Ct. App. July 21, 2014), https://www.courts.wa.gov/opinions/pdf/710109.pdf [https://perma.cc/RQB7-2DYY].

58. Reina & Smith-Wade-el, *supra* note 56, at 5.

genitalia on their victims' faces.[59] Another example of how the harm of sexual assault is diminished through language is the colloquial term "stealthing"—more accurately regarded as "nonconsensual condom removal"[60]—a practice that entered mainstream discourse in 2020 through Micaela Coel's popular television series *I May Destroy You.*[61]

Dating[62] and domestic[63] violence encompass physical, sexual, emotional, economic, or other abuse (or threats of abuse) against a victim

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59. *E.g.*, James Sanna, *Southwest High Taking Steps To Address Hazing*, PATCH (Aug. 9, 2011, 9:41 PM CT), https://patch.com/minnesota/southwestminneapolis/southwest-high-taking-steps-to-address-hazing [https://perma.cc/QM4B-5WRP]; Vickie Holbrook, *Students charged in hazing incident*, TETON VALLEY NEWS (Mar. 17, 2011), https://www.tetonvalleynews.net/news/students-charged-in-hazing-incident/article_1bd59bc7-5080-5361-ab43-243f5c46c946.html [https://perma.cc/QKA6-GC6F].

60. Alexandra Brodsky, *"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183 (2017), https://ssrn.com/abstract=2954726 [https://perma.cc/7RSE-NMLP].

61. Nonny Onyekweli, I May Destroy You *Changed the Way My Friends and I Talk About Consent*, SLATE (Sept. 4, 2020, 4:55 PM), https://slate.com/culture/2020/09/i-may-destroy-you-consent-metoo.html [https://perma.cc/MZG8-XUX4].

62. In 2020, the Department of Education defined *dating violence* in the Title IX regulations by referring to its existing definition in the Violence Against Women Act:

> [V]iolence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.

34 C.F.R. § 106.30(a) (2023) (citing what was 34 U.S.C. § 12291(a)(10), now renumbered § 12291(a)(11)). The Department's 2022 proposed Title IX regulations would retain this definition. 2022 Proposed Rules, *supra* note 29, at 41569 (proposed § 106.2).

63. In 2020, the Department of Education defined *domestic violence* in the Title IX regulations by referring to its existing definition at the time in the Violence Against Women Act (VAWA):

> [F]elony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is

or the victim's family members, friends, pets, or property by a current or former romantic or sexual partner. In practice, this can include the abuser insulting the victim; controlling the victim's appearance; isolating the victim from their friends and family; interfering with the victim's classes or job; monitoring the victim's location and communications; interfering with the victim's birth control; threatening self-harm if the victim ends the relationship; destroying the victim's personal belongings; threatening to report the victim or their family members to the police, immigration officials, child welfare agencies, or a mental health institution; and being violent or threatening violence toward the victim or their family member, friend, or pet. Victims are often at most risk of violence, including lethal violence, when they leave or attempt to leave the relationship, which means many victims choose to remain in abusive relationships as a survival strategy.[64]

Dating violence is common in both PK–12 schools and institutions of higher education. For example, one of NWLC's former clients, a Jane Doe in Pennsylvania, was in tenth grade when she dated an older boy who called her a "whore" and "bitch"; tried to persuade her to drop out of a school program; pushed her; and, during one incident, held her down by her wrists, bit her, and gave her multiple bruises.[65] After she broke up with him, he followed her around at school, waited outside her classrooms, and sent her Snapchat messages from him and his friends telling her that he would kill himself if she did not get back together with him.[66] Another NWLC client, Jill Doe, a former college student in Massachusetts, had been dating her then-boyfriend for one year when he raped her in her dorm

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> protected from that person's acts under the domestic or family violence laws of the jurisdiction.

34 C.F.R. § 106.30(a) (2023) (citing what was 34 U.S.C. § 12291(a)(8), now renumbered § 12291(a)(12)). In 2021, Congress amended the definition of *domestic violence* in VAWA to include "a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including *verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior*." 34 U.S.C. § 12291(a)(12) (emphasis added). However, the Department's 2022 proposed Title IX regulations would not incorporate VAWA's 2021 updates. *See* 2022 Proposed Rules, *supra* note 29, at 41418, 41569 (proposed § 106.2).

64. Brief of *Amici Curiae* 31 Organizations Dedicated to Improving Educational Institutions' Responses to Dating Violence, in Support of Appellants & Reversal at 8–9, Hall v. Millersville Univ., 22 F.4th 397 (3d Cir. 2022) (No. 19-3275).

65. Doe v. Pennridge Sch. Dist., 413 F. Supp. 3d 393, 397, 400 (E.D. Pa. 2019).

66. *Id.* at 401.

room.[67] As mentioned above, dating violence can often become lethal. For example, NWLC recently joined an amicus brief in support of a Title IX lawsuit brought by the parents of Karlie Hall, a Pennsylvania college student who was repeatedly physically abused before being ultimately strangled to death, and possibly also sexually assaulted, in her dorm room by her boyfriend.[68]

Many students are also victims of stalking—being followed in a way that makes them afraid for themselves or for someone else.[69] This may include the stalker calling the victim and hanging up repeatedly; showing up at the victim's home, school, or workplace; using technology to monitor the victim's location; giving unwanted gifts; befriending the victim's friends; pretending to be the victim online; and doxing the victim (i.e., sharing private or identifying information about the victim online).[70] Most stalking victims in high school and college are stalked by someone they know: a former or current intimate partner, acquaintance, friend, or other classmate.[71] In one in five cases, the stalker uses a weapon to threaten or harm the victim.[72] Stalking is often an aspect of dating and domestic violence, as seen in the case of NWLC's former client Jane Doe in

67. Declaration of Jill Doe in Support of Motion To Grant Preliminary Injunction at 2, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv-11104-WGY (D. Mass. July 24, 2020), ECF No. 32-2.

68. Hall v. Millersville Univ., 22 F.4th 397, 399–402 (3d Cir. 2022).

69. In 2020, the Department of Education defined *stalking* in the Title IX regulations by referring to its existing definition in the Violence Against Women Act: "[E]ngaging in a course of conduct directed at a specific person that would cause a reasonable person to—(A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress." 34 C.F.R. § 106.30(a) (2023) (citing what was U.S.C. § 12291(a)(30), now renumbered § 12291(a)(36)).

70. *Types of abuse: Stalking*, LOVE IS RESPECT, https://www.loveisrespect.org/resources/types-of-abuse [https://perma.cc/F9NF-G3J9] (last visited May 5, 2022).

71. *Stalking Among College Students: Fact Sheet*, STALKING AWARENESS, https://www.stalkingawareness.org/wp-content/uploads/2021/09/Campus-Stalking-Fact-Sheet.pdf [https://perma.cc/TG42-8MLT] (last visited May 5, 2022); *Stalking Among Adolescents: Fact Sheet*, STALKING AWARENESS, https://www.stalkingawareness.org/wp-content/uploads/2022/01/SPARC-Stalking-and-Adolescents-Fact-Sheet.pdf [https://perma.cc/YSF2-B9ZA] (last visited May 5, 2022).

72. *Stalking Fact Sheet*, STALKING AWARENESS, https://www.stalkingawareness.org/wp-content/uploads/2019/01/SPARC_StalkngFactSheet_2018_FINAL.pdf [https://perma.cc/4FRV-VEZL] (last visited May 5, 2022).

Pennsylvania.[73] Stalking can also be lethal: three in four women (76%) who are killed by an intimate partner were stalked first.[74]

B. Sex-Based Harassment Is Widely Prevalent Among Students.

Students of all genders experience sexual harassment in schools. In PK–12 schools, 56% of girls and 40% of boys in grades 7–12[75] and 54% of LGBTQI+ students ages 13–21 are sexually harassed in a single school year.[76] In college, 59% of women, 65% of transgender and gender-nonconforming students, and 36% of men have experienced sexual harassment since enrolling at their institution of higher education.[77] As of January 2023, the Department of Education is currently investigating 396 complaints against school districts and institutions of higher education for failing to respond adequately to reported sexual harassment.[78]

For decades, studies have consistently revealed that at least 1 in 5 to 1 in 4 undergraduate women (25.9%)—including nearly 1 in 3 disabled

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73. *See* discussion *supra* notes 65–66 and accompanying text.

74. *Quick Guide to Stalking: 16 Important Statistics, and What You Can Do About It*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE (Jan. 30, 2017), https://ncadv.org/blog/posts/quick-guide-to-stalking-16-important-statistics-and-what-you-can-do-about-it [https://perma.cc/WF9J-9SU2].

75. CATHERINE HILL & HOLLY KEARL, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 28 (2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf [https://perma.cc/X2ZY-7ALA] [hereinafter AAUW Sexual Harassment Report].

76. *The 2021 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN xvii, 22 (Oct. 18, 2022), https://www.glsen.org/research/2021-national-school-climate-survey [https://perma.cc/5Z25-NJAC] [hereinafter GLSEN Survey].

77. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT A7-60, A7-62 (Oct. 15, 2019), https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019 [https://perma.cc/3NZC-NSWT] [hereinafter AAU Report].

78. *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of January 27, 2023 7:30am Search*, DEP'T OF EDUC., OFF. FOR CIV. RTS. (last modified Feb. 1, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html?perPage=1000 [https://perma.cc/F3PZ-EQYL].

women (31.6%)[79]—experience sexual assault,[80] alongside more than 1 in 5 transgender and gender-nonconforming students (22.8%) and 1 in 15 men (6.8%).[81] Meanwhile, there is other sobering data regarding sexual assault: 21% of girls ages 14–18 have been kissed or touched without their consent, including 56% of girls who are pregnant or parenting, 38% of LGBTQI+ girls, 24% of Latina girls, 23% of Indigenous girls, and 22% of Black girls.[82] Furthermore, one in eight transgender adults (13%) who were out or perceived as transgender while in PK–12 schools were sexually assaulted as PK–12 students.[83] In 2017, a research study estimated that ten percent of K–12 students will experience sexual misconduct by a school employee by the time they graduate from high school,[84] which is regrettably consistent with a 2004 survey finding that

79. NAT'L COUNCIL ON DISABILITY, NOT ON THE RADAR: SEXUAL ASSAULT OF COLLEGE STUDENTS WITH DISABILITIES 11 (Jan. 30, 2018), https://ncd.gov/sites/default/files/NCD_Not_on_the_Radar_Accessible.pdf [https://perma.cc/D67D-BMPT].

80. AAU Report, *supra* note 77, at ix; Nick Anderson & Scott Clement, *1 in 5 college women say they were violated*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/ [https://perma.cc/ZPE3-V4NA]; BONNIE S. FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (Dec. 2000), https://www.ojp.gov/pdffiles1/nij/182369.pdf [https://perma.cc/AVA9-RKU8]; Mary P. Koss & Christine A. Gidycz, *Sexual Experiences Survey: Reliability and Validity*, 53 J. OF CONSULTING & CLINICAL PSYCHOL. 422 (1985), https://doi.org/10.1037/0022-006X.53.3.422 [https://perma.cc/Q92J-A4KL].

81. AAU Report, *supra* note 77, at ix.

82. NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 3 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence-1.pdf [https://perma.cc/HP8C-F75U] [hereinafter NWLC Sexual Harassment Report]. In addition, 6% of girls ages 14–18 have been forced to have sex when they did not want to (i.e., raped), including 15% of LGBTQI+ girls, 11% of Indigenous girls, 9% of Black girls, and 7% of Latina girls. *Id.*; NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO ARE PREGNANT OR PARENTING 12 (2017), https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf [https://perma.cc/QA8Q-CMH4] [hereinafter NAT'L WOMEN'S L. CTR., LET HER LEARN].

83. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 134 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/HA9Z-22FH] [hereinafter NCTE Report].

84. BILLIE-JO GRANT ET AL., A CASE STUDY OF K–12 SCHOOL EMPLOYEE SEXUAL MISCONDUCT: LESSONS LEARNED FROM TITLE IX POLICY

seven percent of students in grades 8–11 had received physical sexual contact from a school employee.[85] As of January 2023, the Department of Education is currently investigating 319 complaints against school districts and institutions of higher education for failing to respond adequately to reported sexual assault.[86]

Other forms of sex-based harassment are also common among students. In 2020, 1 in 11 high school girls and 1 in 14 high school boys experienced physical dating violence.[87] In college, one in seven women (14.1%), one in five transgender and gender-nonconforming students (21.5%), and one in ten men (10.1%) have experienced dating or domestic violence (also known collectively as intimate partner violence) since enrolling at their institution.[88] In addition, most stalking is sex-based: more than 60% of women who have been stalked and 44% of men who have been stalked were stalked by a former or current intimate partner, and many more are stalked by an acquaintance or stranger who sees them as a prospective romantic or sexual partner.[89] In 2016, more than a quarter of a million people ages 16–19 were victims of stalking.[90]

C. Most Students Do Not Report Sex-Based Harassment to Their Schools.

Despite the widespread prevalence of sex-based harassment, few students report it to their schools. Many victims do not report because they believe the incident is "not serious enough" to report, sometimes because

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IMPLEMENTATION (Sept. 15, 2017), https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf [https://perma.cc/GD96-JK5Y].

85. Charol Shakeshaft, *Know the warning signs of educator sexual misconduct*, KAPPAN MAG., Feb. 2013, https://filestore.scouting.org/filestore/nyps/2013/pdf/Shakeshaft-Kappan20138.full.pdf [https://perma.cc/MC9X-TTL8].

86. *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of January 27, 2023 7:30am Search*, *supra* note 78.

87. CTR. FOR DISEASE CONTROL AND PREVENTION, PREVENTING TEEN DATING VIOLENCE 1 (2021), https://www.cdc.gov/violenceprevention/pdf/ipv/TDV-factsheet_508.pdf [https://perma.cc/WX27-KBWK].

88. AAU Report, *supra* note 77, at 52.

89. *Stalking Statistics & Facts*, SAFEHORIZON, https://www.safehorizon.org/get-informed/stalking-statistics-facts [https://perma.cc/MC8J-XV4Q] (last visited May 2, 2022).

90. JENNIFER L. TRUMAN & RACHEL E. MORGAN, STALKING VICTIMIZATION, 2016 6 (Apr. 2021), https://bjs.ojp.gov/content/pub/pdf/sv16.pdf [https://perma.cc/3PYL-NZA7].

it began consensually, alcohol and drugs were present, they believe such incidents seem common, others suggest it is not serious enough to report, or they believe they can handle it themselves.[91] Other common reasons for not reporting include shame and embarrassment, fear of not being believed, fear that no one would do anything to help, and doubt that their school's response would be actually helpful.[92] Many survivors fear reporting would only make the situation worse: they fear being labeled a "snitch;" facing retaliation from the harasser; suffering negative academic, social, or professional consequences; or being blamed or disciplined by their school.[93] And many survivors simply do not want their harasser to get into trouble, particularly if their harasser is an intimate partner, romantic interest, friend, or someone who is well-liked in their community.[94]

Just as individuals from historically oppressed communities are more likely to be harassed based on sex, they are also often less likely to report their harassment. For example, Black women report their assaults at far lower rates compared to white women—even when those Black women attend a historically Black college or university (HBCU).[95] Transgender and gender-nonconforming students are three times more likely than women and men to fear they will not be believed when reporting sexual assault, and many also fear their sexual assault will be minimized due to their harasser's gender.[96]

For male survivors, stereotypes and pressures about masculinity can make it harder for them to understand that they have been sexually harassed or to come forward about the harassment. Although men and boys are far more likely to be *victims* of sexual assault than to be falsely

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91. AAU Report, *supra* note 77, at A7-27–33, A7-92–93; GLSEN Survey, *supra* note 76, at 26–28;

92. AAU Report, *supra* note 77, at A7-27–33, A7-92–93; GLSEN Survey, *supra* note 76, at 26–28; *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/VD2W-6JBM] (last visited May 6, 2022) [hereinafter RAINN Statistics].

93. AAU Report, *supra* note 77, at A7-27–33, A7-92–93; GLSEN Survey, *supra* note 76, at 26–28.

94. AAU Report, *supra* note 77, at A7-27, A7-30; RAINN Statistics, *supra* note 92.

95. Lauren Rosenblatt, *Q&A: Why it's harder for African American women to report campus sexual assaults, even at mostly black schools*, L.A. TIMES (Aug. 28, 2017, 4:00 AM PT), http://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html [https://perma.cc/8L7A-GM59].

96. AAU Report, *supra* note 77, at A7-27, A7-30–31.

accused of it, contrary to popular misconception,[97] they often do not understand when they have been sexually assaulted. As NWLC recently explained in amicus briefs to the Sixth Circuit regarding Dr. Richard Strauss's sexual abuse of hundreds of male athletes and other male students at Ohio State University (OSU), male college athletes are especially unlikely to recognize themselves as victims of sexual abuse because they are told they embody "manliness" and male sexuality.[98] As a result of these and other factors, Strauss's victims argued—and the Sixth Circuit ultimately agreed—that they did not realize that the invasive and medically unnecessary examinations they endured from Strauss between 1978 and 1998 constituted sexual abuse until many years later in 2018, when OSU launched an investigation into Strauss's misconduct.[99] Even when college men do recognize that they have been sexually assaulted, many do not report it because they fear their assault will be minimized due to their harasser's gender, because their body showed involuntary arousal, or because they fear their harasser will counter-accuse them.[100]

For PK–12 students, there is yet another reason not to report sex-based harassment to their schools. In most states, nearly all school employees are required to report suspected sexual abuse of minors to police.[101] But many survivors do not want the police to be involved in their cases, whether it is because the criminal legal system will not provide the remedies they are seeking, because police are notoriously ineffective at addressing sex-based

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97. *E.g.*, Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Oct. 16, 2015), https://www.huffpost.com/entry/false-rape-accusations_n_6290380 [https://perma.cc/PX2K-K73R] [hereinafter Kingkade, *Males*].

98. Brief of Nat'l Women's L. Ctr., Women's Sports Foundation, and 49 Additional Organizations as *Amici Curiae* in Support of Plaintiffs-Appellants at 22–23, Snyder-Hill v. Ohio State Univ., 48 F.4th 686 (6th Cir. 2022) (No. 21-3991), https://nwlc.org/wp-content/uploads/2022/02/Moxley-v-OSU-55-NWLC-WSF-amicus-2.9.22.pdf [https://perma.cc/82X5-2ZQN]; Brief of Nat'l Women's L. Ctr., Women's Sports Foundation, and 49 Additional Organizations as *Amici Curiae* in Support of Plaintiffs-Appellants at 22–23, *Snyder-Hill*, 48 F.4th 686 (No. 21-3981), https://nwlc.org/wp-content/uploads/2022/02/Snyder-Hill-v-OSU-50-NWLC-WSF-amicus-2.9.22.pdf [https://perma.cc/62MM-PLCD].

99. Brief of Plaintiffs-Appellants at 11, *Snyder-Hill*, 48 F.4th 686 (No. 21-3991), ECF No. 30; Brief of Plaintiffs-Appellants at 10–11, *Snyder-Hill*, F.4th 686 (No. 21-3981), ECF No. 28; *Snyder-Hill*, 48 F.4th 686.

100. AAU Report, *supra* note 77, at A7-28–29.

101. *Mandatory Reporters of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY (2019), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda [https://perma.cc/PK23-D3J2].

harassment,[102] because police are often *purveyors* of sexual and domestic violence,[103] or because the survivors are abolitionists who want to dismantle the entire prison industrial complex.[104] In particular, many Black, Latinx, and Indigenous students; undocumented students;[105] LGBTQI+ students;[106] and disabled students do not want to report sex-based harassment to police because of their heightened risk of being subjected to police violence or deportation. They may also decide not to come forward if their harasser is a member of their own community, for example, to avoid exacerbating the overcriminalization of men and boys of color.

As a result, sex-based harassment is greatly underreported. Among students in grades 7–12 who are sexually harassed, only one in eight girls (12%) and 1 in 20 boys (5%) report the incident to a teacher, guidance counselor, or other adult at school.[107] Nearly two-thirds of LGBTQI+ students (61.5%) who experience harassment, including sexual harassment, do not report the incident to their schools.[108] For every 50 girls ages 14–18 who are kissed or touched without their consent, only one girl (2%) reports the incident to her school.[109] Among college sexual assault survivors, only one in eight women (12.3%), one in five transgender and gender-nonconforming students (20.8%), and one in ten men (9.9%) report the assault to a school program.[110] Similarly, one in three or fewer victims

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102. *The Criminal Justice System: Statistics*, RAINN, https://rainn.org/statistics/criminal-justice-system [https://perma.cc/XF97-VZUJ] (last visited May 6, 2022).

103. Andrea J. Ritchie, *How some cops use the badge to commit sex crimes*, WASH. POST (Jan. 12, 2018, 9:16 AM EST), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html [https://perma.cc/43H6-CN2S].

104. *See* Cassandra Mensah, *If We Abolish Police, What Happens to Rapists?*, TEEN VOGUE (June 24, 2020), https://www.teenvogue.com/story/what-happens-to-rapists-if-abolish-police [https://perma.cc/845E-RMDU].

105. *See* Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html [https://perma.cc/RVN3-4GGK].

106. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf [https://perma.cc/NAF2-XES4].

107. AAUW Sexual Harassment Report, *supra* note 75, at 2–3.

108. GLSEN Survey, *supra* note 76, at 25.

109. NWLC Sexual Harassment Report, *supra* note 82, at 2.

110. AAU Report, *supra* note 77, at A7-27, A7-30.

of dating violence, domestic violence, or stalking report the incidents to their schools.[111]

D. Students Who Report Sex-Based Harassment Are Often Ignored or Punished Instead of Being Supported.

Despite sex-based harassment being so widely prevalent and underreported, the few students who do come forward to ask for help from their schools are typically ignored or punished instead of receiving support. NWLC has frequently heard from Title IX attorneys that, often, teachers and other school employees who witness these incidents minimize the harassment and do not intervene, telling victims to simply "ignore" their harassers, to brush it off as a "joke," or to accept that "he's only doing this because he likes you." One of NWLC's clients, a Jane Doe in Michigan, was in fourth grade when she was repeatedly sexually assaulted by a classmate.[112] Jane reported each of the incidents to the school, but nothing was done, and her teacher forbade her from calling her mother because it was not "important enough."[113] When the principal was informed, he described the assault as just "kids playing tag" and that it "got out of hand."[114] When another client who was in high school at the time, a Jane Doe in Pennsylvania, reported that her ex-boyfriend was stalking her, her assistant principal dismissed her, telling Jane she was "crazy" and a "drama queen."[115] And in a survey conducted by Know Your IX, a student survivor advocacy organization, one college survivor reported that she was told by her dean that "[n]o one [at this school] would care if you killed yourself, including [your assailant]."[116]

Too often, students are even suspended or expelled instead of receiving help. In many cases, school officials believe the victim engaged in consensual sexual activity in violation of school rules or believe the

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111. *Id.* at A7-92.

112. Declaration of Jane Doe at 2, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv-11104 (D. Mass. Nov. 5, 2020), ECF No. 145-3 [hereinafter Jane Doe Declaration].

113. *Id.*

114. *Id.* at 3.

115. Doe v. Pennridge Sch. Dist., 413 F. Supp. 3d 393, 401 (E.D. Pa. 2019).

116. SARAH NESBITT & SAGE CARSON, THE COST OF REPORTING: PERPETRATOR RETALIATION, INSTITUTIONAL BETRAYAL, AND STUDENT SURVIVOR PUSHOUT 12–13, 23 (Mar. 2021), https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf [https://perma.cc/8E8G-6GUU] [hereinafter KYIX Report].

incident was consensual and that the victim made a false accusation.[117] For instance, one of NWLC's former clients, a Jane Doe in Florida who was 14 years old at the time, was suspended—along with her three rapists—for "sexual misconduct" (i.e., consensual sexual activity on school grounds) because the school police officer investigating her report did not believe her and coerced her into editing her written complaint to say that she was actually a "willing participant" in her own assaults.[118]

Student survivors are also often disciplined because, at the time they were assaulted, they were violating another school rule. For instance, students who report sex-based harassment are commonly punished for using drugs or alcohol, physically defending themselves against their harassers, expressing age-appropriate trauma symptoms after the incident, missing school in order to avoid their harasser, or merely telling other students about the incident.[119] For example, a student survivor from Know Your IX's survey reported that she was dismissed from her graduate program for "unprofessional conduct," which included leaving the classroom when she was triggered by hearing her assailant's voice and speaking with some of her peers about her experience of assault.[120] Others

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117. *See, e.g.*, *id.* at 15–16; Tyler Kingkade, *Schools Keep Punishing Girls – Especially Girls of Color – Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, THE 74 (Aug. 6, 2019), https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it [https://perma.cc/G32K-H2JA]; Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, CHRON. OF HIGHER EDUC. (Aug. 6, 2018), https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164 [https://perma.cc/68D2-WZKZ]; Aviva Stahl, *'This Is an Epidemic': How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016, 4:10 PM), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped [https://perma.cc/7JLP-NM5P]; Kate Taylor, *Schools Punished Teenagers for Being Victims of Sexual Assault, Complaints Say*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/nyregion/schools-punished-teenagers-for-being-victims-of-sexual-assault-complaints-say.html [https://perma.cc/HP7U-V4JQ].

118. Doe v. Sch. Bd. of Miami-Dade Cnty., 403 F. Supp. 3d 1241, 1250–51 (S.D. Fla. 2019).

119. KYIX Report, *supra* note 116, at 15–16; LETICIA SMITH-EVANS & JANEL GEORGE, UNLOCKING OPPORTUNITY FOR AFRICAN AMERICAN GIRLS: A CALL TO ACTION FOR EDUCATIONAL EQUITY 25 (2014), https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf [https://perma.cc/KEC8-6H6W] [hereinafter LDF & NWLC Report].

120. KYIX Report, *supra* note 116, at 16.

reported being threatened by their schools with misconduct charges and even losing their dorm privileges if they spoke with other students about their Title IX complaint.[121]

Sometimes schools force or pressure survivors into enrolling in inferior "alternative" education programs that isolate them from their friends, offer little to no instruction, and deprive them of access to extracurriculars.[122] For example, NWLC's former client Jane Doe in Pennsylvania was pressured into transferring to a skeletal evening program that provided only four to six hours of class time per week and that rushed her into "finishing" the rest of her junior year and all of her senior year in just 30 days, resulting in little actual learning.[123] At schools with Title IX religious exemptions, LGBTQI+ students who report experiencing dating violence within a queer relationship are often referred to "conversion therapy" programs aimed at changing their sexual orientation or gender identity instead of receiving support.[124]

Due to discrimination and bias, certain groups of students are more likely to be ignored or punished when they report sex-based harassment. For instance, pregnant and parenting students are often labeled as "promiscuous" because there is proof that they previously engaged in sexual intercourse, regardless of whether it was consensual.[125] LGBTQI+ students are often perceived as "promiscuous," "hypersexual," "deviant," or "attention-seeking."[126] Disabled students are often seen as less credible

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121. *Id.*

122. *E.g.*, Tyler Kingkade, *Forced Out For Reporting Harassment*, BUZZFEED (Oct. 13, 2017, 8:26 AM), https://www.buzzfeednews.com/article/tylerkingkade/forced-out-of-high-school-for-reporting-harassment-lawsuits [https://perma.cc/9AXB-94UM]; Mark Keierleber, *The Younger Victims of Sexual Violence in School*, THE ATLANTIC (Aug. 10, 2017), https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418 [https://perma.cc/X2DQ-TEZM].

123. Doe v. Pennridge Sch. Dist., 413 F. Supp. 3d 393, 399 (E.D. Pa. 2019).

124. Letter from Know Your IX, It's On Us, End Rape on Campus, the Every Voice Coalition, 24 student groups, and 595 students, survivors, and alumni to Secretary Goldberg, Department of Education: Office for Civil Rights 8–9, https://nwlc.org/wp-content/uploads/2021/06/KYIX-EROC-IOU-EVC-comment-6.11.21.pdf [https://perma.cc/R6X2-PTH4].

125. Jennie M. Kuckertz & Kristen M. McCabe, *Factors Affecting Teens' Attitudes Toward Their Pregnant Peers*, 16 PSI CHI J. UNDERGRADUATE RSCH. 32, 33 (2011), https://www.psichi.org/resource/resmgr/journal_2011/spring11jnkuckertz.pdf [https://perma.cc/ZL6V-CZMG].

126. *See, e.g.*, Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), http://cardozolawreview.com/heterosexism-rules-evidence [https://perma.cc/FBR2-A48E]; Laura Dorwart, *The*

and may also have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.[127]

Schools are also more likely to ignore, blame, and punish girls and women of color who report sex-based harassment due to harmful race and sex stereotypes that label them as "promiscuous," less deserving of protection and care than white girls and women, or simply unable to be sexually harassed.[128] Latina girls and women are stereotyped as "hot-blooded," and Indigenous girls and women as "sexually violable" conquests.[129] Black girls are perceived as more adult-like and less innocent than their white peers due to a phenomenon known as *adultification*, and Black girls and women are stereotyped as "Jezebels" and as "angry" or "aggressive" when they defend themselves against harassers or express trauma symptoms.[130] In fact, even at HBCUs, Black women are frequently ignored or punished after reporting their assaults by Black men or told to "give [their harassers] a pass" because their respective schools are "brother-and-sister institutions."[131] Similarly, Asian American and Pacific

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Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women, MEDIUM (Dec. 3, 2017), https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a [https://perma.cc/UT2B-YVSN].

127. *E.g.*, ANGELA BROWNE ET AL., EXAMINING CRIMINAL JUSTICE RESPONSES TO AND HELP-SEEKING PATTERNS OF SEXUAL VIOLENCE SURVIVORS WITH DISABILITIES 11, 14–15 (2016), https://www.ojp.gov/pdffiles1/nij/grants/250196.pdf [https://perma.cc/FM5J-472C]; LEIGH ANN DAVIS, PEOPLE WITH INTELLECTUAL DISABILITIES AND SEXUAL VIOLENCE 2 (Mar. 2011), https://www.thearc.org/document.doc?id=3657 [https://perma.cc/3XFZ-2ZSL].

128. *E.g.*, Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 16, 17, 24–29 (2019); REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1 (2018), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf [https://perma.cc/8PBU-FDMF] [hereinafter Georgetown Law Report]; Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST (Feb. 3, 2018), http://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color [https://perma.cc/6XQD-J7SM].

129. Cantalupo, *supra* note 128, at 17, 24–25.

130. *Id.*; Georgetown Law Report, *supra* note 128, at 2–6; LDF & NWLC Report, *supra* note 119, at 5, 18, 20, 25; *see also* Sonja C. Tonnesen, *Commentary: "Hit It and Quit It": Responses to Black Girls' Victimization in School*, 28 BERKELEY J. GENDER, L. & JUST. 1 (2013), https://lawcat.berkeley.edu/record/1125570 [https://perma.cc/W6BX-8RNM].

131. Clarissa Brooks, *How HBCUs Can Make It Hard for Sexual Assault Survivors to Speak Up*, TEEN VOGUE (Dec. 21, 2017), https://www.teenvogue

Islander girls and women are stereotyped as submissive, and naturally erotic,[132] making them more vulnerable to sexual abuse, as seen in the case of University of Southern California gynecologist George Tyndall, who targeted Asian women students to sexually abuse them during his medical exams.[133]

The impact of these stereotypes on the support survivors receive—or do not receive—in the wake of their victimization is compounded when survivors occupy multiple marginalized identities. The concept of *intersectionality*, coined by Professor Kimberlé Crenshaw over 30 years ago, instructs that the oppression of Black women cannot be fully understood without considering both how their lived experiences as women and as Black people impact the discrimination they face.[134]

.com/story/hbcus-and-sexual-assault-op-ed [https://perma.cc/Z5Q4-7AVA]; Samhita Mukhopadhyay, *At Historically Black Colleges, The National Discussion of Sexual Abuse Takes on Fraught Layer of Racial Politics*, THE INTERCEPT (Dec. 4, 2017, 2:07 PM), https://theintercept.com/2017/12/04/spelman-morehouse-college-campus-sexual-abuse [https://perma.cc/AM8C-ULS5]; Caitlin Dickerson & Stephanie Saul, *Two Colleges Bound by History Are Roiled by the #MeToo Moment*, N.Y. TIMES (Dec. 2, 2017), https://www.nytimes.com/2017/12/02/us/colleges-sexual-harassment.html [https://perma.cc/4EM6-GRNM]; Elahe Izadi, *Spelman, Morehouse investigate gang-rape allegations posted by anonymous Twitter account*, WASH. POST (May 5, 2016, 3:29 PM EDT), https://www.washingtonpost.com/news/grade-point/wp/2016/05/05/spelman-morehouse-investigate-gang-rape-allegations-posted-by-anonymous-twitter-account [https://perma.cc/RZ5Q-W23J]; Anita Badejo, *What Happens When Women At Historically Black Colleges Report Their Assaults*, BUZZFEED (Jan. 21, 2016, 9:53 PM), https://www.buzzfeed.com/anitabadejo/where-is-that-narrative [https://perma.cc/5FCH-7733].

132. Aiko Fukuchi, *Not Your "Geisha Doll": Why We Need To Stop Skirting Around Racist Sexual Violence*, THE BODY IS NOT AN APOLOGY (Sept. 21, 2019), https://thebodyisnotanapology.com/magazine/i-am-not-your-geisha-doll-we-need-to-talk-about-not-around-racist-sexual-violence [https://perma.cc/6UMU-A8XH]; Cantalupo, *supra* note 128, at 17, 24–25.

133. Matt Hamilton & Harriet Ryan, *USC was told gynecologist could be preying on Asian women, secret records show*, L.A. TIMES (May 23, 2019, 7:48 PM PT), https://www.latimes.com/local/lanow/la-me-usc-george-tyndall-asian-students-abuse-women-gynecologist-20190523-story.html [https://perma.cc/N8GH-SFTU].

134. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 UNIV. OF CHI. LEGAL FORUM 139, 140 (1989) [hereinafter Crenshaw, *Demarginalizing*].

Similarly, intersectionality plays a significant role in the narrative imposed on survivors occupying multiple marginalized identities.[135] For example, if a disabled Black girl reports being sexually harassed, she will also likely experience all of the pernicious stereotypes that come with experiencing sex-based harassment while being Black, disabled, and a girl. When reporting, she will experience vulnerability to racism, sexism, and ableism all at the same time, because when she experiences sex-based harassment, she experiences them with all parts of her identity—which will indelibly shape institutional responses to her victimization when she seeks help.[136]

Although sex-based harassment is pervasive and survivors—especially marginalized survivors—overwhelmingly encounter disbelief when they come forward, rape apologists are increasingly arguing that Title IX protections should be scaled back because they claim such protections will lead to men and boys of color, in particular Black men and boys, being disproportionately disciplined.[137] First, it is important to point out that empirical data to support this claim is lacking.[138] In fact, according

135. *See generally* Antaun M. Johnson, *Ttile IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J.L. & MOD. CRITICAL RACE PERSP. 57 (2017).

136. *Id.* at 67 (explaining that "women of color exist at the intersection of race and gender, so [when experiencing sexual assault], they confront a dual vulnerability to racism and sexism," meaning that "[t]hey are more likely to be sexually harassed and assaulted and less likely to be believed.").

137. *See generally* Johnson, *supra* note 135.

138. To support the 2020 Rules' weakening of civil rights protections for student survivors, the Trump administration endorsed the narrative that vigorous enforcement of Title IX would inevitably lead to Black men and boys being disproportionately and falsely accused of sexual misconduct; however, as Professor Nancy Chi Cantalupo put it, this narrative not only represents a false promise to promote racial justice, but it also ignores the reality that there is no data that supports this conclusion. Nancy Chi Cantalupo, *Title IX & the Civil Rights Approach to Sexual Harassment in Education*, 25 ROGER WILLIAMS L. REV. 225, 239 (2020). Drawing this conclusion is simply farcical, as schools' investigations of sex-based harassment are not public, "and there is almost no data" outlining the racial demographics of complainants and respondents. *Id.* at 238. The data that does exist from schools and the criminal legal system indicates that Black men and boys are not disproportionately disciplined in sexual misconduct cases, even though they are discriminatorily disciplined for other types of misconduct when it injures white individuals. *Id.* Professor Kelly Behre has similarly pointed out that, while it is unquestionable that racism pervades all legal systems, this narrative provides very little "specific information about the scope, frequency, or impact of racism on accused and disciplined students in campus sexual misconduct adjudications." Kelly Behre, *Deconstructing the Disciplined Student Narrative and its Impact on Campus Sexual Assault Policy*,

to a 2018 Government Accountability Office study using data reported by PK–12 schools to the Department of Education under the Civil Rights Data Collection, while Black boys are more than three times more likely than white boys to receive an out-of-school suspension for *any type of misconduct* (18.0% versus 5.2%), there is no significant racial disparity in suspension rates for *sex-based* misconduct (0.3% versus 0.2%).[139] When one recalls that 56% of girls and 40% of boys in grades 7–12 have been sexually harassed and that one in five girls ages 14–18 have been sexually assaulted,[140] these infinitesimally low rates of discipline for sex-based misconduct merely indicate that most schools are not addressing sex-based harassment at all.

Furthermore, the reality is that Black men and boys—like all men and boys[141]—are far more likely to be victims of sex-based harassment than to be falsely accused. Disingenuous, anti-Title IX narratives ignore the fact that Black men and boys are also sexual assault survivors,[142] and indeed, 5.7% of Black men are sexually assaulted during their time in college.[143] Black men have also been targeted for sexual abuse, as in the recent high-profile case at the University of Michigan involving medical doctor Robert Anderson.[144] And yet, this growing backlash to increased Title IX

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61 ARIZ. L. REV. 885, 937 (2019). Instead, proponents of this narrative depend on general research regarding racism in the criminal legal system or the school-to-prison pipeline, while failing to explain why Title IX "is the appropriate target for change or how such changes would meaningfully address the disproportionate impact of school discipline on students of color"—when targeting Title VI would be the more appropriate vehicle to address any racial disparities in school discipline. *Id.* at 937–38. Furthermore, this narrative promotes the fallacy that schools must invariably choose between protecting their students from sex and race discrimination. *Id.* at 938.

139. U.S. GOV'T ACCOUNTABILITY OFF., K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 71 (Mar. 2018), https://www.gao.gov/assets/700/690828.pdf [https://perma.cc/F8C9-CLZP].

140. *See* discussion *supra* notes 75 & 82 and accompanying text.

141. *E.g.*, Kingkade, *Males*, *supra* note 97.

142. Fatima Goss Graves & Derrick Johnson, *Opinion: Rolling back Title IX threatens racial and gender justice*, ATLANTA J.-CONST. (May 6, 2020), https://www.ajc.com/blog/get-schooled/opinion-rolling-back-title-threatens-racial-and-gender-justice/HLXwfxxBt4Xm9jyNKsUuDL [https://perma.cc/J5CB-WGA3].

143. AAU Report, *supra* note 77, at A7-36.

144. Steve Marowski, *Black men were 'particularly vulnerable' to sexual abuse by late University of Michigan doctor, lawyer says*, MLIVE (Apr. 21, 2020, 12:57 PM), https://www.mlive.com/news/ann-arbor/2020/04/black-men-were-

protections against sex-based harassment has ignored the experiences of survivors of color. Tellingly, anti-Title IX extremists did not cry about so-called "racist" Title IX policies until after the Department of Education investigated "Ivy League" and other "elite" colleges[145] for Title IX violations during the Obama administration and found violations at many of them;[146] the Department's actions then called for more accountability from privileged, white-male, college students who engaged in sex-based harassment. Extremists also did not express concern for the Black women and girls, or other women and girls of color, who experienced sex-based harassment.[147] And they were also silent or even supportive when the Trump administration, during its process of rolling back Title IX protections, also rescinded key guidance instructing schools on avoiding racially discriminatory discipline of Black and brown students—which NWLC and other survivor advocates sought to preserve.[148]

Survivor advocates also have grave concerns about the significant problem of discriminatory discipline against Black and disabled students

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particularly-vulnerable-to-sexual-abuse-by-late-university-of-michigan-doctor-lawyer-says.html [https://perma.cc/EF8G-SCME].

145. The authors do not endorse the notions or, indeed, the existence of "Ivy League" and "elite" institutions, which uphold privilege, wealth, and status and inhibit equitable access to education.

146. Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standards*, 78 MONT. L. REV. 109, 147–48 (2017); *see also* Johnson, *supra* note 135, at 74 ("This threat to the social power of white men may well explain much of the strong backlash against OCR. With the change in OCR's enforcement policy, white male perpetrators of sexual assault and harassment are more at risk than ever of being exposed. Because white men are challenged in this situation—not only because they are the ones who have gotten away with this for so long, but also because they continue to do so—they strategically use America's history of racial injustice to bring the hammer down on gender equality.").

147. *See also* Behre, *supra* note 138, at 936–38 ("More troubling the disciplined student narrative offers a male-biased, anti-intersectional analysis of racism that render victims of color invisible. The narrative completely erases women of color, suggesting all students of color are black men, all victims of sexual assault are white women, and only men experience racism in legal systems.").

148. *NWLC Responds to Betsy DeVos' Proposal to Revoke the Department of Education's Rethink Discipline Guidance*, NAT'L WOMEN'S L. CTR. (Dec. 18, 2018), https://nwlc.org/press-release/nwlc-responds-betsy-devos-proposal-revoke-department-of-educations-rethink-discipline-guidance [https://perma.cc/MVY7-NBWJ].

in K–12 schools.[149] However, weakening Title IX protections against sex-based harassment does not address the disproportionate impact of school discipline on students of color and disabled students, and it ignores the experiences of women and girls of color and disabled students, who are more vulnerable to experiencing sex-based harassment. Schools can and should strengthen protections against sex-based harassment while also addressing discriminatory discipline.[150] The two are not mutually exclusive, and to treat them as such is misleading and completely ignores the experiences of so many disabled survivors and survivors of color.

Moreover, *victims* of sex-based harassment are too often punished. In fact, schools are *more than twice* as likely to impose exclusionary discipline against student survivors than their peers, for conduct both related and unrelated to their report of harassment.[151] In many cases, schools enable harassers to retaliate against student survivors through the school's own disciplinary process. One in ten survivors who completed the Know Your IX survey received a retaliatory cross-complaint from their harasser claiming that the survivor was actually the rapist or abuser.[152] Schools have also disciplined student survivors who are manipulated by their harassers into violating a mutual no-contact order imposed by the school,[153] allowing abusers to turn what was intended to be a protective measure for the survivor into a punitive measure against the survivor. In some cases, harassers report their victims as suicidal to trigger a "wellness

149. U.S. DEPT. OF EDUC.: OFF. FOR CIV. RTS., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES IN PUBLIC SCHOOLS FOR THE 2017-2018 SCHOOL YEAR (June 2021), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf [https://perma.cc/6BAZ-DZ4F].

150. What the Department of Education can and should do to combat race discrimination when responding to sex-based harassment is: (1) strengthen Title IX protections so that schools are responding appropriately and effectively to all incidents of sex-based harassment and not creating additional and unfair burdens for survivors that particularly harm survivors of color; *and* (2) ensure schools are not engaging in racially discriminatory discipline practices by restoring and strengthening Department of Education guidance addressing such practices, including effective training on racial bias for school administrators.

151. KAYLA PATRICK & NEENA CHAUDHRY, LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 8 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence-1.pdf [https://perma.cc/7XK7-YC2M].

152. KYIX Report, *supra* note 116, at 18.

153. *E.g.*, 87 Fed. Reg. 41450. *See also* Joan Zorza, *What Is Wrong with Mutual Orders of Protection?*, 4(5) DOMESTIC VIOLENCE REP. 67 (1999), https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005 [https://perma.cc/35LP-M4GZ].

check" by campus police, which can result in the survivor being involuntarily committed to an inpatient facility.[154]

When schools fail to address sex-based harassment, students suffer. Many survivors are forced to miss class, receive lower grades, withdraw from extracurricular activities, change majors, drop to part-time enrollment, drop to an associate's degree, pay extra tuition to retake courses, graduate late, or leave school altogether because they do not feel safe.[155] Others have endured taking a class taught by their abuser, lost campus jobs or scholarships that left them homeless, and remained trapped in abusive relationships to pay rent.[156] Some are even expelled in the wake of their trauma.[157] Ultimately, 34% of college survivors of sexual assault are forced to drop out.[158] Lower grades, lost scholarships, and lost degrees make it harder for student survivors to graduate from high school, college, or graduate school; find jobs; and, in many cases, repay their student loans.

NWLC has seen firsthand the devastating educational losses that its clients suffer when their schools mishandle sex-based harassment at all levels of education. For example, when her elementary school ignored her reports of repeated sexual assault, fourth-grader Jane Doe in Michigan saw her grades decline, began refusing to go to school, and often cried herself to sleep at night.[159] In Pennsylvania, DarbiAnne's high school pushed her first into homebound instruction and later into cyber school, an inferior alternative school where she was forced to withdraw from two of her courses and retake a third course she had already completed the previous year.[160] Once an A-student who had been active in extracurricular activities, she suffered a sharp decline in her grades and had to leave the student council and turn down a nomination to be its president.[161] In Florida, Jane Doe became terrified of returning to her high school and

154. KYIX Report, *supra* note 116, at 20.

155. *Id.* at 4, 6–9.

156. *Id.* at 7–8, 25.

157. *E.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASH. POST (Nov. 18, 2014, 6:00 AM EST), https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-college-students-every-year [https://perma.cc/GUV3-AU9P].

158. Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. COLL. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015).

159. Jane Doe Declaration, *supra* note 112, at 4; *see also* discussion *supra* notes 112–14 and accompanying text.

160. Goodwin v. Pennridge Sch. Dist., 309 F. Supp. 3d 367, 372, 374 (E.D. Penn. 2018); Plaintiff's Motion for Summary Judgment at 1, *Goodwin*, 309 F. Supp 367 (No. 17-cv-3570-TR) [hereinafter Goodwin Motion].

161. *Goodwin*, 309 F. Supp. 3d at 373; Goodwin Motion, *supra* note 160, at 5, 9.

ended up staying home for more than three months, which resulted in a full academic quarter of failing grades on her transcript.[162]

NWLC's college and graduate school clients have seen similar educational losses. In California, Lisa Doe began missing assignment deadlines, which resulted in lower grades, and became increasingly worried about participating in the cultural club she shared with her assailant.[163] Anne Doe, also in California, struggled with depression, debilitating panic attacks, and persistent vomiting until she graduated—robbing her of joy during her senior year of college.[164] Susan Doe in California attempted suicide after her assault, dropped to a partial course load, struggled to pay rent because of new mental healthcare costs, and could not graduate on time, while her assailant graduated and then enrolled as a graduate student on the same campus.[165] In Connecticut, Nancy Doe was forced to retake two college courses she withdrew from during the summer, which required taking on additional student loans, and ultimately decided not to pursue a master's program at her university.[166] Mary Doe in North Carolina began missing classes, was unable to fall asleep at night in the room where she was raped, was plagued by persistent nightmares of the assault when she could fall asleep, and was afraid to leave her room during the day.[167] By the time she decided to quit her campus job and returned home to finish the semester online, her A and B grades had all dropped to Cs.[168] In California, Sobia Doe was forced to leave her master's program, apply to a PhD program in a different state in a different field of study, and take medical leave from her tenure-track job as a community college faculty member.[169] The ongoing abuse and her school's response to it triggered depression, suicidal ideation, latent lupus, and even a stroke.[170]

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162. Doe v. Sch. Bd. of Miami-Dade Cnty., 403 F. Supp. 3d 1241, 1252–53, 1255–56 (S.D. Fla. 2019).

163. Declaration of Lisa Doe in Support of Motion to Grant Preliminary Injunction at 5, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv-11104-WGY (D. Mass. July 24, 2020), ECF No. 32-1.

164. Declaration of Anne Doe in Support of Motion to Grant Preliminary Injunction at 7–8, *DeVos*, No. 1:20-cv-11104-WGY, ECF No. 32-3.

165. Declaration of Susan Doe in Support of Motion to Grant Preliminary Injunction at 7–8, *DeVos*, No. 1:20-cv-11104-WGY, ECF No. 32-5.

166. Nancy Doe Declaration, *supra* note 41, at 5.

167. Declaration of Mary Doe at 6, *DeVos*, No. 1:20-cv-11104-WGY, ECF No. 145-1.

168. Supplemental Declaration of Mary Doe, at 2, *DeVos*, No. 1:20-cv-11104-WGY, ECF No. 145-1.

169. Sobia Doe Declaration, *supra* note 51, at 3.

170. *Id.* at 7–9.

As these and other survivors' stories clearly illustrate, sex-based harassment can seriously derail students' educations, and schools must be held to a higher standard when responding to reported harassment. Part II explains how Congress, the Department of Education, and the courts have required schools to address sex-based harassment. Part III then offers recommendations for strengthening the Title IX statute to address the shortcomings of the current legal framework.

II. TITLE IX REQUIRES SCHOOLS TO ADDRESS SEX-BASED HARASSMENT

The year 2022 was the 50th anniversary of Title IX, which states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[171] While only 37 words long, Title IX was always meant to be broad and sweeping. This was the goal as articulated by one of its authors and lead sponsors, Senator Birch Bayh of Indiana: "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers."[172] The Supreme Court has also acknowledged this broad interpretation: "[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language."[173]

When Title IX was enacted a little over 50 years ago, there were fewer women enrolled in college, scholarships and other educational programs were not as available to girls and women as they were to boys and men, and schools that accepted applications from women often required higher test scores and grades from them.[174] Today, because of Title IX, there are more women in college,[175] more women in tenured-track faculty

171. 20 U.S.C. § 1681(a).

172. 118 CONG. REC. 5806-07 (1972).

173. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (internal quotations omitted) (alterations omitted) (quoting United States v. Price, 383 U.S. 787, 801 (1966)); *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) ("[B]y using such a broad term [as 'discrimination'], Congress gave the statute a broad reach.").

174. U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2 (June 23, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [https://per ma.cc/65XL-D6LD].

175. *Id.*; *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. (2018), https://nces.ed.gov/programs/digest/d18/tables/dt18_303.10.asp?current=yes%22%20%5Ct%20%22 [https://perma.cc/CTK7-NMVJ].

positions,[176] and more women and girls playing school sports.[177] However, sex discrimination in schools persists. Most college presidents are still men,[178] pregnant and parenting students continue to be pushed out of school at high rates,[179] LGBTQI+ students face an onslaught of attacks from discriminatory state laws—many of which especially target transgender students[180]—and, as discussed in Part I, sex-based harassment at all levels of education continues to be widespread and prevalent.

Despite all of this, current legal standards make it very difficult for student survivors to enforce their Title IX rights when their schools discriminate against them. Subpart II.A explains how the federal courts have made it nearly impossible for student survivors to bring successful Title IX lawsuits for money damages against their schools. Subpart II.B discusses how the Department of Education's Title IX guidance instructing schools to more vigorously enforce Title IX has sparked backlash in recent years both by the Trump administration and by harassers disciplined by their schools. Finally, Subpart II.C explains how the Biden administration's proposed changes to the Title IX regulations would be a step in the right direction to ensure greater institutional responses to harassment.

A. Few Title IX Plaintiffs Can Obtain Relief Under Current Litigation Standards.

In 1998, the Supreme Court held in *Gebser v. Lago Vista Independent School District* that a plaintiff can seek money damages in a lawsuit alleging Title IX violations for *employee*-on-student sex-based harassment if: (1) an "appropriate person"—i.e., an official who has authority to institute corrective measures on behalf of the school—had "actual notice"

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176. ASS'N OF AM. UNIV. PROFESSORS, THE ANNUAL REPORT OF THE ECONOMIC STATUS OF THE PROFESSION, 2017–2018 (Apr. 2018), https://www.aaup.org/sites/default/files/ARES_2017-18.pdf [https://perma.cc/8NUU-MKSW].

177. WOMEN'S SPORTS FOUND., 50 YEARS OF TITLE IX (2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf [https://perma.cc/65ZL-3Z7U].

178. *Fast Facts: Women Working in Academia*, AM. ASS'N OF UNIV. WOMEN, https://www.aauw.org/resources/article/fast-facts-academia [https://perma.cc/8XYK-PMYP] (last visited Feb. 13, 2023).

179. NAT'L WOMEN'S L. CTR., LET HER LEARN, *supra* note 82.

180. Anne Branigin, *10 anti-LGBTQ laws just went into effect. They all target schools*, WASH. POST (July 8, 2022, 12:27 PM EDT), https://www.washingtonpost.com/nation/2022/07/08/anti-lgbtq-education-laws-in-effect [https://perma.cc/SQL5-28DW].

(or "actual knowledge") of the alleged harassment; and (2) the school's response amounted to "deliberate indifference."[181] A year later, in *Davis v. Monroe County Board of Education*, a case argued by NWLC on behalf of the student survivor, the Court held that a plaintiff can seek money damages under Title IX for *student*-on-student sex-based harassment if: (1) the harassment was "so severe, pervasive, and objectively offensive" that it "deprive[d]" them of access to the school's educational opportunities or benefits; (2) the school exercised "substantial control" over the harasser and the context of the harassment; (3) the school had "actual notice" (or "actual knowledge") of the harassment; and (4) the school responded with "deliberate indifference."[182] Taken together, these elements, known as the *Gebser–Davis* standards,[183] have become the primary way[184] for victims of sex-based harassment to bring a Title IX lawsuit for money damages. But over the past two decades, the lower courts have increasingly muddled and heightened these already stringent requirements, making it tremendously difficult for Title IX plaintiffs to succeed in their lawsuits. As Justice John Paul Stevens warned in his

181. Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1989).

182. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633, 645, 650 (1999).

183. Title IX plaintiffs must also show that the school is a recipient of federal funds. Recipients of federal funds include all public K–12 schools (including public charter schools), colleges, and universities, as well as private K–12 schools, colleges, and universities that receive federal financial assistance, such as federal loans or grants. Courts have also recently held that Title IX recipients include recipients of a Paycheck Protection Program (PPP) loan during COVID-19 or private schools that have tax-exempt status as a 501(c)(3) organization. *E.g.*, Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n, No. CV RDB-20-3132, 2022 WL 2869041, at *2 (D. Md. July 21, 2022) (501(c)(3) organizations are Title IX recipients.); Karanik v. Cape Fear Acad., Inc., 608 F. Supp. 3d 268, 281–84 (E.D.N.C. 2022) (PPP loan recipients are Title IX recipients.).

184. In addition to the *Gebser–Davis* standard, courts have also held that victims can bring a "pre-assault" claim by showing that: (1) a school maintained a policy of deliberate indifference to reports of sex-based harassment; (2) which created a heightened and "known or obvious" risk of sex-based harassment; (3) which caused the victim to suffer harassment that was "so severe, pervasive, and objectively offensive" that it "deprived" them of access to the school's educational opportunities or benefits; and (4) the school exercised "substantial control" over the harasser and the context of the harassment. *See, e.g.*, Karasek v. Regents of the Univ. of Calif., 956 F.3d 1093, 1112 (9th Cir. 2020); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007). While pre-assault claims offer another way for student survivors to hold their schools accountable, they nevertheless import many of the stringent standards as *Gebser–Davis*, making it similarly difficult for Title IX plaintiffs to prevail.

Gebser dissent, "[F]ew Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard."[185] Indeed, the *Gebser–Davis* standards make it harder for students[186]—many of whom are children—to recover money damages for sex-based harassment under Title IX than workers[187]—nearly all of whom are adults—under Title VII, even if they are subjected to identical forms of harassment and identical mistreatment from their institutions.

First, many courts have made it nearly impossible for Title IX plaintiffs to meet the conjunctive severe-*and*-pervasive standard, which is far more stringent than Title VII's disjunctive severe-*or*-pervasive standard for workers.[188] For instance, M.H. was a ninth-grade student in New York when a classmate attacked her in a stairwell, pressing her against the wall with all of his weight; biting her neck; and touching her all over her legs, stomach, and breasts while she tried to push him off and told him to "get off."[189] However, a federal district court held in 2013 that the initial attack and subsequent harassment from other students was not sufficiently severe and pervasive because "M.H. was not raped, nor did she experience a 'serious' sexual assault."[190] The judge also did not consider her post-traumatic stress disorder (PTSD), flashbacks, and nightmares sufficient to "deprive" her of access to education.[191] Similarly, Jane Doe in Georgia was in tenth grade when an older student forced her to perform oral sex on him and masturbated in her presence on school grounds.[192] However, a federal district court held in 2021 that the oral rape was not severe and pervasive enough because it was a "single incident of alleged sexual assault" and that the subsequent taunting about the assault from Jane's peers might not even constitute sexual harassment at all.[193]

185. *Gebser*, 524 U.S. at 304.

186. Title IX protects "person[s]," which includes applicants, visitors, and other "[m]embers of the public" who "are either taking part or trying to take part of a funding recipient." 20 U.S.C. § 1681(a); Doe v. Brown Univ., 896 F.3d 127, 132 n.6 (1st Cir. 2018).

187. Title IX protects employees and independent contractors. *See, e.g.*, Conviser v. Depaul Univ., No. 20-CV-03094, 2023 WL 130483, at *10 (N.D. Ill. Jan. 9, 2023).

188. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

189. Carabello v. N.Y.C. Dep't of Educ., 928 F. Supp. 2d 627, 635 (E.D.N.Y. 2013).

190. *Id.* at 643.

191. *Id.* at 643–44.

192. Doe v. Gwinnett Cnty. Sch. Dist., No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at *1 (N.D. Ga. Sept. 1, 2021).

193. *Id.* at *12–13.

Likewise, the Sixth Circuit stated that a single rape, though severe enough, would not be considered pervasive and, therefore, would not be actionable under Title IX.[194] In addition, many lower courts have mixed and mismatched the *Gebser–Davis* standards. For example, although *Gebser* never required plaintiffs to prove that employee-on-student harassment be so "severe, pervasive, and objectively offensive" that it deprived them of access to education,[195] many federal appellate and district courts have grafted this requirement from *Davis* to their employee-on-student cases.[196]

Second, the courts have dismissed numerous plaintiffs' Title IX claims by holding that the school official to whom they reported the sex-based harassment was not an "appropriate person." The Supreme Court in *Gebser* explained that an *appropriate person* is someone who "at a minimum ha[d] authority to address the alleged discrimination and to institute corrective measures on the [school's] behalf."[197] Yet, subsequent appropriate-person analyses by the lower courts have landed all over the place, often barring victims from relief. For instance, different courts have held that professors, teachers, teachers' aides, athletics coaches, assistant coaches, guidance counselors, school psychiatrists, directors of women's centers, and campus security guards lack this authority and, therefore, are not appropriate persons.[198] These cases have been particularly damaging

194. Kollaritsch v. Mich. State Univ. Bd. Of Trustees, 944 F.3d 613, 620 (6th Cir. 2019).

195. *See generally* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998).

196. *E.g.*, Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 704 (6th Cir. 2022); Sewell v. Monroe City Sch. Bd., 974 F.3d 577, 584 (5th Cir. 2020); Swearingen v. Pleasanton Unified Sch. Dist. 344, No. 20-2630-DDC-TJJ, 2022 WL 16961236, at *11 (D. Kan. Nov. 16, 2022); Barnett v. Kapla, No. 20-CV-03748-JCS, 2020 WL 7428321, at *6 (N.D. Cal. Dec. 18, 2020); Wyler v. Conn. State Univ. Sys., 100 F. Supp. 3d 182, 189 (D. Conn. 2015); Douglas v. Brookville Area Sch. Dist., 836 F. Supp. 2d 329, 343 (W.D. Pa. 2011). *But see, e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686, 717 (4th Cir. 2007) (applying the severe-*or*-pervasive standard to teacher-on-student cases); Sauls v. Pierce Cnty. Sch. Dist., 399 F.3d 1279, 1284 (11th Cir. 2005) (applying neither severe-*and*-pervasive nor severe-*or*-pervasive standards, only Gebser's appropriate-person, actual notice, and deliberate-indifference standards).

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

198. *E.g.*, Kesterson v. Kent State Univ., 967 F.3d 519 (6th Cir. 2020) (athletics coach, assistant coach, director of women's center); Ross v. Univ. of Tulsa, 859 F.3d 1280, 1292 (10th Cir. 2017) (campus security guard); Hill v. Cundiff, 797 F.3d 948, 971 (11th Cir. 2015) (teacher's aide); Plamp v. Mitchell Sch. Dist. No. 17-2, 565 F.3d 450, 457 (8th Cir. 2009) (guidance counselor, teacher); Warren *ex rel.* Good v. Reading Sch. Dist., 278 F.3d 163, 173–74 (3d Cir. 2002) (guidance counselor); D.V. by & through B.V. v. Pennsauken Sch.

because these school employees are the ones whom students, particularly younger children, are more likely to turn to for help when dealing with a deeply personal problem like sex-based harassment because of their closer relationship with them. Other courts have even held that higher-ranking employees like principals and assistant or vice principals are not appropriate persons[199]—or at least *sometimes* are not appropriate persons,[200] such as when a principal knows about the harassment because they are the harasser[201] or if a principal knows about the harassment but the harasser is employed by a third-party contractor instead of the school.[202] In one case brought in Virginia, a federal court held that even the superintendent is not an appropriate person and that no school employees qualify—except school board members.[203] Moreover, the appropriate-person requirement is a *Gebser* requirement for employee-on-student cases; *Davis* only requires that a school—not an "appropriate person" at the school—have actual notice of peer harassment.[204] Nor did the Supreme Court mention the appropriate-person test in its only subsequent Title IX peer harassment case.[205] Nevertheless, at least four circuit courts and countless federal district courts have unnecessarily grafted this burdensome requirement into their peer-harassment analyses.[206]

Furthermore, under Title IX, courts apply an "actual notice" (or "actual knowledge") standard to student plaintiffs—more stringent than

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Dist., 247 F. Supp. 3d 464, 475 (D.N.J. 2017) (school psychiatrist); Litman v. George Mason Univ., 131 F. Supp. 2d 795, 799 (E.D. Va. 2001), *aff'd in part, vacated in part on other grounds, remanded*, 92 F. App'x 41 (4th Cir. 2004) (professor).

199. Baynard v. Malone, 268 F.3d 228, 238 (4th Cir. 2001) (principal).

200. Bostic v. Smyrna Sch. Dist., 418 F.3d 355, 362 (3d Cir. 2005).

201. Salazar v. S. San Antonio Indep. Sch. Dist., 953 F.3d 273, 275 (5th Cir. 2017).

202. Santiago v. P.R., 655 F.3d 61, 66 (1st Cir. 2011).

203. Rasnick v. Dickenson Cnty. Sch. Bd., 333 F. Supp. 2d 560, 565 (W.D. Va. 2004).

204. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999); Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998).

205. *See* Brian Bardwell, *No One Is An Inappropriate Person: The Mistaken Application of* Gebser*'s "Appropriate Person" Test to Title IX Peer Harassment Cases*, 68 CASE W. RES. L. REV. 1343, 1347–49, 49 n.38 (2018) (citing Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009)).

206. *See, e.g.*, Kesterson v. Kent State Univ., 967 F.3d 519, 528 (6th Cir. 2020); Hill v. Cundiff, 797 F.3d 948, 971 (11th Cir. 2015); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 739 (9th Cir. 2000); Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1247 (10th Cir. 1999).

Title VII's constructive-notice "should have known" standard for employee plaintiffs.[207] In *Gebser*, the Supreme Court held that a principal's awareness of a teacher making "inappropriate comments" toward students, including ninth-grade student Alida Gebser, was insufficient to hold the school responsible under Title IX for that teacher's sexual abuse of Alida.[208] The lower courts have followed suit with this buried-heads approach. In 2021, the Eighth Circuit concluded that a Nebraska school district did not have actual knowledge that one of its male teachers was sexually abusing a ninth-grade girl, even though multiple employees were aware, over a 20-month period, of the teacher being repeatedly alone with her in his classroom, being absent from school on the same day as her, removing her phone from her back pocket, poking her stomach, and massaging her shoulders in the hallway.[209] In other cases, courts have held that schools did not have actual knowledge of sex-based harassment even when school officials heard repeated "rumors" that the teacher-harasser was in a "relationship" with or "dating" several high school students,[210] when it was "well known" that the coach-harasser had previously been fired by the state's department of education for sexually abusing and later marrying another high school student,[211] when the principal knew that the teacher-harasser had previously sexually abused a former elementary school student,[212] and when administrators knew the teacher-harasser had previously touched several students' chests, thighs, and buttocks.[213]

Worse, there is a risk that the Supreme Court will distort the actual-knowledge requirement beyond even what *Gebser* and *Davis* require. The

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207. Vance v. Ball State Univ., 570 U.S. 421, 427, 453–54 (2013). Furthermore, if the harasser is the victim's supervisor, an employer is liable under Title VII regardless of whether the employer has constructive notice "whenever the harassment culminates in a tangible employment action." *Id.* at 453 (Ginsburg, J., dissenting).

208. *Gebser*, 524 U.S. at 287, 291.

209. KD v. Douglas Cnty. Sch. Dist. No. 001, 1 F.4th 591, 595–97, 598–99 (8th Cir. 2021).

210. Doe v. Bradshaw, 203 F. Supp. 3d 168, 175 (D. Mass. 2016); *see also* Hansen v. Bd. of Trustees of Hamilton Se. Sch. Corp., 551 F.3d 599, 606 (7th Cir. 2008) ("Simply knowing that a teacher married a woman formerly his student, without actual knowledge of misconduct, does not suffice to hold a school district liable under Title IX.").

211. Pantastico v. Dep't of Educ., 406 F. Supp. 3d 865, 874–75 (D. Haw. 2019).

212. Baynard v. Malone, 268 F.3d 228, 238 (4th Cir. 2001).

213. McCoy v. Bd. of Educ., Columbus City Sch., 515 F. App'x 387, 392 (6th Cir. 2013).

Supreme Court recently considered whether it would hear a case originally brought by a Jane Doe in Virginia, who reported a sexual assault to her school but was told by school officials that the conduct did not amount to sexual assault.[214] At trial, Jane's jurors issued a faulty verdict in the school's favor,[215] but the district court refused to grant Jane's motion for a new trial, holding that a school could lack actual knowledge if officials "did not believe" that what they heard constituted sex-based harassment.[216] Fortunately, the Fourth Circuit reversed, correctly affirming that a school has actual notice or knowledge when it receives a report of sex-based harassment, "regardless of whether school officials subjectively understood the report to allege sexual harassment or whether they believed the alleged harassment actually occurred."[217] Citing Jane's brief and NWLC's amicus brief, the Fourth Circuit noted that "[a]ny other rule would lead to absurd results" and would create "perverse incentives" for schools to refrain from training employees on recognizing and investigating sex-based harassment in order to avoid Title IX liability altogether.[218] Yet, this victory was tenuous, as the school district then asked the Supreme Court to restore the district court's decision,[219] and the current Court's composition did not particularly inspire confidence. In the end, fortunately, the Supreme Court declined to hear this particular case.[220] But students' access to Title IX remedies remains precarious, as schools have been trying to convince courts to adopt this dangerous misinterpretation of actual notice or knowledge for more than two

214. Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 261–62 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022).

215. Brief of Appellant at 3–4, *Fairfax*, 1 F.4th 257 (No. 19-2203), ECF No. 20 [hereinafter Fairfax Doe Brief]; *Fairfax*, 1 F.4th at 263.

216. Doe v. Fairfax Cnty. Sch. Bd., No. 1:18-CV-614, 2019 WL 8887765, at *2 (E.D. Va. Sept. 27, 2019), *rev'd and remanded*, 1 F.4th 257 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022).

217. *Fairfax*, 1 F.4th at 263.

218. *Id.* at 267 (citing Brief of Amicus Curiae National Women's Law Center et al. in Support of Plaintiff-Appellant at 23–33, *Fairfax*, 1 F.4th 257 (No. 19-2203), https://nwlc.org/resource/jane-doe-v-fairfax-county-school-board [https://perma.cc/4NEA-P4E4]; Fairfax Doe Brief, *supra* note 215, at 32).

219. The United States submitted a brief in support of Jane, noting that "no court of appeals has accepted [the school's] view that *Gebser* allows a school to evade [Title IX] liability . . . merely because its officials subjectively believed that the harasser's conduct did not occur or did not qualify as assault." Brief for the U.S. as Amicus Curiae at 7, Fairfax Cnty. Sch. Bd. v. Doe, No. 21-968 (Sept. 26, 2022).

220. Fairfax Cnty. Sch. Bd. v. Doe, 143 S. Ct. 442 (2022).

decades,[221] and they may very well succeed one day if Congress does not intervene and amend Title IX.

Third, the courts require that, in peer-harassment cases, the school have "substantial control" over both the harasser and the context of the harassment, which has also been unduly burdensome for Title IX plaintiffs.[222] For instance, Mackenzie was a college student in Arizona when she experienced dating violence from her then-boyfriend, a football player, at his residence.[223] In 2022, the Ninth Circuit held that because the residence was off campus, Mackenzie's school lacked substantial control over the context of the harassment—even though her abuser had to obtain his coach's approval to live off campus and his university scholarship paid for his off-campus rent.[224] Similarly, when Joan Roe, a college student in Missouri, was raped by a classmate and subjected to subsequent harassment from other students, the Eighth Circuit held in 2014 that her university was not responsible for addressing any of the incidents because the rape occurred at a private, off-campus party.[225] Likewise, the Tenth Circuit held in 2008 that a Colorado school district was not responsible for investigating multiple rapes of K.C., a disabled girl, by a group of boys because the incidents occurred off campus and several years earlier.[226] Although the boys continued to pester K.C. for oral sex at school and threatened to spread rumors and naked images of her around the school, the court held that this did not cause the harassment to take place in a context subject to the school's control.[227]

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221. *See, e.g.*, Doe *ex rel.* Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 387 (5th Cir. 2000) (declining to address a school's argument that "[a]n allegation that is investigated and determined to be untrue should not form the basis of actual knowledge even if that determination is tragically flawed").

222. Davis *ex rel.* LaShonda D v. Monroe City Bd. Of Educ., 526 U.S. 629, 645 (1999).

223. Brown v. State, 23 F.4th 1173, 1175 (9th Cir. 2022).

224. *Id.* at 1181–83. After this decision, NWLC led an amicus brief asking the Ninth Circuit to rehear the case, and the Circuit agreed. Brown v. Arizona, 56 F.4th 1169 (9th Cir. 2022); Brief of National Women's Law Center & 31 Additional Organizations as Amici Curiae in Supp. of Appellant's Petition for Rehearing or Rehearing En Banc, *Brown*, 56 F.4th 1169 (No. 20-15568), https://nwlc.org/resource/nwlc-leads-amicus-brief-supporting-off-campus-student-survivors [https://perma.cc/FW7A-Z9MW].

225. Roe v. St. Louis Univ., 746 F.3d 874, 884 (8th Cir. 2014).

226. Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1118 (10th Cir. 2008).

227. *Id.* at 1121 n.1, 1130 (McConnell, J., concurring in part, dissenting in part).

The substantial-control element creates additional problems when the victim and harasser are not affiliated with the same school or when the harassment occurred at the harasser's school. In such cases, if the victim's school does not exercise substantial control over the harasser or the context of the harassment, the harasser's school may be the only plausible Title IX defendant. Yet, some courts have barred these lawsuits as well. For example, when Jane Doe, a college student in Rhode Island, was at a bar with some friends, she was drugged by three students from a neighboring college and transported to their on-campus dorm, where they proceeded to sexually assault her.[228] The neighboring college refused to conduct a Title IX investigation, and, as a result, Jane withdrew from her college out of fear for her safety in the general metropolitan area where the two colleges are located.[229] However, the First Circuit held in 2018 that the neighboring college was not responsible for investigating her Title IX complaint because she was not participating or attempting to participate in that college's programs.[230] Similarly, Alison was a high school student in Ohio when she attended a career day co-sponsored by her high school and a local university.[231] There, she met a police officer from the university who made plans to meet with her later that evening and then, over the next many months, sexually abused her in multiple locations during work hours, including on the university's campus and inside his university-issued vehicle.[232] Yet, the Sixth Circuit held in 2022 that Alison's relationship with the university was too "attenuated" because the career day was a one-time event, and she was not participating or planning to participate in the university's programs, such as taking classes for college credit.[233] As a result, students like Jane and Alison are left with no recourse when the sex-based harassment they suffer takes a toll on their education.

Fourth, courts have used the deliberate-indifference standard—far more stringent than Title VII's negligence standard for workers[234]—to bar

228. Doe v. Brown Univ., 896 F.3d 127, 128–29 (1st Cir. 2018).

229. *Id.* at 129.

230. *Id.* at 131–33.

231. Arocho v. Ohio Univ., No. 20-4239, 2022 WL 819734, at *1 (6th Cir. Mar. 18, 2022).

232. *Id.*

233. *Id.* at *3–4.

234. Under Title VII, if a harasser is the victim's supervisor and the harassment did not culminate in a "tangible employment action," the employer is not liable if it exercised "reasonable care" to prevent and promptly correct the harassing behavior and the plaintiff unreasonably failed to take advantage of preventative or corrective measures made available to them. Vance v. Ball State Univ., 570 U.S. 421, 453 (2013). If the harasser is the victim's coworker, then the

Title IX plaintiffs' claims, even when they can meet all the other *Gebser–Davis* elements. For example, Jane Doe was a mentally disabled 16-year-old student when she was gang-raped by seven students at her Florida high school.[235] The school's police officers investigated and concluded that she had been raped.[236] But, realizing that such a decision could lead to legal liability or tarnish the school's image, school district officials decided to turn over the investigation to local police, "relinquish[] all responsibility" for conducting its own Title IX investigation, and simply sign onto the results of the local police's investigation.[237] Two male officers from the local police department interrogated Jane alone, without her parents, and claimed that she recanted her statements about the gang rape.[238] So the school district ignored the results of its internal investigation and charged *Jane* with "sexual misconduct," suspended her, and even recommended that she be expelled.[239] Yet the Eleventh Circuit held that "no reasonable jury" could find that the school's mistreatment of Jane amounted to deliberate indifference.[240] In support of its decision, the Circuit pointed to the facts that (1) the school charged Jane and all of her harassers with "sexual misconduct," so she was not "singled out"; and (2) Jane was not ultimately expelled, albeit only because the school blamed her "misconduct" on her disability.[241]

The decision in Jane's case is far from unique. Federal courts have found that schools did not act with deliberate indifference in the following situations, which are far from exhaustive: (1) taking no serious disciplinary action against a professor who admitted to sexually harassing a student until eight more victims came forward;[242] (2) ignoring a child's report of sexual abuse based on the teacher-harasser's denial of it, leading to "tragic consequences" for "numerous" other students;[243] (3) "orchestrating the closing of the Title IX investigation so that the [harasser], a football player,

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employer is liable if it knew or should have known of the harassment but failed to take "appropriate corrective action." *Id.* at 453–54.

235. Doe v. Bibb Cnty. Sch. Dist., 688 F. App'x 791 (11th Cir. 2017).

236. *Id.* at 799–800 (Martin, J., concurring).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 798.

241. *Id.* at 798–99.

242. Wills v. Brown Univ., 184 F.3d 20, 41–42 (1st Cir. 1999) (Lipez, J., dissenting).

243. Doe *ex rel.* Doe v. Dall., 220 F.3d 380, 388 (5th Cir. 2000).

could transfer to another university with a clean record";[244] (4) denying a victim's request to transfer to another school district and instead recommending that they attend an alternative school for students with "serious disciplinary records";[245] (5) failing to notify or involve its Title IX coordinator in response to a report of sex-based harassment;[246] and (6) delaying a Title IX hearing for nine months, violating its own policy requiring it to hold a hearing within 30 days.[247] And as mentioned in the Introduction, the judge in A.P.'s case held that her school was not deliberately indifferent even though it expelled her instead of protecting her after she reported oral rape.[248]

To make matters worse, some courts have imposed a "one free rape" rule. In 2019, the Sixth Circuit held in *Kollaritsch v. Michigan State University* that a Title IX plaintiff must show that they experienced "further harassment" after their school had actual notice of their first report of sex-based harassment, as a result of the school's deliberate indifference to that first report.[249] This decision directly contravenes the plain text of the Supreme Court's holding in *Davis*, which states that a school's deliberate indifference must either "'cause [students] to undergo' harassment *or 'make them liable or vulnerable' to it*."[250] Perhaps realizing its error, the Sixth Circuit has since declined to extend *Kollaritsch*'s further-harassment requirement to employee-on-student cases[251] and high

244. Doe v. Univ. of Notre Dame Du Lac, No. 3:17CV690-PPS, 2018 WL 2184392, at *2 (N.D. Ind. May 11, 2018).

245. KF *ex rel.* CF v. Monroe Woodbury Cent. Sch. Dist., 531 F. App'x 132, 133–34 (2d Cir. 2013).

246. Roe v. St. Louis Univ., 746 F.3d 874, 883–84 (8th Cir. 2014) (university case); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 170 (5th Cir. 2011) (school district case) .

247. Oden v. N. Marianas Coll., 440 F.3d 1085, 1089 (9th Cir. 2006).

248. *See* discussion *supra* notes 19–21 and accompanying text. In a strikingly similar case, a federal court held that another Georgia school district was not deliberately indifferent after it suspended a Jane Doe—not once, but twice—after she reported oral rape. Doe v. Gwinnett Cnty. Sch. Dist., No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at *4, *14 (N.D. Ga. Sept. 1, 2021).

249. Kollaritsch v. Mich. State Univ. Bd. of Tr., 944 F.3d 613, 623–24 (6th Cir. 2019). The Sixth Circuit later narrowed this holding to apply only to student-on-student cases in higher education. *See* discussion *infra* notes 251–252.

250. Davis *ex rel.* LaShonda D v. Monroe City Bd. of Educ., 526 U.S. 629, 645 (1999) (emphasis added).

251. Wamer v. Univ. of Toledo, 27 F.4th 461, 463 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 444 (2022).

school student-on-student cases,[252] which means it currently only applies to student-on-student cases in higher education in Kentucky, Michigan, Ohio, and Tennessee. Fortunately, no other federal appellate courts have followed *Kollaritsch*,[253] and the Supreme Court recently declined requests from a Virginia school district and an Ohio university asking the Court to apply the further-harassment requirement to all Title IX cases.[254] However, at least one federal district court outside of the Sixth Circuit has adopted this rule.[255] And in the meantime, other courts continue to invent similar requirements, as with A.P.'s judge who required A.P. show that the school knew of "prior sexual harassment" by her harasser against *other students* in order to establish deliberate indifference.[256]

Federal courts have generally imported Title IX's litigation standards to other education civil rights laws like Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination based on race, color, and national origin; and Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination based on disability. For example, the Third Circuit held in 2011 that A.R., a Black middle-school student in Pennsylvania, did not experience severe and pervasive race-based harassment even though numerous students at her middle school harassed her over a one-and-a-half year period, which included slapping her, spitting on her and her book bag, putting chewing gum in her books and in her locker, touching her hair, trying to throw her book bag out of a window, and saying "[i]f I didn't take a shower I would look like you[,] black."[257] As another example, A.M. was a tenth-grade student in Alabama who died by suicide after suffering disability-based harassment "just about every day" due to her weight and bowed legs, which caused her to walk

252. Doe *ex rel.* Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 35 F.4th 459, 468 (6th Cir. 2022).

253. Proponents of the further-harassment requirement have claimed that the Eighth and Ninth Circuits have adopted the rule too. However, the United States Solicitor General has pointed out that "neither circuit has squarely addressed the issue, and both have suggested that they will side with the majority view when they do." Brief for the U.S. as Amicus Curiae, *supra* note 219, at 14–16.

254. Univ. of Toledo v. Wamer, 143 S. Ct. 444 (2022); Fairfax Cnty. Sch. Bd. v. Doe, 143 S. Ct. 442 (2022); *see also* Petition For Writ of Certiorari, Univ. of Toledo v. Wamer, No. 22-123 (U.S. Aug. 5, 2022); Petition For Writ of Certiorari, Fairfax Cnty. Sch. Bd. v. Doe, No. 21-968 (U.S. Dec. 30, 2021).

255. *E.g.*, Doe v. Sch. Dist. No. 1, Denver, Colo., No. 1:19-cv-01210, 2020 WL 209854, at *2 (D. Colo. Jan. 14, 2020).

256. A.P. v. Fayetteville Cnty. Sch. Dist., No. 3:19-CV-109-TCU, 2021 WL 3399824, at *4 (N.D. Ga. June 28, 2021).

257. Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 519–21 (3d Cir. 2011) (alterations in original).

with a limp.[258] Although multiple teachers and a bus driver knew that A.M. was being harassed, a federal district court held in 2014 that they were not appropriate persons.[259] In Texas, Kyana and her sisters—three Black girls—endured countless incidents of race-based harassment for more than a decade, including being called the n-word and finding a noose next to their car.[260] The school took "some action" in response to the incidents, like allowing Kyana to park her car in the teachers' parking lot, but failed to put an end to the ongoing harassment, which eventually forced the two younger sisters to withdraw from the school district.[261] Despite these "relatively weak responses," the Fifth Circuit concluded in 2015 that the school district was not deliberately indifferent.[262] In addition, although this decision pre-dates *Kollaritsch*'s 2019 further-harassment rule, the Second Circuit held in 2009 that a school district in New York was not deliberately indifferent in response to a Black boy being called the n-word by a classmate because his teacher's inadequate response did not "effectively cause[]" a later incident where the victim was called the n-word again and physically attacked by two other students.[263]

Finally, Title IX plaintiffs must also contend with a recent Supreme Court case, *Cummings v. Premier Rehab Keller*, that bars victims of disability discrimination from obtaining money damages for emotional distress under Section 504 and the Affordable Care Act (ACA).[264] Although the case did not expressly foreclose emotional distress damages in Title IX cases, the Court's reasoning turned on the fact that Section 504 and the ACA (like Title IX[265]) were passed under Congress's Spending Clause authority.[266] The decision will have profoundly damaging consequences given that, as Justice Stephen Breyer noted in his dissent, "the primary harm inflicted by discrimination is rarely economic. Indeed, victims of intentional discrimination may sometimes suffer profound

258. Moore v. Chilton Cnty. Bd. of Educ., 1 F. Supp. 3d 1281, 1286–87 (M.D. Ala. 2014).

259. *Id.* at 1298–300.

260. Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398, 402–06 (5th Cir. 2015).

261. *Id.* at 410–11.

262. *Id.*

263. DT v. Somers Cent. Sch. Dist., 348 F. App'x 697, 700 (2d Cir. 2009); DT v. Somers Cent. Sch. Dist., 588 F. Supp. 2d 485, 489–90 (S.D.N.Y. 2008), *aff'd*, 348 F. App'x 697.

264. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022).

265. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 74–75 (1992).

266. *E.g.*, *Cummings*, 142 S. Ct. at 1574.

emotional injury without any attendant pecuniary harms. The Court's decision today will leave those victims with no remedy at all."[267] This is especially concerning for Title IX plaintiffs, who are mostly children and young adults who cannot point to lost income and almost exclusively rely on emotional distress damages as a financial remedy in private litigation. Already, some federal district courts are applying *Cummings* to Title IX,[268] and one has even held that *Cummings* precludes Title IX plaintiffs from seeking compensatory damages for *medical costs or lost earnings* resulting from emotional distress.[269]

In sum, the combined effect of the burdensome *Gebser–Davis* requirements and their progeny, the *Kollaritsch* one-free-rape rule and the *Cummings* bar on emotional distress damages, sends a troubling message to students that sex-based harassment is not to be taken seriously. These legal standards perpetuate the harmful message that "boys will be boys" and disincentivize schools from doing anything to actually help survivors. Part III will discuss policy solutions to fix each of these litigation challenges created by the courts. But before that, this Part will review how the Department of Education has also created barriers for survivors when they report sex-based harassment at the school level—long before a lawsuit becomes ready to be filed.

B. The Department of Education's Implementation of Strong Title IX Protections Against Sex-Based Harassment Was Met with Significant Backlash.

Subpart II.B.1 outlines the Department of Education's efforts to vigorously enforce Title IX through sub-regulatory guidance from 1997 to 2017, which was followed by a period of backlash under the Trump administration when the Department significantly vitiated protections against sex-based harassment, as detailed in Subpart II.B.2. Subpart II.B.3 concludes by outlining a parallel backlash in the courts, whereby students disciplined for sex-based harassment have been increasingly bringing suits

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267. *Id.* at 1582 (Breyer, J., dissenting).

268. *E.g.*, Party v. Ariz. Bd. of Regents, No. CV-18-01623-PHX-DWL, 2022 WL 17459745, at *4 (D. Ariz. Dec. 6, 2022); Doe v. City of Pawtucket, No. 17-365-JJM-LDA, 2022 WL 4551953, at *3 (D.R.I. Sept. 29, 2022); Doe v. Bd. of Regents of Univ. of Neb., No. 4:20CV3036, 2022 WL 3566990, at *4 (D. Neb. Aug. 18, 2022); Doe 1 v. Curators of Univ. of Mo., No. 19-CV-04229-NKL, 2022 WL 3366765, at *3 (W.D. Mo. Aug. 15, 2022); Bonnewitz v. Baylor Univ., No. 6:21-CV-00491-ADA-DTG, 2022 WL 2688399, at *4 (W.D. Tex. July 12, 2022).

269. Doe v. Fairfax Cnty. Sch. Bd., No. 118CV00614MSNIDD, 2023 WL 424265, at *3–7 (E.D. Va. Jan. 25, 2023).

against their schools for disciplining them, claiming "reverse discrimination" or due process violations. Several federal courts have emboldened and validated this backlash by conflating schools' enforcement of Title IX's protections against sex-based harassment with so-called "anti-male bias." In doing so, these courts have ultimately created less burdensome litigation standards for disciplined harassers (primarily male students who are disciplined for sex-based harassment and then allege "reverse discrimination" under Title IX) than for student survivors (primarily girls, women, and LGBRQI+ people who are subject to the burdensome *Gebser–Davis* standards described in Subpart II.A).

1. Department of Education's Enforcement of Title IX (1997–2017)

While the courts offer student survivors one avenue of relief for Title IX violations, federal agencies, particularly the Department of Education, offer another avenue to hold schools accountable for violating Title IX and other civil rights laws.[270] Although the *Gebser–Davis* standards for private litigation are unduly burdensome for survivors, the Supreme Court and the Department have acknowledged that these Court-created standards are limited to private actions for money damages and that federal agencies may "'promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,' even in circumstances that would not give rise to a claim for money damages."[271] Thus, for decades, through guidance dating back to 1997 in often-called Dear Colleague Letters (DCLs) or Questions & Answer documents (Q&As), the Department required schools to comply with broader standards when addressing sex-based harassment, similar to Title VII's workplace standards regarding constructive notice, reasonableness, and "severe or pervasive" harassment.

The first of these guidance documents was published in 1997 after a public notice and comment period and "extensive consultation with interested parties, . . . [including] students, teachers, school administrators, and researchers."[272] The Department subsequently issued revisions to the 1997 Guidance in 2001, reaffirming many of the principles set forth in the

270. *See About OCR*, OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/aboutocr.html [https://perma.cc/QWJ6-GDRG] (last visited Nov. 9, 2022).

271. 2001 Guidance, *supra* note 30, at ii.

272. *See* 1997 Guidance, *supra* note 30, at 12,035; Office for Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52,172 (Oct. 4, 1996); Sexual Harassment Guidance: Peer Sexual Harassment, 61 Fed. Reg. 42,728 (Aug. 16, 1996).

1997 Guidance.[273] These principles were later reaffirmed and elaborated upon years later in 2011 and 2014,[274] after pressure on the Department to enforce Title IX against schools that continued to fail to treat sexual harassment seriously.[275] These guidance documents addressed the standards that the Department requires of institutions in complying with Title IX and clarified how schools can conduct investigations that are prompt and equitable.[276] This included: requiring an equitable standard of evidence that treats both sides fairly, namely, the preponderance-of-the-evidence standard;[277] requiring schools to provide "interim measures" to students during the pendency of a complaint investigation (i.e., supportive services such as counseling, classroom or housing adjustments, stay-away orders, or other measures to preserve or restore access to education);[278] discouraging the use of direct, live cross-examination between parties because it is unnecessary and potentially traumatic;[279] and ultimately ensuring that both complainants (people who file Title IX complaints) and respondents (people who respond to Title IX complaints) are treated equally in the grievance process.[280]

These guidance documents led to greater and more meaningful action by schools to address sexual harassment and more accountability of institutions that failed to meet their civil rights obligations under Title IX. Indeed, after these guidance documents were released, the Department

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273. 2001 Guidance, *supra* note 30.

274. *Questions and Answers on Title IX and Sexual Violence*, DEP'T OF EDUC.: OFF. FOR CIV. RTS. (issued Apr. 29, 2014; rescinded Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/973Q-T3QJ] [hereinafter 2014 Guidance]; 2011 Guidance, *supra* note 30.

275. *See* Michele Landis Dauber & Meghan O. Warner, *Legal and Political Responses to Campus Sexual Assault*, 15 ANN. REV. OF L. & SOC. SCI. 311, 317 (2019) (explaining that a 2009 multipart investigative series on campus sexual assault by the Center for Public Integrity shows how schools that regularly violated Title IX pressured the Obama administration to issue the 2011 DCL and that student survivors and activists subsequently filed Title IX complaints with OCR and demanded greater transparency of their investigations).

276. 2014 Guidance, *supra* note 274; 2011 Guidance, *supra* note 30.

277. 2014 Guidance, *supra* note 274, at 13–14, 26; 2011 Guidance, *supra* note 30, at 10–11.

278. 2014 Guidance, *supra* note 274, at 32; 2011 Guidance, *supra* note 30, at 16.

279. 2014 Guidance, *supra* note 274, at 31; 2011 Guidance, *supra* note 30, at 12.

280. 2014 Guidance, *supra* note 274, at 29; 2011 Guidance, *supra* note 30, at 12.

received an increased number of Title IX complaints,[281] suggesting that more students knew that they had civil rights protections against sexual harassment and that if they experienced harassment, they could trust the federal government to enforce their rights. Unfortunately, with more enforcement of protections against sexual harassment in education, a backlash against those protections also arose.

2. Trump Administration's Weakening of Title IX

Similar to the backlash that followed #MeToo going viral in late 2017,[282] the increase in Title IX enforcement also faced a backlash that had legal repercussions.[283] Largely driven by so-called men's rights advocates,[284] the Trump administration under Betsy DeVos's leadership as Secretary of Education upended Title IX civil rights protections addressing sex-based harassment that had been in place for decades, as discussed above in Subpart II.B.1.

When DeVos became Secretary of Education, one of her first actions within the first month of the Trump administration was rescinding key guidance addressing protections for transgender students, which had not even been in effect for one year at that point.[285] The guidance that took years to create was undone with a brief letter, and reports indicated that even DeVos was not certain about rescinding that guidance in the first

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281. Valerie Strauss, *DeVos withdraws Obama-era guidance on campus sexual assault. Read the letter.*, WASH. POST (Sept. 22, 2017, 12:37 PM EDT), https://www.washingtonpost.com/news/answer-sheet/wp/2017/09/22/devos-withdraws-obama-era-guidance-on-campus-sexual-assault-read-the-letter/ [https://perma.cc/D4QM-Y6PJ] (noting that the number of Title IX sexual violence cases under investigation by OCR rose from 55 in May 2014 to 344 by July 2017).

282. Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, THE NEW YORKER (Jan. 24, 2018), https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash [https://perma.cc/DX4B-MXHC].

283. *Title IX Rollbacks: Has the #MeToo Backlash Begun?*, AM. ASS'N OF UNIV. WOMEN (Feb. 27, 2022), https://www.aauw.org/resources/news/media/insights/title-ix-rollbacks-this-is-what-metoo-backlash-looks-like [https://perma.cc/MA28-27SX].

284. Hélène Barthélemy, *How Men's Rights Groups Helped Rewrite Regulations on Campus Rape*, THE NATION (Aug. 14, 2020), https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights [https://perma.cc/VJJ3-ZS97].

285. Evie Blad, *Trump Administration Rescinds Transgender-Student Guidance*, EDUCATIONWEEK (Feb. 22, 2017), https://www.edweek.org/leadership/trump-administration-rescinds-transgender-student-guidance/2017/02 [https://perma.cc/3RDA-8AUA].

place "because of the potential harm that rescinding the protections could cause transgender students . . . ."[286] This signified early on in the Trump administration that, contrary to the mission of the Department to "promote student achievement" and ensure equal access to education,[287] the administration was knowingly and intentionally not prioritizing students' civil rights.

Similarly, the Trump administration began signaling its intent to roll back student survivors' rights. In July 2017, then Acting Assistant Secretary for Civil Rights Candice Jackson, who oversaw the Department's Office for Civil Rights (OCR), was quoted in a *New York Times* article being dismissive of campus sexual assault allegations, claiming that

> [there's] not even an accusation that these accused students overrode the will of a young woman. Rather, the accusations—90 percent of them—fall into the category of "we were both drunk," "we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right."[288]

Months later, in September 2017, DeVos gave remarks at George Mason University[289] about the Department's Title IX enforcement and announced that she was planning to change the Department's Title IX rules. She also subsequently rescinded the earlier guidance documents from 2011 and 2014[290] and replaced them with weaker guidance. Even though the Department had previously held a public-comment period and received thousands of comments in support of maintaining the earlier guidance

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286. Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html [https://perma.cc/R3KS-4Q8D].

287. *About ED*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/landing.jhtml [https://perma.cc/AH3H-QZEM] (last visited Nov. 9, 2022).

288. Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html [https://perma.cc/4KWH-MB85] (emphasis added).

289. Susan Svrluga, *Transcript: Betsy DeVos's remarks on campus sexual assault*, WASH. POST (Sept. 7, 2017, 2:08 PM EDT), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault [https://perma.cc/TB53-M8TB].

290. Strauss, *supra* note 281.

documents,[291] DeVos claimed in her remarks that "the current approach [was not] working" and that she would replace it,[292] which even reportedly stunned staff at the Department who worked on Title IX policy.[293] DeVos claimed the harm faced by sexual violence survivors was equally as problematic as the harm faced by individuals—mostly men—who have been falsely accused, despite a lack of evidence that the latter is a widespread problem extending beyond a few rare occurrences, unlike the former.[294] And she said, "[I]f everything is harassment, then nothing is" expressing doubt about the seriousness of sexual harassment claims. [295]

Soon after, DeVos began changing the Department's Title IX regulations regarding *sexual harassment*, which the new rules defined to include *sexual assault*, *dating violence*, *domestic violence*, and *stalking*.[296] DeVos's changes, which were finalized in May 2020 (2020 Rules), dramatically weakened protections against sexual harassment by narrowing which incidents of sexual harassment schools may respond to under Title IX, singling out sexual harassment complaints for uniquely burdensome and unfair grievance procedures, and ultimately creating a chilling effect on reporting.[297]

Specifically, the 2020 Rules imported the Supreme Court's *Gebser–Davis* standards, which had previously applied only to lawsuits for money

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291. Amanda Orlando et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, CAL. L. REV. (Mar. 2019), https://www.californialawreview.org/widely-welcomed-and-supported-by-the-public [https://perma.cc/D4D3-EKJK].

292. Svrluga, *supra* note 289.

293. Rebecca Klein, *Betsy DeVos' Legacy: Transforming How the Education Department Treats Civil Rights*, HUFFINGTON POST (Nov. 16, 2020, 9:55 AM EST), https://www.huffpost.com/entry/betsy-devos-department-of-education-civil-rights_n_5fb015ffc5b68baab0fcb183 [https://perma.cc/469N-SYTJ].

294. *Id.* Research shows that the prevalence of false allegations of sexual assault is very low; false accusations regarding criminal sexual assault, for example, are estimated at two to ten percent. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010).

295. Svrluga, *supra* note 289.

296. 2020 Title IX Rules, *supra* note 46; 34 C.F.R. § 106.30(a)(3) (2023) (defining *sexual harassment*).

297. Bianca Quilantan, *DeVos' Title IX rule has had a 'chilling effect' on misconduct reporting, advocates say*, POLITICO (May 23, 2022, 5:01 AM EDT), https://subscriber.politicopro.com/article/2022/05/devos-title-ix-rule-has-had-a-chilling-effect-on-misconduct-reporting-advocates-say-00034183 [https://perma.cc/6XVN-62WT].

damages, into the standards for administrative enforcement where money damages are not available.[298] For example, the 2020 Rules require schools to dismiss sexual harassment complaints alleging a hostile educational environment unless the harassment rose to the level of being "so severe, pervasive, *and* objectively offensive that it *effectively denies* a person equal access to the recipient's education program or activity."[299] This departs from the Department's previous, longstanding standard for hostile environment claims requiring schools to respond to harassment that is "so severe, pervasive, *or* persistent" that it *limited* a student's ability to participate in or benefit from the education program.[300] As explained above in Subpart II.A, the severe-*and*-pervasive standard is unduly

298. 34 C.F.R. § 106.30(a) (2023).

299. *Id.* (emphasis added).

300. *See* 2014 Guidance, *supra* note 274, at 1 (requiring schools to address sex-based harassment if "the alleged conduct is sufficiently serious to *limit* or deny a student's ability to participate in or benefit from the school's educational program" (emphasis added)); 2011 Guidance, *supra* note 30, at 3 (requiring schools to address sex-based harassment "if the conduct is sufficiently serious that it interferes with or *limits* a student's ability to participate in or benefit from the school's program" (emphasis added)); *Dear Colleague Letter: Harassment and Bullying*, DEP'T OF EDUC.: OFF. FOR CIV. RTS. 2 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html [https://perma.cc/4AJ7-CK9F] [hereinafter 2010 Harassment Guidance] (requiring schools to address harassment based on sex, race, color, national origin, or disability if "the conduct is sufficiently *severe, pervasive, or persistent* so as to interfere with or *limit* a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school" (emphases added)); 2001 Guidance, *supra* note 30, at 12 (requiring schools to address sex-based harassment if "the harassing conduct is sufficiently serious to deny or *limit* the student's ability to participate in or benefit from the program" (emphasis added)); *Dear Colleague Letter on Prohibited Disability Harassment*, DEP'T OF EDUC.: OFF. FOR CIV. RTS. (July 25, 2000), https://www2.ed.gov/about/offices/list/ocr/docs/disab harassltr.html [https://perma.cc/22S6-NQAY] [hereinafter 2000 Disability Harassment Guidance] (requiring schools to address disability-based harassment if the "harassing conduct is sufficiently *severe, persistent, or pervasive* that it creates a hostile environment" (emphasis added)); 1997 Guidance, *supra* note 30; Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (Mar. 10, 1994), https://www2.ed.gov/about/offices/list/ocr/docs/race394.html [https://perma.cc/LFK2-AMYN] [hereinafter 1994 Racial Harassment Guidance] (requiring schools to address race-based harassment if it is "sufficiently *severe, pervasive or persistent* so as to interfere with or *limit* the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient" (emphases added)).

burdensome for survivors in litigation, and its importation into administrative-enforcement standards means that many survivors are currently forced to endure repeated and escalating levels of abuse before schools can even investigate their complaint.

The 2020 Rules force schools to dismiss complaints of most off-campus harassment, including complaints of harassment occurring during study abroad programs, outside of a school's program or activity, or outside of a context that is under the school's "substantial control."[301] This means students who are assaulted abroad, at a fraternity that is not officially recognized by their university, in off-campus housing or who are harassed or stalked online outside of a school-sponsored program are unable to access recourse under Title IX.[302] In addition, the 2020 Rules require schools to dismiss sexual harassment complaints by individuals who were not "participating in or attempting to participate" in a school program or activity at the time they filed their complaints[303]—meaning schools must ignore complaints brought by prospective students; former students after they withdraw, transfer, or graduate; or former employees.[304] Additionally, schools may dismiss harassment complaints when the

301. 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i) (2023).

302. The preamble to the 2020 Rules outlines an exception to the rule requiring schools to dismiss most complaints regarding off-campus sexual harassment if the school has "substantial control over the respondent and context in an off-campus setting." U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT 9 (June 28, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf [https://perma.cc/35LP-M4GZ] (citing 2020 Title IX Rules, *supra* note 46, at 30,197–30,200). The 2020 Rules explain that this could include an incident of off-campus harassment between two students in a private hotel room if it happens in a context that is "related to a school-sponsored activity, such as a school field trip or travel with a school athletics team." *Id.* A school could also have substantial control over an incident of off-campus harassment that happens in a student's home, for example, if "a teacher employed by a school visits a student's home ostensibly to give the student a book but in reality, to instigate sexual activity with the student." *Id.*

303. 34 C.F.R. § 106.30(a) (2023) (defining *formal complaint*).

304. The 2020 Rules make an exception to this dismissal rule that allows a person to file a complaint if they intend to enroll in a different school program at the same institution or if they are an alumnus who intends to stay involved in alumni programs. However, this exception still leaves many people who experience sex-based harassment without recourse under Title IX, including those prospective students, students, and employees who end their connection with a school, specifically because they experienced harassment there. 85 Fed. Reg. 30138.

respondent transfers, withdraws, graduates, or retires—even if an investigation has already begun.[305]

The 2020 Rules also impose uniquely burdensome and excessively prescriptive requirements for grievance procedures addressing sexual harassment alone—not for any other form of harassment, discrimination, or misconduct. For example, colleges and universities must allow direct, live cross-examination of all parties and witnesses by a party's advisor of their choosing,[306] which ultimately chills reporting by survivors who do

305. 34 C.F.R. § 106.45(b)(3)(ii) (2023).

306. *Id.* § 106.45(b)(6)(i). This direct, live cross-examination requirement was implemented in response to what Professor Behre refers to as the "disciplined student narrative," whereby some advocates and policymakers attempt to engender sympathy for Title IX respondents by spreading misinformation about sexual assault, including promoting the misogynistic stereotypes that survivors lie about sexual assault. Behre, *supra* note 138, at 892–93. Professor Behre observed how Betsy DeVos, in her 2017 speech at George Mason University, endorsed the "disciplined student narrative" by referring to respondents as "victims of a lack of due process"—implying that students are reported for sexual misconduct because of "inadequate procedural protections in campus disciplinary processes" and not because they have in fact engaged in sexual misconduct due to a culture that promotes sex-based harassment. *Id.* at 893. Moreover, most circuit courts have held that direct, live cross-examination is not required to satisfy due process; instead, they have held that a neutral hearing officer or panel can ask the parties questions. *See, e.g.*, Walsh v. Hodge, 975 F.3d 475, 485 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1693 (2021) (due process is satisfied by questions from neutral hearing panel); Doe v. Univ. of Ark., 974 F.3d 858, 867 (8th Cir. 2020) (same); Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019) (same); Doe v. Colgate Univ., 760 F. App'x 22, 27, 33 (2d Cir. 2019) (respondent's Title IX rights were not violated when hearing panel questioned him and complainants instead of allowing the parties to directly cross-examine each other); Doe v. Loh, No. CV PX-16-3314, 2018 WL 1535495, at *7 (D. Md. Mar. 29, 2018), *aff'd*, 767 F. App'x 489 (4th Cir. 2019) (due process satisfied by neutral hearing panel asking the parties questions); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (same). In so doing, these courts have not only recognized the efficacy of permitting neutral panels or hearing officers to ask the parties questions but also have recognized the emotional harm or trauma associated with allowing parties or their representatives to directly conduct the cross-examination. Only two federal appellate courts have held that cross-examination by parties or their representatives in Title IX investigations is required, but they have only required cross-examination in limited circumstances, such as where witness credibility is at issue and serious sanctions are possible. Doe v. Univ. of Scis., 961 F.3d 203, 215 (3d Cir. 2020) (holding that fundamental fairness requires private schools to provide cross-examination if credibility is at issue); Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) (concluding that due process requires public universities to

not want to submit to cross-examination, as it can be often retraumatizing.[307] The 2020 Rules also originally included an exclusionary rule, which required institutions of higher education to exclude from the evidence all oral or written statements made by any individual if they refused to submit to cross-examination or did not answer every question posed during cross-examination.[308] Fortunately, a federal judge struck down this exclusionary rule in June 2021 after NWLC and other survivor advocates filed a lawsuit challenging the 2020 Rules.[309] The 2020 Rules also inappropriately tilted Title IX grievance procedures in favor of respondents by mandating that schools presume that the respondent is not responsible for sexual harassment until a determination is made at the end of an investigation.[310] This presumption of non-responsibility is not only

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provide cross-examination if credibility is at issue and serious sanctions are possible).

307. Suzannah Dowling, *(Un)due Process: Adversarial Cross-Examination in Title IX Adjudications*, 73 ME. L. REV. 123, 159 (2021); UNIV. OF MICH.: OFFICE FOR INSTITUTIONAL EQUITY, ANNUAL REPORT REGARDING STUDENT SEXUAL & GENDER-BASED MISCONDUCT & OTHER FORMS OF INTERPERSONAL VIOLENCE, JULY 2018-JUNE 2019 1 (Nov. 11, 2018), https://ecrt.umich.edu/wp-content/uploads/2022/03/fy19sexual_misconduct_report.pdf [https://perma.cc/F7YZ-G4W4] (showing a decrease in reporting during the year a school implemented direct cross-examination). The direct, live cross-examination requirement also received significant push-back by mental health experts when it was proposed. Over 900 mental health experts specializing in trauma authored a letter opposing the Department's "live-hearing" requirement, explaining that subjecting a student survivor of sexual assault to cross-examination was "almost guaranteed" to worsen symptoms associated with post-traumatic stress and was "likely to cause serious harm to victims who complain and to deter even more victims from coming forward." Letter from 902 Mental Health Professionals and Trauma Specialists to Kenneth L. Marcus, Assistant Secretary for Civil Rights, Department of Education 3 (Jan. 30, 2019), https://www.regulations.gov/document?D=ED-2018-OCR-0064-104088 [https://perma.cc/5VM5-LXMX].

308. 34 C.F.R. § 106.45(b)(6)(i) (2023); *see also* NAT'L WOMEN'S L. CTR., DEVOS'S NEW TITLE IX SEXUAL HARASSMENT RULE, EXPLAINED 3–4 (May 12, 2020), https://nwlc.org/wp-content/uploads/2020/05/Title-IX-Final-Rule-Fact sheet-5.28.20-v3.pdf [https:// perma.cc/3WQ7-96A8] [hereinafter NWLC TITLE IX EXPLAINER].

309. *Federal Judge Vacates Part of Trump Administration's Title IX Sexual Harassment Rule*, NAT'L WOMEN'S L. CTR. (Aug. 11, 2021), https://nwlc.org/resource/federal-judge-vacates-part-of-trump-administrations-title-ix-sexual-harassment [https://perma.cc/2749-Y6XH].

310. 34 C.F.R. § 106.45(b)(3) (2023); *see also* NWLC TITLE IX EXPLAINER, *supra* note 308, at 4. Contrary to the Department's longstanding Title IX guidance

in direct tension with requiring a decision-maker in a school investigation to maintain neutrality, impartiality, and fairness, but it is also clearly intended to mimic the presumption of innocence in criminal proceedings, which is inappropriate to import into the context of non-criminal Title IX investigations.[311] Imposing standards for sexual harassment proceedings that, due to the 2020 Rules, are now significantly more burdensome than proceedings for complaints of other types of student or employee misconduct reinforces a gross and offensive myth that individuals who report sexual misconduct are more likely to lie about it than those who report other kinds of misconduct and therefore require greater scrutiny.

Finally, and especially relevant for the purposes of this Article, the 2020 Rules single out sexual harassment complaints for uniquely burdensome standards—standards that are more onerous and unfair than for other forms of discriminatory harassment, including race- or disability-based harassment. Specifically, the administrative enforcement standards for actionable discriminatory harassment ("severe, pervasive, *and* objectively offensive" versus "severe *or* pervasive"), notice, reasonableness in the institution's response, and grievance procedures are now all more burdensome under Title IX than under Title VI (which prohibits discrimination based on race, color, or national origin) and Section 504 (which prohibits discrimination based on disability) because of the changes from the 2020 Rules.[312] So, since schools are required or permitted by the 2020 Rules to adopt different standards[313] for different

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requiring schools to use the preponderance-of-the-evidence standard to decide whether sexual harassment happened, the 2020 Rules allow schools to use the considerably more burdensome clear-and-convincing standard in sexual harassment proceedings, while using the preponderance-of-the-evidence standard for all other student or employee misconduct investigations—even if they carry the same maximum penalties. 34 C.F.R. § 106.45(b)(4)(i) (2023).

311. *The Disinformation You're Falling for on Title IX*, NAT'L WOMEN'S L. CTR. (Aug. 3, 2021), https://nwlc.org/resource/the-disinformation-youre-falling-for-on-title-ix [https://perma.cc/3T5C-2L88].

312. 2010 Harassment Guidance, *supra* note 300; 2000 Disability Harassment Guidance, *supra* note 300 (requiring schools to respond to disability-based harassment when it is "sufficiently severe or pervasive" such that it "limits or denies" a person's ability to participate in or benefit from a school's program or activity); 1994 Racial Harassment Guidance, *supra* note 300 (requiring schools to respond to race-based harassment when it is "sufficiently severe or pervasive" such that it "interfere[s] with or limit[s]" a person's ability to participate in or benefit from a school's program or activity).

313. Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 16, 17 (2019).

types of harassment, it begs the following questions: What happens when a student experiences harassment that is *both* sexist and racist, racist and ableist, ableist and transphobic, etc.? What standards would a school use in such situations if it has different procedures for sex-, race-, and disability-based harassment?[314] In other words, how can schools account for intersectional forms of harassment while complying with the 2020 Rules?

While it has been over 30 years since Professor Crenshaw pointed out the need for legal reforms to address intersectional experiences of discrimination,[315] the law has yet to catch up, particularly in the education context.[316] Students who are harassed because of some combination of their race, disability, sexual orientation, and gender identity have their legal claims siloed based on different parts of their impacted identities. Furthermore, victims of intersectional harassment now face more burdensome regulatory standards for the sex-based part of the harassment than for the race- and disability-based parts of the harassment. Though most federal courts have not analyzed overlapping claims of race and sex discrimination,[317] some federal courts have recognized intersectional discrimination claims in the workplace context under Title VII.[318] However, there is yet to be a federal court case reviewing a claim of intersectional discrimination in the education context.

Unsurprisingly, the 2020 Rules' weakened protections for survivors were met with significant opposition. When the Department published the

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314. *Id.*

315. Crenshaw, *Mapping the Margins*, *supra* note 134; Crenshaw, *Demarginalizing*, *supra* note 134.

316. Jessica C. Harris, *Women of Color Undergraduate Students' Experiences with Campus Sexual Assault: An Intersectional Analysis*, 44 REV. OF HIGHER EDUC. 1, 3 (2020).

317. *See* Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality and the Movement*, 62 BOS. COLL. L. REV. 1798, 1806 (2021).

318. *See* Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) (holding that "discrimination against black females can exist even in the absence of discrimination against black men or white women"). *See also* Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) (holding, in an employment discrimination case alleging race and national origin discrimination in the academic faculty hiring process by an Asian woman, that "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex"); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416–17 (10th Cir. 1987) (holding that "a trial court may aggregate evidence of racial hostility with evidence of sexual hostility" for hostile work environment claims).

notice of proposed rulemaking for the 2020 Rules in November 2018, the public submitted more than 120,000 comments in vehement opposition.[319] A 2022 report analyzed 117,358 of these comments submitted, finding that 99% of the comments opposed the proposed 2020 Rules, whereas less than 1% supported them.[320] Opponents decried the Department for stripping away essential civil rights protections from student survivors of sexual harassment.[321] Many criticized the severe-and-pervasive standard, explaining that even shocking and disturbing incidents of young students experiencing harassment would not satisfy this exacting standard and would leave many without recourse under Title IX.[322] Numerous commenters also expressed deep concerns about the proposed mandatory dismissal provision regarding off-campus harassment, explaining that, despite off-campus harassment being increasingly common, schools would have no obligation to address most of these incidents—even if a student could not continue with their education because of the harassment.[323] And, many also took issue with the proposed grievance procedures, warning that live hearings and direct cross-examination would retraumatize survivors by triggering depression and symptoms of PTSD.[324]

In addition, civil rights organizations and the attorneys general of many states filed lawsuits seeking to block the 2020 Rules' harmful provisions from going into effect.[325] One such lawsuit, filed by NWLC on behalf of individual student survivors and several survivor advocacy organizations, challenged most of the provisions of the 2020 Rules as violations of the Administrative Procedures Act (APA) because the rules were "arbitrary and capricious" and in excess of the authority granted to

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319. *Rulemaking Docket: Title IX of the Education Amendments of 1972*, REGULATIONS.GOV, https://www.regulations.gov/docket/ED-2018-OCR-0064 [https://perma.cc/Q8AK-UJUA].

320. Nancy Chi Cantalupo et al., Overwhelming Opposition: The American Public's Views on the DeVos Title IX Rulemaking of 2018-2020 (July 2022) (Wayne State Univ. L. Sch. Rsch. Paper No. 2022-92).

321. Comments in opposition were written by civil rights organizations, mental health advocates, school faculty and administrators, local governments, and parents. *Id.* at 4–5.

322. *Id.* at 16–17.

323. *Id.* at 14–15.

324. *Id.* at 18–19.

325. *Lawsuits Challenging Secretary DeVos's New Title IX Rules*, CORREIA & PUTH, PLLC (Aug. 7, 2020), https://www.correiaputh.com/news/lawsuits-challenging-secretary-devoss-new-title-ix-rules [https://perma.cc/3BJZ-MNFP].

the Department by Congress.[326] In addition, NWLC's lawsuit challenged the 2020 Rules as violations of the Equal Protection Clause of the Fifth Amendment because they discriminated on the basis of sex.[327] A federal district court in Massachusetts vacated the exclusionary rule as a violation of the APA, noting that it allowed respondents to manipulate their schools into excluding a confession or apology by simply refusing to attend their live hearing.[328] The court noted that this rendered Title IX hearings "a remarkably hollow gesture," and because the Department failed to consider these consequences, the court held the exclusionary rule was arbitrary and capricious in violation of the APA.[329] However, the court left the rest of the 2020 Rules intact, and they remain in place today.[330]

3. Rise in Respondent-Initiated Litigation

In tandem with the backlash against #MeToo and the rollback of Title IX protections by the Trump administration, Title IX respondents who have been disciplined for sex-based harassment are increasingly suing their schools, claiming "due process" violations[331] or "reverse discrimination" under Title IX.[332] The specious argument advanced by these respondents in response to their schools treating sex-based harassment seriously is that they are being mistreated because of their sex.[333] Specifically, respondents allege that, in disciplining them for sex-

326. *See* Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 115 (D. Mass. 2021).

327. *Id.*

328. *Id.* at 135; *Federal Judge Vacates Part of Trump Administration's Title IX Sexual Harassment Rule*, *supra* note 309.

329. *See Cardona*, 552 F. Supp. 3d at 136.

330. *Id.* at 138, *order clarified*, No. CIV 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021) (clarifying that the exclusionary rule was vacated).

331. Disciplined Title IX respondents bringing claims for violation of due process generally argue that campus disciplinary systems must provide procedures analogous to those required by the criminal legal system, such as the right to counsel and the right to directly cross-examine complainants. But campus disciplinary proceedings are *not* criminal proceedings and, thus, do not need to mirror criminal procedural requirements. *See* Behre, *supra* note 138, at 920. In fact, as explained above, a majority of federal circuit courts have held that direct, live cross-examination is not required to satisfy due process rights. *See* discussion *supra* note 306 and accompanying text.

332. Dana Bolger et al., *A Tale of Two Title IXs: Title IX Reverse Discrimination Law and Its Trans-Substantive Implications for Civil Rights*, 55 U.C. DAVIS L. REV. 743 (2021).

333. *Id.* at 746.

based harassment, their schools are motivated by "anti-male bias"—an argument that totally co-opts the purpose of Title IX, which is to protect and restore access to education for survivors—the actual victims of sex discrimination.[334]

Not only do these so-called reverse discrimination suits subvert the purpose of Title IX, but they have also given rise to dangerous legal precedent. While survivors must struggle to satisfy the stringent *Gebser–Davis* standards to hold their schools accountable for ignoring their victimization, federal courts have allowed disciplined respondents bringing these reverse discrimination suits to bypass those exacting legal standards.[335] For example, in one appellate decision written by now-

334. *Id.*

335. *Id.* at 745. Bolger, Brodsky, and Singh's article explains that several federal circuit courts have justified allowing respondents disciplined for sexual misconduct to circumvent the legal barriers survivors face by conflating enforcement of Title IX with bias against men. *Id.* This conflation is part of the significant backlash to the Obama administration's 2011 Dear Colleague Letter (DCL), which clarified schools' obligations to respond to sexual harassment under Title IX. *Id.* at 777. *See also* Penny Venetis, *Misrepresenting Well-Settled Jurisprudence: Peddling "Due Process" Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women*, 40 WOMEN'S RTS. L. REP. 126, 138–39 (2018) (outlining the considerable backlash by so-called "men's rights advocates" and conservative groups to the 2011 DCL). For example, the Third Circuit concluded that a disciplined respondent "state[d] a plausible claim of sex discrimination" when his Title IX claim was viewed in context with the 2011 DCL "ushered in a more rigorous approach to campus sexual misconduct allegations." Bolger et al., *supra* note 332, at 775–76 n.163 (citing Doe v. Univ. of Scis., 961 F.3d 203, 210–11 (3d Cir. 2020)). Similarly, the Seventh Circuit reasoned that the 2011 DCL constituted "pressure" on schools to comply with Title IX, which provided the disciplined respondent with "a story about why [his school] might have been motivated to discriminate against males accused of sexual assault." *Id.* at 780. Likewise, the Sixth Circuit concluded that a disciplined respondent's claim that his school "faced external pressure from the federal government" (that is, the 2011 DCL) to enforce Title IX, together with other factual allegations (including that every male respondent over two semesters was found responsible for sex-based harassment) was sufficient to raise an inference of gender discrimination. *Id.* at 775–76 n.163 (citing Doe v. Purdue Univ., 928 F.3d 652, 668–69 (7th Cir. 2019); Doe v. Mia. Univ., 882 F.3d 579, 594 (6th Cir. 2018)). In other words, these courts recognize that, alone, the evidence put forth by disciplined respondents claiming reverse discrimination would be insufficient to support a claim of sex discrimination but hold that the so-called bias created by OCR's efforts to vigorously enforce Title IX "transforms pleadings otherwise insufficient to raise an inference of sex discrimination into viable allegations of anti-male bias." *Id.* at 776.

Justice Amy Coney Barrett, the Seventh Circuit created a standard allowing men disciplined for sex-based harassment to bring a Title IX lawsuit by merely claiming there was a "plausible inference" that their school was motivated by anti-male bias.[336] In contrast, survivors are held to a much higher standard because they must show that their schools treated them with deliberate indifference.[337] At least six federal appellate courts and many more federal district courts have adopted Barrett's plausible-inference standard, easily allowing reverse discrimination suits by disciplined respondents to proceed even though harassment victims bringing Title IX claims must overcome the much more stringent *Gebser–Davis*, *Kollaritsch*, and *Cummings* standards to survive a motion to dismiss.[338]

By conflating enforcement of Title IX with bias against men, courts that have adopted the plausible-inference standard endorse beliefs that experiencing and committing sex-based harassment are strictly gendered. However, just the opposite is true: as discussed in Part I, students of all genders experience and perpetrate sex-based harassment, and Title IX protects *all* victims of sex-based harassment.[339] These so-called reverse discrimination decisions penalize schools for enforcing Title IX, disincentivizing them from treating sex-based harassment seriously. These decisions also harm other survivors who do not fit the cis-heteronormative[340] image of sex-based harassment, whereby the victim is always rendered a woman and the perpetrator is always rendered a man. Ultimately, these decisions chill reporting by dissuading survivors from

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336. *Amy Coney Barrett Threatens a Lifetime of Harm to Sexual Assault Survivors*, NAT'L WOMEN'S L. CTR. (Oct. 13, 2020), https://nwlc.org/amy-coney-barrett-threatens-a-lifetime-of-harm-to-sexual-assault-survivors [https://perma.cc/V5MT-ND5R].

337. *See* discussion *supra* Part II.A.

338. Bolger et al., *supra* note 332, at 745. The Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have adopted Barrett's plausible-inference standard. *Doe*, 961 F.3d at 209; Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 235–36 (4th Cir. 2021); Overdam v. Tex. A&M Univ., 43 F.4th 522, 527 (5th Cir. 2022); Schwake v. Ariz. Bd. of Regents, 967 F.3d 940, 947 (9th Cir. 2020); Doe v. Univ. of Denver, 952 F.3d 1182, 1192 (10th Cir. 2020); Doe v. Samford Univ., 29 F.4th 675, 686–87 (11th Cir. 2022).

339. AAUW Sexual Harassment Report, *supra* note 75, at 28.

340. *Cis-heteronormative* refers to a system of norms and beliefs that privilege cisgender and heterosexual identities by assuming that all people are cisgender and heterosexual and that all romantic and sexual relationships necessarily involve a cisgender and heterosexual man and woman. A *cisgender* person is someone whose gender identity aligns with their presumed gender at birth, which is typically presumed based on their physical anatomy.

coming forward about their victimization and push schools to further sweep sex-based harassment under the rug—just as the Trump administration's 2020 Rules do.

C. The Biden Administration's Next Steps for Title IX: Revitalizing Protections for Student Survivors.

Early in his presidency, President Biden announced that his administration would review the 2020 Rules addressing sexual harassment and consider how the Title IX regulations could address protections for LGBTQI+ students.[341] After a three-day public comment period in June 2021,[342] during which thousands of members of the public submitted oral and written comments,[343] the Department released proposed changes to the Title IX regulations on June 23, 2022, the 50th anniversary of Title IX.[344] These proposed changes (2022 Proposed Rules) to the Title IX rules would undo many of the significant harms from the 2020 Rules burdening survivors of sex-based harassment, and they would also codify protections for LGBTQI+ students and address protections for pregnant and parenting students.[345]

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341. *Department of Education's Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden's Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination*, DEP'T OF EDUC. (Apr. 6, 2021), https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination [https://perma.cc/KE56-99QV].

342. *OCR's Virtual Public Hearing on Title IX: June 7 – 11, 2021*, DEP'T OF EDUC.: OFF. OF CIV. RTS. (June 7, 2021), https://www2.ed.gov/about/offices/list/ocr/blog/20210607.html [https://perma.cc/39P7-6DA6].

343. *June 2021 Title IX Public Hearing*, DEP'T OF EDUC.: OFF. OF CIV. RTS. (Sept. 1, 2022), https://www2.ed.gov/about/offices/list/ocr/public-hearing.html [https://perma.cc/ULE5-AFXF].

344. *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, DEP'T OF EDUC. (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment [https://perma.cc/66SG-LXNU].

345. 2022 Proposed Rules, *supra* note 29; *see also The Biden Administration's Proposed Department of Education Title IX Rules, Explained*, NAT'L WOMEN'S L. CTR. (July 14, 2022), https://nwlc.org/resource/the-biden-administrations-proposed-department-of-education-title-ix-rules-explained [https://perma.cc/LF9H-24JV].

For example, the 2022 Proposed Rules would restore many of the Department's previous, longstanding standards regarding sex-based harassment. Survivors would only have to show that the harassment they faced was severe *or* pervasive, not severe *and* pervasive,[346] meaning that they would not be forced to suffer continued and worsening abuse before schools could even investigate their complaint. And schools would have to respond to sex-based harassment occurring off-campus—even if it occurs outside the United States—as long as it creates a hostile environment within a school's program or activity.[347] For example, if a student is harassed off campus and their harasser's continued presence on campus or the perpetration of additional harassment contributes to a hostile educational environment on-campus, the school must respond.[348]

The 2022 Proposed Rules would also require schools to address sex-based harassment even if one or both parties were not currently "participating or attempting to participate" in the school's program. For example, whereas the 2020 Rules currently require schools to dismiss complaints of sex-based harassment by individuals who are not participating or attempting to participate in a school program or activity *at the time they file their complaint*,[349] the 2022 Proposed Rules would allow an individual's complaint to proceed so long as they were participating or attempting to participate in a school program or activity *at the time they experienced the harassment.*[350] The 2022 Proposed Rules would retain the 2020 Rules' provision that permits schools to dismiss Title IX complaints at any time when the respondent transfers, withdraws, graduates, or retires—even after an investigation has begun.[351] However, the Proposed Rules would require additional safeguards in such cases.[352] For example, schools would be required to provide the complainant with supportive measures, and the school's Title IX coordinator would be required to take

346. 2022 Proposed Rules, *supra* note 29, at 41,569 (proposed 34 C.F.R. § 106.2(2) (2023) (defining *sex-based harassment*)).

347. *Id.* at 41,571 (proposed 34 C.F.R. § 106.11 (2023)).

348. *Id.* at 41,573, 41,576 (proposed 34 C.F.R. §§ 106.45(d)(4)(i), 106.44(g) (2023)).

349. 34 C.F.R. § 106.30(a) (2023) (defining *formal complaint*).

350. 2022 Proposed Rules, *supra* note 29, at 41,567 (proposed 34 C.F.R. § 106.2 (2023) (defining *complainant*)).

351. 34 C.F.R. § 106.45(b)(3)(ii) (2023).

352. 2022 Proposed Rules, *supra* note 29, at 41,575 (proposed 34 C.F.R. § 106.45(d)(1)(ii) (2023)).

measures to both prevent further sex discrimination from occurring and protect the complainant and all students from such discrimination.[353]

Finally, the 2022 Proposed Rules would undo some of the uniquely burdensome and overly prescriptive grievance procedures that the 2020 Rules implemented. For example, instead of requiring that all parties and witnesses at institutions of higher education submit to direct, live cross-examination by a party's advisor of their choosing, the 2022 Proposed Rules would provide colleges and universities increased flexibility in grievance procedures by acknowledging that direct, live cross-examination is not required to satisfy either Title IX or due process requirements.[354]

Ultimately, these proposed changes would be a significant step forward and would facilitate access to justice for countless student survivors. However, the 2022 Proposed Rules would still burden survivors bringing Title IX complaints to some degree by retaining some of the 2020 Rules' harmful provisions.[355] When finalized, the 2022 Proposed Rules

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353. *Id.* at 41,575–76 (proposed 34 C.F.R. § 106.45(d)(4)(i)–(iii) (2023)). *See also id.* at 41,573 (proposed 34 C.F.R. § 106.44(f)(6) (2023)). For example, the Title IX coordinator could prevent further sex discrimination by prohibiting a third party (such as a former student or employee) from visiting the school's campus and conducting staff trainings on how to monitor for risks of sex discrimination in a specific class, department, athletic team, or program where discrimination has been reported in the past.

354. *Id.* at 41,505.

355. The 2022 Proposed Rules would unfortunately retain some concerning provisions from the 2020 Rules governing schools' grievance procedures. First, while a federal judge vacated the exclusionary rule in the 2020 Rules in July 2021, the 2022 Proposed Rules would implement another exclusionary rule that, while different in scope, would still burden survivors. The 2022 exclusionary rule states that if a party or witness at a college or university does not respond to a question "related to their credibility," their school would be required to ignore any oral or written statement they make that "supports their position." *See* 2022 Proposed Rules, *supra* note 29, at 41,578 (proposed 34 C.F.R. § 106.46(f)(4) (2022)). Under this proposed rule, a survivor's refusal to answer a single question related to their credibility could result in the exclusion of all their oral and written statements from the evidence, which could result in their having to rely solely on their witnesses' statements to prove their case. Also, the 2022 Proposed Rules would continue to inappropriately tilt the grievance procedure in favor of respondents by retaining the 2020 Rules' presumption that a respondent is not responsible for harassment until a determination is made at the end of an investigation. *Id.* at 41,575 (proposed 34 C.F.R. § 106.45(b)(3) (2022)). Finally, instead of requiring that schools use a single, less burdensome evidence standard—that is, the preponderance-of-the-evidence standard—in all Title IX investigations, the 2022 Proposed Rules would allow schools to use the clear-and-convincing-evidence

will also inevitably face legal challenges by so-called "men's right advocates," anti-transgender advocates, and conservative states. Additionally, *regulations*—no matter how progressive—are not a permanent solution to the distinct possibility that a future administration will roll back civil rights protections for student survivors. Part III next explores a possible solution that amends the Title IX *statute*.

III. A PATH FORWARD: A STATUTORY AMENDMENT TO TITLE IX.

There is good reason to be concerned that the Trump administration's civil rights rollbacks may happen again in the future under a president who does not respect civil rights laws and especially federal agency enforcement of those laws. While changing an agency rule is a long and arduous process, rule changes can happen from administration to administration, as seen in the 2018–2020 Title IX rulemaking under the Trump administration and currently with the Biden administration's Title IX rulemaking. Preventing this ping-ponging of Title IX protections against sex-based harassment in the future requires a legislative fix—that is, an amendment to the Title IX statute itself. Such a legislative amendment could undo the harmful and burdensome court-made standards that unfairly force students, including young children, to suffer worse harassment than adult workers under Title VII just to receive *some* justice in court. It would also lock in protections in the Title IX statute itself so that the Department cannot require less of educational institutions in their response to sex-based harassment than what the statute would require. Subpart III.A discusses an important federal bill that would amend the Title IX statute, and Subpart III.B explains two sources of authority Congress has under the U.S. Constitution to amend Title IX.

A. The SAFER Act Would Lock in Strong Protections for Student Survivors.

Congress has an opportunity to fix the harmful decisions by the Supreme Court and other federal courts that have limited protections for students under Title IX case law and to ensure that Title IX regulatory and sub-regulatory protections will not change based on the political leanings of a future administration by passing the Students' Access to Freedom & Educational Rights Act (SAFER Act). United States Senators Bob Casey,

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standard to investigate sex-based harassment if it uses the clear-and-convincing-evidence standard for other "comparable" investigations, such as investigations for other kinds of harassment and discrimination. *Id.* at 41,576 (proposed 34 C.F.R. § 106.45(h)(1)(2022)).

Jr., and Mazie Hirono, along with Representatives Jahana Hayes, Debbie Dingell, and Deborah Ross introduced the SAFER Act in the late 117th Congress in December 2022.[356] The SAFER Act provides a framework that would create uniform standards for harassment based on sex, race, color, national origin, and disability; address intersectional discrimination claims; and provid much-needed support for student survivors of sex-based harassment—particularly students with marginalized identities.[357]

Specifically, the SAFER Act would make the following changes to undo the harmful *Gebser–Davis*, *Kollaritsch*, and *Cummings* standards. First, the SAFER Act would require an institutional response to harassment when it changes a person's ability to participate in or receive any benefit, service, or opportunity from an education program or activity, including by creating an intimidating, hostile, or offensive environment—a much needed improvement over the current unduly burdensome "severe, pervasive, and objectively offensive" standard.[358] Second, the SAFER Act would broaden the notice standards by requiring schools to respond to harassment when one of a broader swath of school employees knew or "should have known" about the harassment in the exercise of reasonable care, instead of only requiring schools to respond when a narrow set of *appropriate persons* have *actual notice* of the harassment.[359] Third, institutions would be responsible for addressing harassment "regardless of where [it] occurs," including harassment that is enabled or assisted by an employee or agent of the school, which means victims would not be constrained by the current substantial-control requirement.[360] Fourth, institutions would be required to respond to harassment with "reasonable care," thus removing the current deliberate-indifference standard that has allowed many schools to escape liability for insufficient and harmful responses to harassment.[361] Fifth, the SAFER Act rejects the Sixth Circuit's one-free-rape rule in *Kollaritsch* by clarifying that a school may be liable for its failure to address harassment regardless of whether such

356. Students' Access to Freedom & Educational Rights Act, S. 5158, 117th Cong. (2022) [hereinafter SAFER Act].

357. *Id.*

358. *Id.* at §§ 101(3), 102(a), 103(2). Note that the current bill as introduced would create a slight discrepancy between the standard under Title IX and the standards under Title VI and Section 504. A uniform standard across all statutes would be more equitable.

359. *Id.*.

360. *Id.*

361. *Id.*

failure causes the plaintiff to experience further harassment.[362] And finally, victims of harassment and other discrimination would be assured of their right to money damages for emotional distress, thus overriding the Supreme Court's decision in *Cummings.*[363]

As students often experience harassment targeted at multiple aspects of their identity, sexual harassment, sexual assault, dating violence, domestic violence, and stalking cannot be treated as completely unique and unrelated to harassment on the basis of race, color, national origin, disability, or other forms of sex-based harassment, such as harassment based on gender identity, sexual orientation, sex characteristics, parental status, pregnancy, or related medical conditions. Thus, the SAFER Act would similarly amend analogous civil rights statutes that require schools to address harassment based on race, color, national origin, and disability, under Title VI and Section 504. As explained above in Subpart II.B.2, harassment based on these other identities also undermines students' equality, safety, and dignity, and a consistent liability standard across civil rights laws would ensure that students experiencing intersectional forms of harassment are not subjected to inconsistent litigation and regulatory standards under Title IX, Title VI, and Section 504.

Outside of the amendments to these civil rights laws, the SAFER Act would also require schools to take other measures to ensure that survivors of sex-based harassment, especially women and girls of color, disabled women and girls, and LGTBQI+ students, have their particular needs met and experiences considered. Given that these students frequently receive fewer protections and support from institutions that too often discredit their complaints and punish them after coming forward, comprehensive and effective supportive measures and protections against retaliation are especially important.

To counter the negative impact that sex-based harassment has on victims' ability to study and maintain their grades, participate in school activities, or even attend school, as outlined above in Subpart I.D, schools must, under the 2020 Rules and the 2022 Proposed Rules, offer *supportive measures* to survivors at no cost that restore and preserve their access to education. Such measures may include mental health services, medical services, housing assistance, disability services, and academic support services—all of which can mean the difference between a student succeeding or being forced to withdraw from school. However, NWLC attorneys have heard from students that they are often unaware that

362. *Id.* (providing that schools do not escape liability simply because "the harassment did not recur after the recipient receives notice of the harassment").

363. *Id.*

supportive measures exist or that they are entitled to such measures. The SAFER Act would require Title IX coordinators and school administrators to notify individuals who make complaints of sex-based harassment about the availability of supportive measures, in addition to the specific types of supportive measures that may be available.[364]

While federal law prohibits retaliation against students who report discrimination, including sex-based harassment, too many schools subject students—especially students of color, LGBTQI+ students, and disabled students—to adverse action when they report sex-based harassment, as discussed above in Subpart I.C. This not only harms victims who have already spoken out, but it also chills further reporting of something that is already so underreported. The SAFER Act would protect students reporting sex-based harassment from being punished for student code of conduct violations that are related to the harassment, including using intoxicating substances at or around the time of the harassment, taking reasonable action to defend against the harassment, or taking actions later to avoid contact with the respondent.[365] It would also require schools to issue guidance addressing protections for complainants against punishment or other retaliation and would prohibit schools from disciplining complainants for a "false report" simply because the school has decided there is insufficient evidence of the harassment.[366]

Moreover, to ensure school employees are fully aware of their Title IX obligations and how to respond appropriately to survivors in a trauma-informed way, the SAFER Act would impose additional duties on Title IX coordinators, who are responsible for overseeing schools' compliance with Title IX, and would provide grants to schools to facilitate trainings for Title IX coordinators and all employees.[367] Additionally, because sex-based harassment is underreported, it can be difficult for schools to know how pervasive it is and whether the prevention and support efforts are having an impact. Anonymous school climate surveys can help schools obtain more accurate data and honest feedback from students and educators on their policies, practices, and training, ensuring that schools are better equipped to determine the effectiveness of existing practices and to develop new strategies as appropriate. Similar to the climate surveys now required for higher education institutions from the recent reauthorization of the Violence Against Women Act[368] as part of the

364. *Id. at* § 205(a).
365. *Id.* at § 205(b).
366. *Id.* at § 205(b)(3)–(4).
367. *Id.* at § 206.
368. S. Daniel Carter, *Campus Climate Surveys Due in 2024 Will Significantly Expand On Clery Act Sexual Violence Data*, SAFETY ADVISORS FOR EDUC.

Consolidated Appropriations Act of 2022,[369] the SAFER Act would require the Secretary of Education to develop and administer standardized climate surveys in PK–12 schools regarding students' experiences with sexual harassment, sexual assault, dating violence, domestic violence, and stalking.[370] The bill would also require all PK–12 schools to report to the Department, through the Civil Rights Data Collection, how often their students report harassment based on race, color, national origin, sex, and disability to the school and what the results of school investigations are.[371]

And finally, in addition to current enforcement mechanisms under Title IX and other analogous civil rights laws, the Department should have the power to levy fines against institutions when they violate federal civil rights laws. This is particularly important given that OCR has virtually never revoked all Department funding from an educational institution for violating a civil rights law. The SAFER Act would allow OCR to impose fines on institutions and to disclose on its website which schools are under investigation, have entered into a resolution agreement with OCR, or have been sanctioned, including fined, for violating students' civil rights.[372] Such a tool could be extremely impactful given the current reality that schools are now facing rising pressure to mitigate monetary liability from lawsuits initiated by respondents claiming so-called reverse sex discrimination under Title IX or due process violations.[373]

B. Congress Can Also Draw from Section 5 Enforcement Authority, Not Only its Spending Clause Authority, to Amend Title IX.

The Supreme Court has long recognized that Title IX was passed pursuant to Congress's power under the Spending Clause,[374] which requires that recipients "voluntarily and knowingly accept[] the terms of the 'contract'" or the conditions to which the funds are attached.[375] Indeed,

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CAMPUSES (Mar. 30, 2022), https://safecampuses.biz/campus-climate-surveys-due-in-2024-will-significantly-expand-on-clery-act-sexual-violence-data [https://perma.cc/BZL7-HZLA].

369. Violence Against Women Reauthorization Act of 2022, S.B. 3623, 117th Cong. § 1507 (2022).

370. SAFER Act, S. 5158, 117th Cong. § 203 (2022).

371. *Id.* at § 204.

372. *Id.* at § 201.

373. *See* discussion *supra* Part II.B.3.

374. *See, e.g.*, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998). *See also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181 (2005).

375. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

in creating the stringent *Gebser–Davis* standards, the Court's analysis relied on Title IX's contractual nature: whether schools can be held liable for money damages for not complying with conditions is based on whether they are provided *adequate notice* of such conditions.[376] However, Congress can rely on multiple sources of authority when enacting legislation;[377] accordingly, Congress can also draw on its authority under § 5 of the Fourteenth Amendment to amend Title IX (and other civil rights statutes) and restore its broad purpose.[378] Subpart III.B explains that Congress acted not only pursuant to its power under the Spending Clause to enact Title IX, but also pursuant to § 5 of the Fourteenth Amendment,[379]

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376. *Davis*, 526 U.S. at 640–42 ("[I]t would be contrary to the very purpose of Spending Clause legislation to impose liability on a funding recipient for the misconduct of third parties . . . . We agree with respondents that a recipient of federal funds may be liable in damages under Title IX only for its own misconduct." As such, "we decline[] the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known. Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge."); *id.* at 640 (citing *Pennhurst State Sch.*, 451 U.S. at 24–25) ("In interpreting language in spending legislation, we thus 'insis[t] that Congress speak with a clear voice,' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'").

377. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003).

378. Many have argued that Title IX is an appropriate exercise of Congress's power under § 5 of the Fourteenth Amendment. *See, e.g.*, Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN'S L.J. 159 (1999); Emily Martin, *Title IX and the New Spending Clause*, AM. CONST. SOC'Y FOR L. & POL'Y (Dec. 2012); Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER, L. & POL'Y 1, 29–30 (2016). And some circuit courts have held that, in addition to Title IX being a valid exercise of Congress's Spending Power, it is also a valid exercise of Congress's § 5 power. *See, e.g.*, Franks v. Ky. Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997).

379. Just because the Supreme Court has recognized that Congress passed Title IX pursuant to its power under the Spending Clause does not exclude the possibility that Title IX was also a valid exercise of its § 5 power. The Supreme Court has recognized that there are no specific words Congress must employ in order to validly invoke its power to enact legislation. *See* NFIB v. Sebelius, 567 U.S. 519, 570 (2012) (Roberts, J., plurality) ("The 'question of the constitutionality of action taken by Congress does not depend on recitals of the

and, therefore, has the power to amend Title IX through the SAFER Act to ensure that sex-based harassment is broadly addressed and prevented.

Section 5 of the Fourteenth Amendment allows Congress "to enforce, by appropriate legislation" the Equal Protection Clause.[380] The Supreme Court has stated that, in order to enforce the guarantees of Equal Protection, Congress may do more than simply outlaw what has already been deemed unconstitutional by passing "appropriate prophylactic legislation."[381] Such legislation may "proscribe[] facially constitutional conduct, in order to prevent and deter unconstitutional conduct," so long as it does not "substantively redefine the States' legal obligations" under the Fourteenth Amendment.[382] The Court explained that the metric for discerning between legislation that "substantively redefines the States' legal obligations" from valid § 5 legislation is whether that legislation is "reasonably prophylactic," which requires Congress to show that there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[383] Whether legislation meets the congruence-and-proportionality test hinges on Congress's ability to demonstrate that the conduct it seeks to regulate is within the parameters of conduct that the Fourteenth Amendment proscribes, which is ordinarily established by showing a pattern of unconstitutional conduct by the states.[384] In other words, if Congress passes legislation to enforce the Equal Protection Clause, it must show a history of extensive unconstitutional conduct by the states, such that it would justify Congress acting to proscribe that state conduct.

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power which it undertakes to exercise.'" (quoting Woods v. Miller, 333 U.S. 138, 144 (1948))). *See also* Martin, *supra* note 378, at 15, n.102 ("Congress need not recite any magic words of intent in order to exercise available constitutional powers."). Similarly, in holding that Title IX is a valid exercise of Congress's § 5 power, circuit courts have recognized that this does not depend on Congress stating it is invoking its § 5 power. *See, e.g.*, Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) ("as long as Congress had such authority [to legislate pursuant to Section 5] as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant"); Franks v. Ky. Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998) (Congress's failure to expressly invoke § 5 authority in passing Title IX is "not fatal," as the question is "not whether Congress correctly guessed the source of its authority," but "whether Congress actually had the authority to adopt the legislation pursuant to [§ 5].").

380. U.S. CONST. amend. XIV.

381. *Hibbs*, 538 U.S. at 727.

382. *Id.* at 727–28 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000)).

383. *Id.* at 728 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

384. *Id.* at 729.

Ordinarily, the Court will look at whether Congress has established evidence of such unconstitutional conduct in the legislative record.[385] The Court outlined in *Nevada Department of Human Resources v. Hibbs* what sort of evidence Congress must put forth to justify legislation it passes as "reasonably prophylactic" and, thus, valid under § 5.[386] In *Hibbs*, the Court assessed whether the family-care leave provisions of the Family Medical Leave Act (FMLA) were enacted pursuant to a valid exercise of Congress's § 5 power; specifically, the question before the Court was whether Congress had established a pattern of unconstitutional gender-based discrimination by the states in granting family leave.[387] There, the Court found that Congress sufficiently established a history of extensive gender-based discrimination in employment.[388] This was evinced by previous decisions by the Court affirming state laws that limited women's employment opportunities.[389] Other evidence the Court found persuasive included two Bureau of Labor Statistics surveys in the FMLA's legislative record, which showed that the disparity between the rates at which employers maintained maternity and paternity leave policies increased from 1989 to 1990.[390] Finally, the Court also found compelling testimony Congress heard that "[p]arental leave for fathers . . . is rare," and even where employers maintained parental leave policies, both private and public employers were "notoriously discriminatory in [granting] . . . requests for such leave"; for example, many state employers provided extended maternity leave, whereas very few states extended a similar paternal leave policy.[391] In short, to the Court, this indicated that, even when states had parental leave policies that were not facially discriminatory, states were applying them in discriminatory ways, which produced significant sex-based differences in their granting of parental

385. *Id.*

386. *Id.* at 721.

387. *Id.* at 729.

388. *Id.*

389. That is, the Court found that its history of upholding various state laws that limited women's working opportunities evidenced a pattern of unconstitutional sex discrimination by the states; for example, the Court upheld an Illinois law preventing women from practicing law, a Michigan law preventing women from bartending, and an Oregon law that limited the hours women were permitted to work for wages. *Id.* (citing Bradwell v. State, 83 U.S. 130, 133 (1872); Goesaert v. Cleary, 335 U.S. 464, 466 (1948); Muller v. Oregon, 208 U.S. 412, 419 (1908)). At the heart of these laws, the Court opined, was the sexist belief that a woman's role in society was relegated to being "the center of home and family life." *Id.* (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

390. *Id.* at 730.

391. *Id.* at 731.

leave.[392] Thus, the evidence presented in the legislative record of states' history of unconstitutional gender-based discrimination in the granting of leave benefits was "weighty enough to justify the enactment of [the FMLA as] prophylactic § 5 legislation."[393]

The *Hibbs* Court also clarified that the legislative record is less significant in proving a pattern of unconstitutional conduct in cases where Congress seeks to regulate conduct that is presumptively unconstitutional and subject to heightened scrutiny, as gender-based discrimination is.[394] More simply put, Congress will have an easier time showing a pattern of gender-based discrimination by the states because it is enshrined in this nation's history and in previous court decisions condoning sexist practices by states.[395]

Finally, the *Hibbs* Court suggested that an additional factor to assess whether legislation satisfies the congruence-and-proportionality test is whether Congress has tried and failed through previous legislative attempts to address the unconstitutional conduct at issue. The *Hibbs* Court raised *South Carolina v. Katzenbach* as an example of where a failure by Congress to address unconstitutional conduct through previous legislative efforts justified additional prophylactic legislation.[396] The *Katzenbach* Court noted that Congress had "repeatedly tried to cope with the problem [of racial discrimination in voting] by facilitating case-by-case litigation against voting discrimination" and by passing the Civil Rights Act of 1957 and amending it several times; still, those laws did "little to cure the problem of voting discrimination," as there persisted a 50-percentage-point disparity between the registration of white and Black voters.[397] Therefore, Congress was justified in passing the Voting Rights Act as additional prophylactic legislation.[398] On the question of whether Congress was justified in passing the family care leave provisions of the FMLA in *Hibbs,* the Court noted that Congress had already tried and failed to address workplace gender discrimination by passing Title VII and later amending it with the Pregnancy Discrimination Act.[399] The Court explained that, even with these legislative efforts, "state gender discrimination did not cease," and accordingly, Congress was justified in

392. *Id.* at 732.
393. *Id.* at 735.
394. *Id.* at 736.
395. *Id. See also* Martin, *supra* note 378, at 11.
396. *Hibbs*, 538 U.S. at 737 (citing South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966)).
397. *Katzenbach*, 383 U.S. at 313.
398. *Hibbs*, 538 U.S. at 737 (citing *Katzenbach*, 383 U.S. at 313).
399. *Id.* at 729–30, 737.

passing the family care leave provisions of the FMLA to address persistent sex-based disparities in state employers' granting of leave benefits.[400]

Under the above analysis, Title IX constitutes appropriate legislation to enforce the Equal Protection Clause. First, Title IX is "reasonably prophylactic legislation" because its efforts to remedy sex discrimination—including sex-based harassment—are a congruent and proportional response to rampant sex discrimination in education, specifically including public education.[401] Just as the Equal Protection Clause prohibits sex discrimination by the states, Title IX does so by barring schools that receive federal funding from relying on sex stereotypes to engage in unconstitutional practices.[402]

Second, while the scope of Title IX protections and Fourteenth Amendment protections are not identical, establishing liability under Title IX closely parallels doing so under the Equal Protection Clause of the Fourteenth Amendment, as both prohibit sex discrimination by covered entities.[403] Accordingly, Title IX's bar on sex discrimination does not "substantively redefine the states' legal obligations" under the Fourteenth Amendment, as it goes no further than enacting a congruent and proportional remedy to sex discrimination by states.[404]

Third, when Title IX was enacted, Congress had before it significant evidence of unconstitutional sex discrimination perpetuated by the states in education, such that it would satisfy *City of Boerne*'s congruence-and-proportionality test.[405] When Congress passed Title IX in 1972, it presented a pattern of unconstitutional state conduct by documenting a

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400. *Id.*

401. *Id.* at 727–28 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

402. Martin, *supra* note 378, at 15 (explaining that, like the Equal Protection Clause, Title IX protects against unconstitutional conduct; for example, where Title IX protects "against pregnancy discrimination and discrimination on the basis of parental status [Title IX] similarly respond[s] to and prevent[s] unconstitutional practices based on gender stereotypes.").

403. Schaffner, *supra* note 378, at 190 (arguing that Title IX is a valid exercise of Congress's § 5 power because "Title IX is not so sweeping as to saddle the states with burdens" that go well beyond what the Fourteenth Amendment empowers Congress to prevent or remedy).

404. Martin, *supra* note 378, at 14. *See also* Archibald, *supra* note 378, at 29–30 (asserting that Title IX is valid § 5 legislation because the Equal Protection Clause outlaws sex discrimination by the states and that since Congress has power to legislate to prevent unconstitutional sex discrimination, Title IX represents congruent and proportional legislation to an injury the Fourteenth Amendment was meant to prevent or address).

405. *City of Boerne*, 521 U.S. at 520.

culture of widespread, consistent, and longstanding sex discrimination in education, both in public and private institutions.[406] This included: testimony indicating that institutions of higher education consistently admitted men over women by subjecting women to disproportionately stringent admission standards; data which showed that women had almost no representation amongst faculty members at institutions of higher education; and data that showed examples of rampant sex discrimination at the elementary and secondary school level, including teachers favoring boys over girls in class and leading public schools across the country giving preference to boys over girls in their admission processes.[407]

Fourth, like the Equal Protection Clause, Title IX regulates presumptively unconstitutional behavior. The *Hibbs* Court held that because the FMLA sought to regulate presumptively unconstitutional conduct—sex discrimination by employers in the granting of leave benefits—Congress could easily demonstrate a pattern of unconstitutional conduct by the states, such that the FMLA met the congruence-and-proportionality test. Similarly, Title IX regulates presumptively unconstitutional conduct—sex discrimination by federally funded schools, including by public schools. Therefore, by the Court's reasoning in *Hibbs*, and given the history of sex discrimination in education, efforts by Congress to pass prophylactic legislation like the SAFER Act to remedy sex discrimination in education by requiring schools to take effective action in response to sex-based harassment is undoubtedly a congruent and proportional legislative remedy.[408]

Finally, the ongoing sex-based harassment faced by students represents a failure by Congress to successfully prevent unconstitutional sex discrimination by the states, such that it would justify Congress passing the SAFER Act as a remedy. As explained above, the Supreme Court in *Hibbs* suggested that a failure by Congress to remedy workplace sex discrimination through previous legislative efforts justified passing the FMLA as prophylactic legislation under § 5. Similarly, Congress's efforts to address sex discrimination in education, including by passing Title IX, have not been successful. This is evidenced by students still facing widespread sex-based harassment and significant harms to their education as a result, as explained above in Subparts I.A–D, and, relatedly, the numerous suits student survivors have brought against their schools for failing to respond appropriately under Title IX to their victimization.[409]

406. Martin, *supra* note 378, at 12–13.

407. *Id.*

408. *Id.* at 14.

409. *See, e.g.*, Williams v. Bd. of Regents of Ga., 477 F.3d 1282, 1296 (11th Cir. 2007); Farmer v. Kan. State Univ., 918 F.3d 1094, 1097 (10th Cir. 2019);

The unfortunate reality is that sex discrimination in education continues,[410] but the SAFER Act represents additional prophylactic § 5 legislation that is justified under the congruence-and-proportionality test and necessary to effectively address and prevent sex discrimination in schools.

Without digging too deeply into the topic here, a final word should be said about an additional source of authority Congress may rely on to amend and strengthen Title IX: the Commerce Clause.[411] It is well established that the Equal Protection Clause only reaches state actions; in the Title IX context, that reaches only sex discrimination by *public* schools and universities. However, Congress can also rely on its powers under the Commerce Clause to amend Title IX, reaching *private* educational institutions that receive federal financial assistance.[412] Under the Commerce Clause, Congress may regulate activity that has a "substantial effect on interstate commerce."[413] As the Court has recognized in previous civil rights cases, this includes "noneconomic" activity occurring in "economic establishments,"[414] like public accommodations. Thus, since private schools charge tuition,[415] Congress should be able to draw from its

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Vance v. Spencer Cty. Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000); Hall v. Millersville Univ., 22 F.4th 397, 399 (3d Cir. 2022).

410. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003). *See also* Martin, *supra* note 378, at 11.

411. *See* U.S. CONST. art. I, § 8, cl. 3.

412. Several federal courts have found that Congress's regulation of private employers by Title VII, the interpretation of which influences Title IX, is a valid exercise of its commerce power. *See, e.g.*, Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 81 (3d Cir. 2003); EEOC v. Elrod, 674 F.2d 601, 607 (7th Cir. 1982).

413. United States v. Lopez, 514 U.S. 549, 559, 565 (1995).

414. *Id.* at 656–57 (Breyer, J. dissenting) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (upholding provisions of Title II of the Civil Rights Act of 1964 that barred discrimination in public accommodations as a valid exercise of Congress's commerce power, finding that because the public accommodations provisions regulated noneconomic activity (racial discrimination) by establishments that had a "direct and substantial relation to the interstate flow of goods and people," this constituted a substantial impact on interstate commerce)).

415. Also, the fact that students often travel from other states to attend and reside at private educational institutions may be another relevant factor for Congress to be able to amend Title IX through its commerce power. Under the Court's logic in *Heart of Atlanta Motel*, students traveling from other states makes Congress's proscribing of sex discrimination by private schools regulation of a noneconomic activity by an establishment with a "direct and substantial relation to the interstate flow of goods and people . . . ." *Heart of Atlanta Motel*, 379 U.S. at 250.

commerce power to amend Title IX and strengthen protections against sex-based harassment in education through the SAFER Act.[416]

CONCLUSION

The recent celebration of Title IX's 50th anniversary is an occasion to reflect on the immense progress made towards gender equity in education over the last half-century.[417] However, it is also an opportunity to reflect on the significant work that must be done to eradicate the rampant sex discrimination, including sex-based harassment, that many students—including NWLC's client A.P. in Georgia—still face.[418] In undertaking this work, it bears acknowledging that progress in advancing the civil rights of all marginalized groups—survivors of sex-based harassment included—has been met with backlash. But this time, while history is yet again repeating itself, the backlash towards strong protections addressing sex-based harassment in schools seems particularly powerful. The dismissive and aggressive responses by rape apologists and so-called men's rights advocates to #MeToo and to strong enforcement of Title IX

416. It is worth addressing two Supreme Court cases regarding Congress's commerce power: *United States v. Lopez* and *United States v. Morrison*. In *Lopez*, the Court struck down the Gun Free School Zones Act of 1990 (GFSZA), which made it a federal offense to knowingly possess a firearm in any local public-school zone. *Lopez*, 514 U.S. at 551. There, the Court held that Congress's findings that gun violence had an impact on interstate commerce by negatively impacting classroom learning, which ultimately would adversely impact commerce, were too attenuated. *Id.* at 565. Second, in *Morrison*, the Court struck down the civil remedy provision of the Violence Against Women Act (VAWA), holding that Congress cannot regulate gender-based violence based only on findings that the violence had a substantial indirect effect on interstate commerce in the aggregate. United States v. Morrison, 529 U.S. 598, 617 (2000). According to the Court, reductions in national productivity and interstate travel due to gender-based violence were immaterial because, as in *Lopez*, this impact on interstate commerce was too attenuated to justify VAWA as a valid invocation of the commerce power. *Id.* at 615. In contrast, an amendment to Title IX is distinguishable from both GFSZA and VAWA because, in regulating private institutions, Title IX regulates sex discrimination by institutions against students charged with tuition and employees of those institutions—thus regulating economic relationships with a far more direct effect on interstate commerce than the impacts found to be attenuated in *Lopez* and *Morrison*.

417. *See* ELIZABETH TANG ET AL., TITLE IX AT 50: A REPORT BY THE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION 10–11 (2022), https://nwlc.org/wp-content/uploads/2022/06/NCWGE-Title-IX-At-50-6.2.22-vF.pdf [https://perma.cc/B943-P87F].

418. *See id.* at 12–13.

protections have been amplified through virtual channels and social media. Policymakers have participated in this backlash by seeking to—and succeeding in—weakening Title IX's regulatory protections against harassment. Moreover, many courts—the Supreme Court included—are now filled with Trump judicial appointees, making the outlook grim for students bringing Title IX lawsuits. And unfortunately, it is very likely that a future administration hostile towards civil rights will undo any progress made to the Title IX regulations by the Biden administration.

While the law is not *the* solution for ending sex-based harassment in schools, it *is* a powerful tool to ensure that schools take effective steps to both curb harassment and change the culture from one that encourages schools to sweep sex-based harassment under the rug to one that supports student survivors. To that end, Congress needs to take bold action and pass legislation that cements strong civil rights protections for students, like the SAFER Act. Students cannot wait. The last 50 years of progress since Title IX's enactment will ring hollow if Congress does not take definitive legislative action to accord Title IX a sweep as broad as its promise, eradicate sex discrimination in education, and secure gender equity for all students.