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## Time's Up: Schools Need to Teach Students About Sexual Harassment

Alyssa Nielsen

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# Time's Up: Schools Need to Teach Students About Sexual Harassment

Alyssa Nielsen\*

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At the beginning of the #MeToo movement, victims of sexual assault and harassment used that hashtag across various social media platforms to share their personal stories. As those posts took over social media, it became clear just how pervasive this problem is. The movement challenged companies, organizations, politicians, individuals, and the legal system to do something more than they had done in the past to account for and remedy this problem.

The lesser known #MeTooK12 movement, an offshoot of #MeToo, tried to shed light on the sexual harassment of children in schools.<sup>1</sup> According to an American Association of University Women (AAUW) survey, more than 80% of students will be victims of sexual harassment before they graduate from high school,<sup>2</sup> mostly from other students.<sup>3</sup> Not only does this sexual harassment “leave [its] victims with deep and lasting scars,” but the problem also “prevails in adulthood because these behaviors aren’t being addressed in childhood—a pivotal time when kids are learning social norms and developing their sense of identity.”<sup>4</sup>

Title IX liability for student-on-student sexual harassment incentivizes schools to take some action about this problem. And hopefully genuine care for students further incentivizes schools. However, the prevalence of sexual harassment in schools calls into question how well Title IX liability and other motivations are driving schools to help curtail this problem.

This Note examines the current Title IX liability standards for student-on-student sexual harassment and argues that those standards need to be supplemented by mandatory education about sexual harassment, both for educators and for students. Part I provides an overview of the current Title IX liability standards and their limitations for student-on-student sexual harassment. Part II argues that the presumptions underlying the standards are barriers

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1. Valerie Strauss, *#MeTooK12: A New Hashtag for Students Sexually Assaulted or Harassed in K-12 Schools*, WASH. POST (Jan. 3, 2018, 11:51 AM), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/01/03/metook12-a-new-hashtag-for-students-sexually-assaulted-or-harassed-in-k-12-schools/>.

2. Catherine Hill & Holly Kearn, *Crossing the Line: Sexual Harassment at School*, AM. ASS’N OF UNIV. WOMEN 10 (2011), <https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

3. *Id.* at 3.

4. Wendy Lu, *What #MeToo Means to Teenagers*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/well/family/metoo-me-too-teenagers-teens-adolescents-high-school.html>.

in the way of reducing the problem. Part III recommends educating students and school employees about sexual harassment—what it is, what its consequences are, what the school's policy is, and what resources are available to victims.

If schools teach students that sexual harassment is never appropriate and has significant consequences for both the harassed and the harasser, those students will be less likely to sexually harass each other, less likely to sexually harass people when they enter universities and the workforce, and more empowered to respond to sexual harassment.

#### I. CURRENT STATE OF THE LAW: TITLE IX LIABILITY UNDER *DAVIS V. MONROE COUNTY BOARD OF EDUCATION*

In 1999, the Supreme Court considered *Davis v. Monroe County Board of Education*, which asked whether students could hold schools liable for sex discrimination under Title IX when other students harassed them.<sup>5</sup> The Court held in *Davis* that schools were liable for sex discrimination under Title IX when the district had actual knowledge of and was deliberately indifferent to sexual harassment “so severe, pervasive, and objectively offensive that it . . . deprive[d] the victims of access to the educational opportunities or benefits provided by the school.”<sup>6</sup>

Cries that the Court had gone too far followed,<sup>7</sup> echoing the dissent's lamentation that this decision would make schools liable for “immature students,” who “are not fully accountable for their actions” and “who are just learning to interact with their peers.”<sup>8</sup> The dissent questioned whether it was even proper to “label[] the conduct of fifth graders ‘sexual harassment’ and ‘gender discrimination.’”<sup>9</sup>

Fifth graders were, after all, the center of *Davis*.<sup>10</sup> The petitioner alleged that her daughter, LaShonda, had for months been

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5. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). The Court had the year prior held that schools could be liable when teachers harassed students. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

6. *Davis*, 526 U.S. at 650.

7. E.g., Jennifer C. Bracer, *New Menace in the Schools: Hand Holding*, WALL ST. J., May 25, 1999, at A26.

8. *Davis*, 526 U.S. at 666, 672 (Kennedy, J., dissenting).

9. *Id.* at 673.

10. *Id.* at 633.

“the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates.”<sup>11</sup> The complaint detailed how G.F. “attempted to touch LaShonda’s breasts and genital area and made vulgar statements such as ‘I want to get in bed with you’ and ‘I want to feel your boobs.’”<sup>12</sup> During their physical education class, he also “purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda,” and later he “allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner.”<sup>13</sup>

While the *Davis* dissenters thought it may be inappropriate to label such conduct “sexual harassment,” criminal law had no problem defining it as such. The student-aggressor actually “pleaded guilty to[] sexual battery for his misconduct.”<sup>14</sup> That ended the harassment, but the complaint alleged that it all could have ended long before. LaShonda reported the harassment to school officials time after time, and according to the complaint, the school took “no disciplinary action.”<sup>15</sup> Vulnerable as she was, she had no help or protection. Her grades dropped, and her father found “she had written a suicide note.”<sup>16</sup> She was not G.F.’s only victim.<sup>17</sup>

Prior to *Davis*, lower courts were split on what, if anything, Title IX liability could do about student-on-student sexual harassment.<sup>18</sup> The Court held in *Davis* that Title IX could do nothing if (1) school officials did not know about the harassment, (2) the school’s response was anything short of deliberately indifferent, or (3) the harassment was not sufficiently “severe, pervasive, and objectively offensive.”<sup>19</sup> The legal protection offered by these standards is limited, and this sort of sexual harassment remains just as prevalent two decades after *Davis*.<sup>20</sup> The next Sections provide

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11. *Id.*

12. *Id.* (internal citations omitted).

13. *Id.* at 634.

14. *Id.*

15. *Id.* at 633–35.

16. *Id.* at 634.

17. *Id.* at 635.

18. *Id.* at 637.

19. *Id.* at 650.

20. Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2041 (2016) [hereinafter MacKinnon, *In Their Hands*].

an overview of the actual knowledge, severity, and deliberate indifference standards.

### *A. Overview of "Actual Knowledge" Standard*

Before *Davis*, some federal courts were using the constructive notice standard, meaning liability attached when schools either knew or should have known about the discrimination.<sup>21</sup> These courts borrowed this standard from the Title VII co-worker sexual harassment context.<sup>22</sup> If adult employees have legally accepted reasons for not reporting harassment prior to filing a Title VII suit, "why, then, [would] we require children to confront the adults in their schools, even when pervasive and repeated harassment already occurs in the presence of adults?"<sup>23</sup> It makes implicit sense that a school should be responsible—at some level—to actively discover the harassment happening by and to its students, particularly when it is happening in classrooms and hallways.

The Court in *Davis* rejected the constructive notice theory. It had already held that in the context of *teacher-student* sexual harassment, Title IX liability only attached when the school had "actual knowledge" of the harassment.<sup>24</sup> The Court transplanted that same standard to *Davis*.<sup>25</sup> According to the Court's reasoning, actual knowledge is necessary because a school is not held liable for the harasser's actions but for the school's actions. The school's action or inaction *in response* to harassment may be discrimination on the basis of sex, which Title IX expressly forbids.<sup>26</sup> If the school

21. See, e.g., *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 958 (4th Cir. 1997); *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 479 (D.N.H. 1997); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1377 (N.D. Cal. 1997); *Franks v. Ky. Sch. for the Deaf*, 956 F. Supp. 741, 748 (E.D. Ky. 1996); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426 (N.D. Cal. 1996).

22. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515–16 (9th Cir. 1989) ("The prevailing trend of the case law . . . seems to hold that employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in exercise of reasonable care should have known."); see also *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 72 (1986) ("[A]bsence of notice to an employer does not necessarily insulate that employer from liability.").

23. Heather D. Redmond, *Davis v. Monroe County Board of Education: Scant Protection for the Student Body*, 18 LAW & INEQ.: J. THEORY & PRAC. 393, 414 (2000).

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

25. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999) (citing *Gebser*, 524 U.S. at 290).

26. *Id.* at 640–41; 20 U.S.C. § 1681.

does not know about the harassment, the school cannot respond to the harassment and cannot, therefore, discriminate against the victim.

However, *Davis* does not specify *who* within the school must actually know – leaving lower courts to assume that the same rule from the teacher-student context applies.<sup>27</sup> In *Gebser v. Lago Vista Independent School District*, the Court held that for a school to be liable when a teacher harasses a student, an “appropriate person” must know.<sup>28</sup> That person must be someone who has the “authority to take corrective action to end the discrimination.”<sup>29</sup> Thus, if a teacher is harassing a student, the teacher’s own knowledge of his or her actions does not give the school requisite notice. And if only a fellow teacher knows, the school still does not actually know because the fellow teacher cannot institute corrective action.<sup>30</sup>

In the student-on-student harassment context, courts have been reluctant to hold that teachers are appropriate officials *per se*.<sup>31</sup> In one of earliest applications of *Davis*,<sup>32</sup> the Tenth Circuit recognized that “[i]t is possible that . . . teachers would also meet the definition of ‘appropriate persons’ for the purposes of Title IX liability if they exercised control over the harasser and the context in which the harassment occurred,”<sup>33</sup> but it explicitly “decline[d] simply to name job titles that would or would not adequately satisfy [the actual knowledge] requirement.”<sup>34</sup> Instead, the Tenth Circuit explained that it is “a fact-based inquiry” because school districts assign different responsibilities to different employees.<sup>35</sup> *Davis* did however establish, according to the Tenth Circuit, “that a school

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27. See, e.g., *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999).

28. *Gebser*, 524 U.S. at 289–90.

29. *Id.*

30. See, e.g., *Baynard v. Lawson*, 112 F. Supp. 2d 524, 533–34 (E.D. Va. 2000) (finding that a principal who could not suspend teachers was not an appropriate official even if the principal could limit contact or arrange meetings to address the harassment); *Nelson v. Lancaster Indep. Sch. Dist. No. 356*, No. 00-2079, 2002 U.S. Dist. LEXIS 30393, at \*14–15 (D. Minn. Feb. 15, 2002) (finding because a teacher, bus driver, and custodian were all who may have known about a bus driver’s sexual relationship with a minor student, the school district was not liable).

31. See, e.g., *Murrell*, 186 F.3d at 1247.

32. The Tenth Circuit had already heard oral argument for *Murrell* before the Supreme Court’s *Davis* ruling. *Id.* at 1245.

33. *Id.* at 1248.

34. *Id.* at 1247.

35. *Id.*

official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision, would meet this definition.”<sup>36</sup>

Still, it is uncertain under the case law whether teachers, let alone other adult school employees, are appropriate officials. “A teacher or other school official could, under this standard, ignore blatant sexual harassment occurring within the classroom, unless the victim of the misconduct officially notified the appropriate authority in the school.”<sup>37</sup> Limiting liability to only the situations *when the right person actually knows* perversely encourages schools to not train their employees about reporting peer sexual harassment to school administrators and to not explain to their students the proper way to report Title IX complaints.

In 2018, the Department of Education proposed new Title IX regulations, which included a provision to make primary and secondary teachers appropriate officials.<sup>38</sup> In its final form, which took effect in 2020, that particular rule made every employee in elementary and secondary schools an appropriate official.<sup>39</sup> This corrects the problem temporarily at least. However, the new regulations as a whole (not specifically the rule that makes every employee an appropriate official) drew intense criticism both before and after they took effect,<sup>40</sup> and President Joe Biden vowed

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36. *Id.*

37. Redmond, *supra* note 23, at 415.

38. Nondiscrimination on the Basis of Sex in Education or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61467 (proposed Nov. 29, 2018) (codified at 34 C.F.R. pt. 106).

39. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Finance Assistance, 34 C.F.R. § 106.30 (2020) (“*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment . . . to any employee of an elementary or secondary school.”).

40. See, e.g., Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, WAKE FOREST L. REV. 303, 306 (arguing DeVos’s agenda is “to use Title IX . . . in a larger war on civil rights and equal educational opportunity”); Jeannie Suk Gersen, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> (explaining that the “response from liberals has ranged from skepticism to denunciation”); Valerie Strauss, *Betsy DeVos’s Controversial New Rule on Campus Sexual Assault Goes into Effect*, WASH. POST (Aug. 14, 2020), <https://www.washingtonpost.com/education/2020/08/14/betsy-devos-controversial-new-rule-campus-sexual-assault-goes-into-effect/> (describing reactions to the regulation changes). For more about the full scope of the regulation changes,



during his candidacy to undo them.<sup>41</sup> There is a chance that the appropriate official rule could get tossed out when the Biden administration delivers on the promise to undo the Trump administration's controversial Title IX regulation changes.

*B. Overview of "Deliberate Indifference" Standard*

The next standard that a student must overcome in a suit against his or her school is that of "deliberate indifference." The Court in *Davis* emphasized that a school is not held liable for the harasser's actions but for the school's actions.<sup>42</sup> It "may be liable in damages under Title IX *only* for its *own misconduct*."<sup>43</sup> That misconduct is "deliberate indifference" to the harassment. When a school responds with deliberate indifference, the school discriminates against the victim student on the basis of sex.<sup>44</sup>

*Davis* did not outline right and wrong responses, explaining precisely what a school should do when a student reports harassment. Rather, the Court "stress[ed] that [its] conclusion here . . . does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action."<sup>45</sup> Victims cannot prescribe the exact ways that schools address and correct the harassment, and courts are not supposed to "second-guess[] the disciplinary decisions made by school administrators."<sup>46</sup> Thus, *Davis* explains that a school is deliberately indifferent only when its "response to the harassment or lack thereof is clearly unreasonable in light of known circumstances."<sup>47</sup>

This standard has done little to prevent sexual harassment in schools and has instead "permit[ted] a wide margin of tolerance for

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see R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-education-final-title-ix-rules-on-sexual-misconduct/>.

41. Bianca Quilantan, *Biden Vows 'Quick End' to DeVos' Sexual Misconduct Rule*, POLITICO (May 7, 2020), <https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715>.

42. See *supra* Section I.A.

43. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) (emphasis added).

44. *Id.* at 645 ("[T]he deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.") (internal punctuation omitted).

45. *Id.* at 648.

46. *Id.*

47. *Id.*

sexual abuse.”<sup>48</sup> Professor Catharine MacKinnon argues that in the decades since *Davis*, “the deliberate indifference standard has repeatedly and disproportionately been deployed against survivors’ cases” even when the schools’ responses are “concededly callous, incompetent, unresponsive, inept, and inapt.”<sup>49</sup> Not only does the standard disadvantage victims in their Title IX suits but it also has allowed schools to take no constructive steps to reduce the problem. “[O]verall data on the occurrence of sexual abuse in schools has not moved an inch” since *Davis*, suggesting that schools held to a deliberate indifference standard are not actually addressing the problem.<sup>50</sup>

That said, some schools are not deliberately indifferent and respond effectively to sexual harassment reports. Good responses have a number of positive results, including supporting the victims and preventing repeat harassment. When a school responds well,<sup>51</sup> the school demonstrates to the students its commitment to care for and protect its students. For instance, the school in *I.L. v. Houston Independent School District* immediately investigated when a student reported being sexually assaulted by another student.<sup>52</sup> The school then “implemented remedial measures that were almost entirely successful in eliminating *any* contact between the students and prevented future sexual contact or harassment.”<sup>53</sup> The school chose not to formally discipline the student-aggressor until the police investigation concluded, but in the meantime, the separation plan worked well.<sup>54</sup> The victim and alleged aggressor “never came into contact except for an occasion when they inadvertently

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48. MacKinnon, *In Their Hands*, *supra* note 20, at 2041; *see also* Redmond, *supra* note 23, at 415–16 (arguing that the deliberate indifference standard is too narrow).

49. MacKinnon, *In Their Hands*, *supra* note 20, at 2040–41 (footnote omitted).

50. *Id.* at 2041.

51. Responding well does not mean responding to every allegation with prompt, severe punishment of the alleged aggressor. These alleged student-aggressors have due process rights that schools have to consider. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 665, 682 (1999) (Kennedy, J., dissenting) (explaining that schools are limited by due process in disciplining students accused of sexual harassment). What due process should look like in this context is heavily debated, and this Note does not address these arguments, focusing instead on other changes that can be made to decrease the incidents of sexual harassment in schools—for the benefit of *both* the victims and those who would otherwise sexually harass their peers.

52. *I.L. v. Hous. Indep. Sch. Dist.*, 776 Fed. App’x. 839, 843 (5th Cir. 2019).

53. *Id.*

54. *Id.* at 840.

bumped into each other in a school staircase.”<sup>55</sup> School officials also reached out to the victim multiple times during the school year to offer her support and ask how she was doing.<sup>56</sup>

Unfortunately, other school officials may egregiously fail to even consider addressing very real and serious harassment. For instance, in *Hill v. Cundiff*, the principal had enacted a policy that “students had to be ‘caught in the act’ of sexual harassment to impose discipline.”<sup>57</sup> Instead of responding to and properly investigating legitimate allegations of sexual harassment, school officials repeatedly dismissed a student-aggressor’s harassment of female students.<sup>58</sup> Eventually, an aide who had reported the harassment to the principal before with no success decided to arrange a sting operation, using eighth-grade student Jane Doe as bait.<sup>59</sup> The plan left the student-aggressor and Jane Doe in the bathroom while the school officials stumbled over which bathroom to search and who should search.<sup>60</sup> The first teacher to finally go into the bathroom left after seeing “two pairs of feet ‘close together’ beneath the stall.”<sup>61</sup> Jane Doe was raped.<sup>62</sup>

The Eleventh Circuit concluded that a jury could find that the school was deliberately indifferent.<sup>63</sup> After all, “the [school’s] knowledge of [the] sexual harassment, its catch in the act policy, its orchestration of a sting operation using Doe as bait . . . , and its failure to help Doe in any way was patently odious,” and the only policy change after the rape was to “discontinue[] a one-day sexual harassment training workshop for administrators.”<sup>64</sup> The catch-in-the-act policy and sting operation led to a horrendous violent crime against a vulnerable student, and the school’s next move was to

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55. *Id.* at 840–41.

56. *Id.* at 840. While the school’s response may have worked for purposes of avoiding Title IX liability and for purposes of responsibly addressing sexual harassment in schools, the effects of sexual assault cannot be fully remedied by subsequent safety measures, no matter how good and responsible they are. In this case, the victim’s mental and physical health suffered after the assault, and she eventually transferred to another school. *Id.*

57. *Hill v. Cundiff*, 797 F.3d 948, 958 (11th Cir. 2015).

58. *Id.* at 960.

59. *Id.* at 961.

60. *Id.* at 963.

61. *Id.*

62. *Id.*

63. *Id.* at 973–75.

64. *Id.* at 973 (emphasis added).

stop training administrators about sexual harassment. Nevertheless, the principal unremorsefully argued that the school “did as good a job I think as you could do under the circumstances.”<sup>65</sup>

### C. Overview of Severity Standard

Finally, the harassment itself must be “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>66</sup> “Whether gender-oriented conduct rises to the level of actionable ‘harassment’ thus ‘depends on a constellation of surrounding circumstances, expectations, and relationships,’ including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.”<sup>67</sup>

One of the primary disagreements between the majority and dissent in *Davis* was whether Congress intended Title IX to create this cause of action. The dissent emphasized that Spending Clause legislation requires that Congress give clear notice of the condition placed on spending.<sup>68</sup> The majority, recognizing this requirement, limited liability to a recipient’s own intentional violations of Title IX—hence the actual notice and deliberate indifference requirements mentioned earlier.<sup>69</sup> Then the majority struck a balance between Title IX protections and funding recipients’ expectations. The Court held that the harassment must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school”<sup>70</sup> because Title IX provides that “[n]o person . . . 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.*”<sup>71</sup>

The Court explained that the clearest example of sufficiently severe harassment “would thus involve the overt, physical

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65. *Id.* at 973–74.

66. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

67. *Id.* at 651 (citations omitted) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

68. *Id.* at 656 (Kennedy, J., dissenting).

69. *Id.* at 640–42 (majority opinion).

70. *Id.* at 650.

71. 20 U.S.C. § 1681(a) (emphasis added).

deprivation of access to school resources.”<sup>72</sup> However, “[i]t is not necessary . . . to show physical exclusion.”<sup>73</sup> The harassment must simply be bad enough that it “undermines and detracts from the victims’ education experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>74</sup> *Davis* allows for a claim to be predicated on “a single instance of sufficiently severe one-on-one peer harassment,” but it prejudices such a claim, saying a single instance is unlikely “to rise to this level.”<sup>75</sup>

Applying this standard, the Eastern District Court of New York concluded that the harassment was not sufficiently severe as a matter of law when the student-aggressor “grabbed [the victim] by the arm and pressed her against the wall with all of his weight,” “touch[ed] her breasts, stomach and legs over clothing, and bit[] her neck hard enough to leave a mark.”<sup>76</sup>

The severity standard, like the actual knowledge and deliberate indifference standards, tolerate too much sexual harassment within schools. Schools are not liable for so much of the sexual harassment happening regularly in their hallways and classrooms, so if we expect schools to start curtailing this problem, then something other than Title IX liability needs to incentivize or enforce those changes.

## II. PRESUMPTIONS UNDERLYING *DAVIS*

Throughout the *Davis* decision and dissent, the justices relied on presumptions regarding children, schools, and harassment’s effects. Two decades of hindsight demonstrate that these presumptions are deeply flawed even if they were commonly believed in the past or are still believed today. This part details the Court’s reliance on these implicit presumptions and then examines how those presumptions are flawed.

The presumptions underlying the *Davis* opinions must be understood before positive change can happen. Any plan – be it the education plan recommended in Part III or another plan

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72. *Davis*, 526 U.S. at 650.

73. *Id.* at 651.

74. *Id.*

75. *Id.* at 652–53.

76. *Carabello v. N.Y.C. Dep’t of Educ.*, 928 F. Supp. 2d 627, 635, 643 (E.D.N.Y. 2013).

altogether—must avoid the traps of these presumptions or it will fare no better than *Davis* at lowering the rate of sexual harassment in schools.

### A. The Court's Reasoning

This Note explores four errant presumptions in *Davis*: (1) student sexual harassment is inevitable; (2) the severity standard is nonmoving; (3) students and school officials properly report harassment; and (4) school officials know best how to handle harassment.

#### 1. Student sexual harassment is inevitable.

Throughout the majority and dissenting opinions in *Davis*, school children are cast as inevitable harassers. The majority believed that only some of the inevitable harassment was sufficient for Title IX liability whereas the dissenters questioned “whether it [was] either proper or useful to label this immature, childish behavior gender discrimination.”<sup>77</sup> Still, the presumption that children, for the sheer sake that they are children, are innately prone to commit this abuse pervades both opinions.

Rather than calling such problematic behavior “sexual harassment,” the dissent elected to call it “immature, childish behavior,”<sup>78</sup> a “routine problem[] of adolescence,”<sup>79</sup> “inappropriate behavior,”<sup>80</sup> “immature or uncontrollable behavior[],”<sup>81</sup> part of the “adolescenc[t] struggle to express their emerging sexual identities,”<sup>82</sup> part of the “rough-and-tumble” of school,<sup>83</sup> and “teasing.”<sup>84</sup> While some of these diminishing labels were in the context of hypothetical claims, the dissent was not willing to even

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77. *Davis*, 526 U.S. at 673 (Kennedy, J., dissenting).

78. *Id.*

79. *Id.* at 686.

80. *Id.* at 672.

81. *Id.* at 673 (quoting Brief for National School Boards Ass’n et al. as Amici Curiae Supporting Respondents at 10–11, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843)).

82. *Id.* at 673.

83. *Id.* (quoting Brief for National School Boards Ass’n et al. as Amici Curiae Supporting Respondents at 10–11, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843)).

84. *Id.* at 678.

label the specific conduct alleged “sexual harassment”<sup>85</sup> even though the student-aggressor “pleaded guilty to[] sexual battery for his misconduct.”<sup>86</sup> After all, the dissent argued, “[t]he law recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment.”<sup>87</sup> While children are commonly held less accountable under the law than adults, that as a justification still ignores that the child aggressor in *Davis* was guilty for sexual battery—perhaps the most obvious form of sexual harassment.

The dissent argued that there is simply too much of this behavior for schools to be liable. It references a 1993 AAUW study that found “4 out of 5 students (81%) report that they have been the target of some form of sexual harassment during their school lives.”<sup>88</sup> In the dissent’s view, there are too many “practical obstacles schools encounter in ensuring that thousands of immature students conform their conduct to acceptable norms.”<sup>89</sup> And it is true that public schools have “to educate all students who live within defined geographic boundaries,” even the worst of the misbehavers.<sup>90</sup>

Unfortunately for victims, schools are “the primary locus of most children’s social development [and] are rife with inappropriate behavior by children who are just learning to interact with their peers.”<sup>91</sup> “[A] teenager’s romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence.”<sup>92</sup>

While the majority did not talk so brazenly about the inevitability of sexual harassment in schools, that presumption still underlies the reasoning—both expressly and impliedly. For example, the majority directed lower courts to remember that “children may regularly interact in a manner that would be

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85. *Id.* at 674 (“[R]espondents have made a cogent and persuasive argument that the type of student conduct alleged by petitioner should not be considered ‘sexual harassment,’ much less gender discrimination . . .”).

86. *Id.* at 634 (majority opinion).

87. *Id.* at 672 (Kennedy, J., dissenting).

88. *Id.* at 680 (quoting ANNE L. BRYANT, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS* 7 (1993)).

89. *Id.* at 666.

90. *Id.* at 664.

91. *Id.* at 672.

92. *Id.* at 675.

unacceptable among adults.”<sup>93</sup> The maturity of the student-aggressor factors into the analysis. The Court emphasized this distinction again when it expressly held that “[w]hether gender-oriented conduct rises to the level of actionable ‘harassment’ . . . ‘depends on a constellation of surrounding circumstances, expectations, and relationships,’ including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.”<sup>94</sup> In this way, the majority distinguished student-on-student harassment at younger ages from student-on-student harassment at older ages. So, while *Davis* applies for all student-on-student harassment, what may be sufficiently severe harassment in a university context may not be sufficiently severe in a grade-school context.

Furthermore, the majority impliedly relied on this presumption as it explained why a single instance of harassment is very unlikely to be sufficiently severe.<sup>95</sup> The majority “reconcile[d] the general principal that Title IX prohibits official indifference to known peer sexual harassment with the practical realities or responding to student behavior” and essentially carved out a liability exception for single incidents.<sup>96</sup>

The reconciliation of the legal principle with the practical reality presumes that the practical reality—that children sexually harass each other—is inevitable and uncorrectable.

## 2. *The severity standard is nonmoving.*

The Court also presumes that the severity standard makes schools potentially liable for a specific, limited set of behaviors. The majority scoffed at the dissent’s accusation that the severity standard would, over time, make schools liable for regular school teasing and bullying.<sup>97</sup>

In its discussion about single instances of harassment, the Court indicated that the true test is whether “Congress would have thought such behavior sufficient to rise to this level.”<sup>98</sup>

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93. *Id.* at 651 (majority opinion).

94. *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)) (emphasis added).

95. *See id.* at 652–53.

96. *Id.* at 653.

97. *Id.* at 652.

98. *Id.* at 652–53.



According to the Court, Congress through Title IX intended to strike a balance between regular inappropriate schoolyard behavior and severe harassment.<sup>99</sup> Thus, the measure for whether a school's deliberate indifference is actionable is the severity test: is it "so severe, pervasive, and objectively offensive"?<sup>100</sup> Of course, to ensure that this standard is nonmoving—that it would ensure to include and exclude the same behaviors in 2021 that the 1972 Congress intended—the Court added other guiding language: "[w]hether [it] rises to the level of actionable harassment . . . depends on a constellation of surrounding circumstances, expectations, and relationships."<sup>101</sup> The harassment must "den[y] its victims the equal access to education that Title IX is designed to protect."<sup>102</sup> The Court believed that this guidance would help lower courts match Congress's intent for schools to be liable under Title IX for some—but not all—of the sexual harassment they ignored.

3. *Students and school officials properly report harassment.*

The complaint at issue in *Davis* alleged that each time LaShonda was harassed she told at least one teacher and that her mother also told the principal.<sup>103</sup> The Court presumed that other children would do the same—that they would tell their teachers. Those teachers then would either handle the harassment or, if they did not have that authority, they would tell a school official with requisite authority.

This presumption is most evident in the Court's discussion on the actual knowledge requirement. Remember, the Court explained that Title IX made funding recipients liable only for their *own intentional* actions, so the Court refused to extend liability to situations where the school did not actually know but should have known.<sup>104</sup> Of course, if school officials *should have known* about the harassment, the school's failure to discover the harassment may have been intentional. The Court rejected that idea. If the school

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99. *Id.* at 653.

100. *Id.* at 650.

101. *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)) (internal quotations omitted).

102. *Id.* at 652.

103. *Id.* at 633–34.

104. *Id.* at 642; *see also supra* Section I.A.

does not know about the harassment, the fault rests with the victim for not telling the school; it does not rest with the school for failure to observe and investigate.

And under the actual knowledge standard, telling a teacher may not be enough.<sup>105</sup> The Court did not specify whose knowledge was the school's knowledge, leaving it to be "a fact-based inquiry"<sup>106</sup> into whether the person who knew was "an official of the recipient entity with authority to take corrective action to end the discrimination."<sup>107</sup> Perhaps the Court found it unnecessary to specify who was an appropriate authority because the Court presumed that an adult employee would report such harassment to school administrators. Parents, students, and society at large entrust school employees with caring for children. The assumption is that because teachers care about their students' well-being, teachers without authority to rectify harassment themselves promptly report it to someone who could.

#### 4. *Schools officials know best how to handle harassment.*

Finally, the Court presumed that school officials know best how to handle sexual harassment in their schools—just as they do other behavioral problems.<sup>108</sup> Thus, the Court accorded great deference to schools' chosen responses to sexual harassment.<sup>109</sup> The majority accused the dissent of mischaracterizing the deliberate indifference standard as requiring schools to enforce specific rules.<sup>110</sup> However, the majority maintained that the schools had plenty disciplinary discretion: they simply had to "respond to known peer harassment in a manner that is not clearly unreasonable."<sup>111</sup>

The dissent's position here was that the majority was wrong to believe that its decision would not affect school discipline.<sup>112</sup>

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105. *See supra* Section I.A.

106. *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999).

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

108. *Davis*, 526 U.S. at 648 (citing *New Jersey v. T. L. O.*, 469 U.S. 325, 342 n.9 (1985)) ("We have 'repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969))).

109. *Id.*

110. *Id.* at 649.

111. *Id.*

112. *Id.* at 678–79 (Kennedy, J., dissenting).

This of course reaffirms the presumption that school officials best know how to handle student-on-student harassment.<sup>113</sup> As the dissent explained, “[t]he obvious reason for the majority’s expressed reluctance to allow courts and litigants to second-guess school disciplinary decisions is that school officials are usually in the best position to judge the seriousness of alleged harassment and to devise an appropriate response.”<sup>114</sup>

This presumption does not appear for the first time in *Davis*. “[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”<sup>115</sup> In *Epperson v. Arkansas*, the Supreme Court explained that “[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”<sup>116</sup> Furthermore, public education is “[b]y and large . . . committed to the control of state and local authorities.”<sup>117</sup>

### *B. The Flaws of Davis’s Presumptions*

While the presumptions in *Davis* may be reasoned, they are flawed. That is not to say that the Court was entirely wrong but rather that there is a significant gap between protections offered under *Davis* and the protections society does and should expect for vulnerable children.

In recent years, the public has widely discussed sexual harassment—its reality, its consequences, prevention methods, and the legal and moral responsibilities individuals and organizations have to prevent and respond to sexual harassment.<sup>118</sup> The #MeToo

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113. *Id.*

114. *Id.* at 678.

115. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

116. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

117. *Id.*

118. See, e.g., *The #MeToo Moment*, N.Y. TIMES, <https://www.nytimes.com/series/metoo-moment> (last visited Oct. 27, 2019) (Jessica Bennett ed.) (collection of articles regarding the #MeToo movement).

movement rocked Hollywood,<sup>119</sup> news organizations,<sup>120</sup> corporations,<sup>121</sup> churches,<sup>122</sup> government bodies,<sup>123</sup> courts,<sup>124</sup> universities,<sup>125</sup> and more. Primary and secondary schools could not escape public scrutiny.<sup>126</sup> After all, over 80% of students are victims of sexual harassment before they leave high school.<sup>127</sup>

This public discussion has illuminated the many ways in which individuals and organizations have failed to protect people from sexual harassment. The #MeToo movement has had and will likely continue to have effects on sexual abuse laws broadly<sup>128</sup> and on Title VII sexual harassment law.<sup>129</sup> It will likewise affect Title IX harassment law as courts handle more Title IX harassment claims and as courts and lawmakers consider the policies behind

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119. See, e.g., Pamela Hutchinson, *#MeToo and Hollywood: What's Changed in the Industry a Year On?*, GUARDIAN (Oct. 8, 2018), <https://www.theguardian.com/world/2018/oct/08/metoo-one-year-on-hollywood-reaction>.

120. See, e.g., Katie Warren & Liz Lane, *The Powerful Men in the News Accused of Sexual Misconduct*, NBC4 WASH. (Oct. 24, 2017), <https://www.nbcwashington.com/news/national-international/The-Powerful-Men-Accused-of-Sexual-Harassment-452785093.html>.

121. See, e.g., Jeff Green, *#MeToo Has Implicated 414 High-Profile Executives and Employees in 18 Months*, TIME (June 25, 2018, 11:49 AM), <https://time.com/5321130/414-executives-metoo/>.

122. See, e.g., Casey Quackenbush, *The Religious Community Is Speaking Out Against Sexual Violence with #ChurchToo*, TIME (Nov. 22, 2017, 1:34 AM), <https://time.com/5034546/me-too-church-too-sexual-abuse/>.

123. See, e.g., Dan Corey, *Here's a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 9, 2017, 3:00 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821>.

124. See, e.g., Joan Biskupic, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN POL. (Updated Jan. 26, 2018, 12:35 PM), <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html>.

125. See, e.g., Collin Binkley, *#MeToo Inspires Wave of Old Misconduct Reports to Colleges*, PBS NEWSHOUR (Oct. 13, 2018, 3:26 PM), <https://www.pbs.org/newshour/nation/metoo-inspires-wave-of-old-misconduct-reports-to-colleges>.

126. See, e.g., Wendy Lu, *What #MeToo Means to Teenagers*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/well/family/metoo-me-too-teenagers-teens-adolescents-high-school.html>.

127. Hill & Kearn, *supra* note 2, at 10.

128. E.g., 2019 SOL Summary, CHILD USA, <https://childusa.org/2019sol/#c> (last visited Sept. 6, 2019) (providing an overview of states' recent laws that lengthen the statutes of limitation for child sexual abuse cases); see also Hannah Giorgis, *The Biggest Deterrent to Reporting Child Sexual Abuse*, ATLANTIC (June 26, 2019), <https://www.theatlantic.com/entertainment/archive/2019/06/fixing-statute-limitation-laws-child-sexual-abuse/592627/> (discussing how states have reconsidered and modified their statutes of limitation for child sexual abuse).

129. Cynthia L. Cooper, *#MeToo Shakes the Legal Landscape on Sexual Harassment*, A.B.A. (Aug. 31, 2018), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/summer/metoo-shakes-legal-landscape-sexual-harassment/>.

harassment laws. Each presumption on which the Court based *Davis* fails in one or more ways to protect children from sexual harassment. The following sections will examine why these presumptions fail. Understanding the flaws of these presumptions will help lawmakers, schools, and citizens know why it is important to prevent and remedy student-on-student harassment and know how to better protect schoolchildren.

*1. If student-on-student sexual harassment is inevitable, then vulnerable children will inevitably be hurt.*

Surely, there is no disputing that school children can be immature and inappropriate. They can tease and bully. They can be crude and insensitive. They can be cruel. They can be hard to manage, especially in large numbers. There is also no disputing that children are not held to the same responsibilities as adults are under the law. Children are learning and developing, and there is more allowance for them to make mistakes during their youth and adolescence than there will be when they are adults.

While the *Davis* dissent and majority were not wrong in recognizing these truths, the presumption that this problem is an inevitability fails to consider that children are also incredibly vulnerable. Children are the victims. When the Court excluded a swath of sexual harassment from Title IX protection,<sup>130</sup> the Court implicitly accepted the argument, more expressly proffered by the dissent,<sup>131</sup> that there is just too much sexual harassment in schools for there to be more comprehensive harassment protections under Title IX. That reasoning accounts for the student-aggressors' propensity to harass but fails to account for the student-victims' vulnerability to harassment.

More than 80% of students are sexually harassed before they complete high school.<sup>132</sup> Nearly all of that is student-on-student sexual harassment.<sup>133</sup> The most common type of sexual harassment in schools is verbal, but the AAUW found that in a single school year 23% of students – and 33% of female students – in grades 7–12

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130. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651–52 (1999).

131. See *id.* at 672–73 (Kennedy, J., dissenting).

132. Hill & Kearl, *supra* note 2, at 10.

133. *Id.* at 3.

experienced *physical* sexual harassment.<sup>134</sup> Furthermore, some researchers believe that “sexual harassment is so common for girls that many fail to recognize it as sexual harassment.”<sup>135</sup>

And the consequences are very real. Sexual harassment victimization is associated with higher rates of absenteeism, lower grades, suicidal ideation, self-harm, substance abuse, eating disorders, and the feeling that school is not safe.<sup>136</sup> The consequences are heightened for girls.<sup>137</sup>

Despite sexual harassment’s pervasiveness in schools and its serious effects on victims, the Court in *Davis*, both the majority and the dissent, was anything but victim-centered in its analysis. It found that the prevalence of student-on-student harassment should lessen schools’ liability rather than heighten schools’ responsibilities to student-victims. Since *Davis*, there have been many efforts to make laws more victim-centered, especially for victims of sex crimes and sexual harassment.<sup>138</sup> The #MeToo

134. *Id.* at 2, 12. Physical sexual harassment includes unwelcome sexual touching, physical intimidation in sexual way, flashing, and forced sexual acts.

135. *Id.* at 10.

136. Susan Fineran and Larry Bennett, *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, 43 SOC. WORK 55, 55 (1998) (“Many students report school performance difficulties as a result of sexual harassment, including absenteeism, decreased quality of schoolwork, skipping or dropping classes, lower grades, loss of friends, tardiness, and truancy.”); Debbie Chiodo, David A. Wolfe, Claire Crooks, Ray Hughes & Peter Jaffe, *Impact of Sexual Harassment Victimization by Peers on Subsequent Adolescent Victimization and Adjustment: A Longitudinal Study*, 45 J. ADOLESCENT HEALTH 246, 249 (2009) (“[F]or girls, sexual harassment victimization [is] associated with elevated risk of . . . suicidal thoughts, self harm, maladaptive dieting, early dating, substance use, and [feeling unsafe at] school . . .”). Of course, the dissent in *Davis* acknowledged the consequences sexual harassment has on victims but dismissed those consequences because bullying generally also negatively affects victims’ education. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 678 (1999) (Kennedy, J., dissenting). The obvious difference is that there are no federal protections from bullying in schools and there are federal protections from discrimination on the basis of sex in schools.

137. Chiodo et al., *supra* note 136 (“With the exception of dieting and self-harm behaviors a similar pattern of risk was found for boys . . . . In all cases, the magnitude of the impact was smaller for boys than girls.”).

138. See, e.g., CAL. EDUC. CODE § 67386(b) (Deering 2019) (“[Universities] shall adopt detailed and victim-centered policies and protocols regarding sexual assault, domestic violence, dating violence, and stalking involving a student that comport with best practices and current professional standards.”) (enacted 2014); M. Isabelle Chaudry, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims*, 43 SETON HALL LEGIS. J. 215, 246 (2019) (“If Congress amends the [Federal Arbitration Act], there are many structural changes that need to be implemented in the process to make it more victim centered.”); Alexandra Hunstein Roffman, *The Evolution and Unintended Consequences of Legal Responses to Childhood Sexual Abuse: Seeking*

movement has been largely victim-centric, empowering victims to share their stories and advocating for more people to believe victims. As law and culture has shifted to focus more on victims, *Davis's* reasoning seems unsatisfactory even if the Court did help by at least recognizing the possibility of Title IX liability for student-on-student harassment.

This “kids will be kids” or “boys will be boys”<sup>139</sup> logic fails not only student-victims but also student-aggressors. Students may graduate from high school without learning how deeply wrong and impermissible their sexual harassment is.<sup>140</sup> They may even be held socially, professionally, and politically responsible years later for the sexual harassment of their school years, and their excuse may simply be that they were young and did not know better.<sup>141</sup> Schools should teach them better so that they do not, and cannot, rely on this excuse that leaves victims deeply hurt and traumatized.<sup>142</sup>

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*Justice and Preventions*, 34 CHILD. LEGAL RTS. J. 301, 302 (2014) (“That second wave of reforms is a much more victim-centered approach and offers the benefit of potentially identifying abusers who are still at large by allowing victims to bring claims of childhood sexual abuse that would have previously expired.”); Scott Gordon, *Calif. Law Offers New Hope for Child Sexual Abuse Victims*, LAW 360 (Oct. 16, 2019, 4:34 PM), <https://www.law360.com/articles/1209081/calif-law-offers-new-hope-for-child-sexual-abuse-victims> (describing how expanding the statute of limitation for victims of child abuse, as a recent California law did, is victim-centered and how this issue was brought to the forefront by recent child sexual abuse cases); Laura Garcia, Note, “Enough Is Enough”: Examining Due Process in Campus Sexual Assault Disciplinary Proceedings Under New York Education Law Article 129-B, 69 RUTGERS U. L. REV. 1697, 1722 (2017) (describing New York’s victim-centered requirements imposed on colleges).

139. Male students are more often harassers than are female students. See Hill & Kearn, *supra* note 2, at 3.

140. See Lu, *supra* note 4 (noting that one reason sexual harassment “prevails in adulthood [is] because these behaviors aren’t being addressed in childhood—a pivotal time when kids are learning social norms and developing their sense of identity”).

141. See, e.g., Jonathan Zimmerman, *Is Brett Kavanaugh a Nice Guy? That’s Irrelevant. So Is Alleged Sexual Assault as a Teen*, USA TODAY (Sept. 17, 2018, 7:37 AM), <https://www.usatoday.com/story/opinion/2018/09/16/what-kavanaugh-did-teen-irrelevant-so-whether-hes-nice/1328274002/>.

142. See, e.g., Samantha Schmidt, *Amid Kavanaugh Debate, Teens Push Back Against Adults Who Say ‘Boys Will Be Boys’*, WASH. POST (Sept. 21, 2018, 8:15 AM), [https://www.washingtonpost.com/local/social-issues/boys-will-be-boys-amid-kavanaugh-debate-teens-push-back-on-adults-who-are-acting-like-its-no-big-deal/2018/09/21/072b65ba-bd92-11e8-8792-78719177250f\\_story.html](https://www.washingtonpost.com/local/social-issues/boys-will-be-boys-amid-kavanaugh-debate-teens-push-back-on-adults-who-are-acting-like-its-no-big-deal/2018/09/21/072b65ba-bd92-11e8-8792-78719177250f_story.html); Dan Levin, *What Teenagers Think About the Allegations Against Brett Kavanaugh*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/us/brett-kavanaugh-high-school.html>.

2. *Davis's severity standard will be stretched to its breaking point.*

The dissent in *Davis* noted that Title IX does not provide “any guidance in distinguishing individual cases between actionable discrimination and the immature behavior of children and adolescents.”<sup>143</sup> According to the dissenting justices, *Davis's* severity standard fails to solve this problem because they predicted the standard’s interpretation was “likely to be quite expansive,” as courts and juries attempt to assess the severity from a reasonable child’s perspective.<sup>144</sup>

However, the *Davis* majority opinion presumes that the severity standard will attach Title IX liability only for a limited range of harassment—as intended by Congress.<sup>145</sup> The irony is that “[g]iven the state of gender discrimination law at the time Title IX was passed, . . . there is no basis to think that Congress contemplated liability for a school’s failure to remedy discriminatory acts by students,” particularly sexual harassment.<sup>146</sup> Thus, the standard is prone to shifts and is unpredictably applied across the federal courts.

Shifts in how society views sexual harassment undoubtedly affects how judges and juries understand *Davis's* severity standard. In an article for the *Atlantic*, Professor Catharine MacKinnon explained that “[a]s #MeToo moves the culture beneath the law of sexual abuse, early indications are that some conventional systemic legal processes may be shifting too.”<sup>147</sup> For instance, she has observed that “[s]ome courts are beginning to take explicit account

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143. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 672 (1999) (Kennedy, J., dissenting).

144. *Id.* at 678.

145. *Id.* at 651–52 (majority opinion).

146. *Id.* at 663 (Kennedy, J., dissenting); see also *Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390, 1395–1406 (11th Cir. 1997) (reviewing the legislative history of Title IX and finding that Congress did not intend for Title IX liability to extend to student-on-student sexual harassment); Committee A on Academic Freedom and Tenure & Committee on Women in the Academic Profession, *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS’N UNIV. PROFESSORS 69, 73–75 (2016), <https://www.aaup.org/file/TitleIXreport.pdf> (recounting the development of sexual harassment liability) [hereinafter AAUP]; Catharine A. MacKinnon, *Where #MeToo Came From, and Where It’s Going*, ATLANTIC (Mar. 24, 2019), [hereinafter MacKinnon, *Where #MeToo Came From*] <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/> (recounting how sexual harassment law came into existence).

147. MacKinnon, *Where #MeToo Came From*, *supra* note 146.



of the cultural shift in what is ‘reasonable’ to expect of a survivor who alleges sexual harassment at work.”<sup>148</sup>

Knowing that expectations have radically changed in the last few years, *Davis*’s relatively open severity standard, which says it “depends on a constellation of surrounding . . . expectations,”<sup>149</sup> is anything but static. Juries are more likely now to find harassment “severe, pervasive, and objectively offensive,” are more likely to find it “denie[d] its victims . . . equal access to education,” are more likely to find “a single instance . . . sufficiently severe,” and are less likely to view sexual harassment as “simple acts of teasing and name-calling.”<sup>150</sup> Likewise, judges are going to be less inclined to dismiss and grant summary judgment in favor of schools.

These shifts may be welcome, but they are hardly going to be uniform across courts or consistent with Congress’s supposed Title IX intent or *Davis*’s early progeny cases. Shifts will likely bring up again the dissent’s concern that schools do not have proper notice about the Title IX conditions on their federal funding because the schools are relying on past interpretations of the severity standard.<sup>151</sup>

### 3. Reporting is not that simple.

In *Minarsky v. Susquehanna County*, the Third Circuit vacated summary judgment after finding “that a jury could find that [the victim of workplace sexual harassment] did not act unreasonably under the circumstances” when she did not report.<sup>152</sup> The Third Circuit noted specifically that the #MeToo movement has shown how often sexual harassment victims do not report.<sup>153</sup> Victims “anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.”<sup>154</sup>

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148. *Id.*

149. *Davis*, 526 U.S. at 651 (emphasis added).

150. *Id.* at 651–52 (explaining the severity requirement).

151. See *id.* at 654–62 (Kennedy, J., dissenting) (discussing the notice requirement at length and arguing that there was not sufficient notice that Title IX funding was conditioned to recipients’ liability for their insufficient responses to student-on-student sexual harassment).

152. *Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 313 (3rd Cir. 2018).

153. *Id.* at 313 n.12.

154. *Id.*

Children are even less likely to report harassment.<sup>155</sup> Only 9% of student sexual harassment victims report the harassment to a school employee.<sup>156</sup> There are a variety of reasons for this:

Children are more easily intimidated by the harassing behavior, may not recognize a satisfactory redress for harassment, may fear isolation from their peers in retaliation for turning in a classmate, and may blame themselves for the harassment. . . . [T]hey are also less likely to label behavior as harassment and report it to the appropriate person.<sup>157</sup>

Many students do not report because they believe the school will not do anything about it, the harassment will get worse because of the report, they do know how to report, or they do not know whom to report to.<sup>158</sup> There is also a real risk that reporting will lead to punishment—for the victim.<sup>159</sup>

If they report harassment at all, they might not report it to the right person. “Many students and parents will not always report the incident to the most powerful official at the school, but instead are more likely to report harassment to someone at the school with whom they feel comfortable, or who has direct control over the classroom.”<sup>160</sup> How is a student supposed to know whether a teacher is the proper authority to handle the harassment on the school’s behalf?

155. Kelly Dixon Furr, Note, *How Well Are the Nation’s Children Protected from Peer Harassment at School?: Title IX Liability in the Wake of Davis v. Monroe County Board of Education*, 78 N.C. L. REV. 1573, 1595 (2000).

156. Hill & Kearl, *supra* note 2, at 2.

157. Furr, *supra* note 155, at 1595.

158. Letter from Linda Mangel, Regional Director, U.S. Dep’t of Educ. Off. for C.R., to Christina Kishimoto, Superintendent, Hawaii State Dep’t of Educ., at 3 (Jan. 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10115003-a.pdf>.

159. See, e.g., Mark Keierleber, *The Younger Victims of Sexual Violence in Schools*, ATLANTIC (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/>; Courteney Stuart, *William Monroe Student Suspended After She Reports Being Raped*, CBS19 NEWS (Mar. 7, 2019), <https://www.cbs19news.com/content/news/William-Monroe-student-reports-being-raped-at-school-506850041.html>; Tyler Kingkade, *Schools Keep Punishing Girls—Especially Students of Color—Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, 74 MILLION (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/>.

160. Redmond, *supra* note 23, at 414–15.

In *L.E. v. Lakeland Joint School District #272*, a minor student alleged that he was sexually assaulted by his teammates at a cross country camp.<sup>161</sup> His coach heard he was upset and asked him what happened, and the student told him.<sup>162</sup> The district argued that the coach, who was also a teacher in the district, was not an “appropriate person.”<sup>163</sup> If that were true,<sup>164</sup> who exactly was the student supposed to tell after he already told his coach? He likely believed that the *adult* he told would either handle it or tell whoever needed telling. Should the law expect him to keep reporting until he finally tells the right employee with the authority sufficient for Title IX liability? “[W]hy . . . do we require children to confront the adults in their schools, even when pervasive and repeated harassment already occurs in the presence of adults?”<sup>165</sup>

As mentioned earlier, the regulations currently specify that any employee is the right employee,<sup>166</sup> and hopefully that rule will remain through subsequent Title IX regulatory reforms. In the absence of such a rule, the burden is on the victim-children to figure out whom to tell.

#### 4. *Schools have not stopped sexual harassment.*

Educators *are not* the sole people responsible for protecting children from sexual harassment. And it is unrealistic to believe that any third party can eliminate sexual harassment in schools. However, courts are deferring to schools’ responses because they believe schools are best positioned to resolve student-on-student sexual harassment,<sup>167</sup> and yet over 80% of students are sexually harassed before they graduate from high school.<sup>168</sup> Is that the best they can do? If it is, can anyone else do better?

Of course, many schools claim that there is no problem. Indeed, 79% of public schools reported zero incidents of sexual harassment toward their 7–12 grade students during the 2015–2016 school year,

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161. *L.E. v. Lakeland Joint Sch. Dist. #272*, 403 F. Supp. 3d 888 (D. Idaho 2019).

162. *Id.*

163. *Id.* at \*11.

164. The court did not answer whether the coach was an appropriate person but rather held that a reasonable jury could find that he was. *Id.*

165. Redmond, *supra* note 23, at 414.

166. See *supra* text accompanying notes 38–41.

167. See *supra* Section I.A.4.

168. Hill & Kearn, *supra* note 2, at 10.

yet the AAUW found that nearly half of all 7–12 grade students are sexually harassed within a given school year.<sup>169</sup>

The Department of Education investigated the Chicago Public Schools District after receiving two Title IX complaints in 2015 and 2016.<sup>170</sup> In June 2018, while the Department of Education was still investigating the complaints, the *Chicago Tribune* began publishing a special report about how “Chicago public schools ha[ve] failed to protect students from sexual abuse and assault.”<sup>171</sup> In September 2019, the Department of Education completed its investigations of the specific complaints and of the District’s management of sexual harassment.<sup>172</sup> The Department of Education determined that the District had violated Title IX regulations.<sup>173</sup> The Department found that, “[f]or years, the District’s management, handling, and oversight of complaints of student on student and adult on student sexual harassment have been in a state of disarray, to the great detriment of the students the District is responsible for educating.” The problems included poorly trained staff; unreliable and inadequate investigations; poor record-keeping; and lack of prevention efforts, coordination, and administrative review.<sup>174</sup>

A *New York Times* article about the investigation quoted Joel Levin, co-founder of Stop Sexual Assault in Schools, predicting what the Education Department would find if they investigated more schools. He said, “Unfortunately, there are hundreds of school districts across the country, large and small, that mismanage

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169. *Schools Are Still Underreporting Sexual Harassment and Assault*, AM. ASS’N OF WOMEN (Nov. 2, 2018), <https://www3.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/>.

170. Letter from Adele Rapport, Regional Director, U.S. Dep’t of Educ. Off. for C.R., to Janice K. Jackson, Chief Executive Officer, Chicago Pub. Sch. Dist. #299, at 1 (Sept. 12, 2019), [https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151178-a.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151178-a.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=). One of the complaints alleged student-on-student harassment, and the other alleged teacher-student harassment. *Id.*

171. *Betrayed: Updates and Opinion*, CHI. TRIB., <https://www.chicagotribune.com/investigations/ct-betrayed-investigation-20180622-storygallery.html> (last updated Feb. 28, 2019) (series of articles).

172. Rapport, *supra* note 170, at 1.

173. *Id.* at 2.

174. *Id.*

reported peer and adult sexual harassment and fail to comply with Title IX regulations every day.”<sup>175</sup>

Experts say that “many other districts also appear to be failing to meet even basic requirements under Title IX . . . to appoint a coordinator and publicize their resolution processes.”<sup>176</sup> Even where there are coordinators, they “juggle their duties alongside several others, and few of them get any intensive training on how to follow the law – or do right by students dealing with traumatic life events.”<sup>177</sup>

The *Davis* standards may even provide perverse incentives for districts to not have robust Title IX processes. For instance, if liability attaches *only* when high-level officials know, then the district may not want employees who are not “appropriate persons” to report incidents up the ladder. Thus, the district might strategically not tell employees, parents, or students how to report harassment. The less they know, the less likely the district will be held liable. This theory may seem overly skeptical of public school districts but, ultimately, the incentive is there, and 79% of schools are reporting zero incidents of harassment while approximately 48% of students are sexually harassed in any given school year.<sup>178</sup> Children deserve better.

### III. EDUCATION-FOCUSED REFORM

Though the severity standard is susceptible to some non-explicit expansion,<sup>179</sup> courts are restricted from changing the *Davis* standards outrightly. Title IX makes federal education funding conditional on schools’ compliance.<sup>180</sup> As such, the Court crafted the *Davis* standards in a way it found consistent with the Spending Clause’s requirement that there be sufficient notice of the

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175. Erica L. Green, *Chicago Public Schools Ordered to Toughen Sexual Misconduct Policies*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/us/politics/chicago-schools-sexual-misconduct.html>.

176. Stephen Sawchuk, *Are Schools Prepared to Respond to Sex Abuse? Latest Probe Reveals Shortcomings*, EDUC. WEEK (Sept. 24, 2019), <https://www.edweek.org/ew/articles/2019/09/25/sex-abuse-probe-exposes-wider-title-ix.html>; see 34 C.F.R. § 106.8.

177. Sawchuk, *supra* note 176.

178. See *Schools Are Still Underreporting Sexual Harassment and Assault*, AM. ASS’N OF WOMEN (Nov. 2, 2018), <https://www3.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/>.

179. *Supra* Section I.B.2.

180. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

funding's conditions.<sup>181</sup> The dissent insisted that there was not sufficient notice of this new form of Title IX liability.<sup>182</sup> While this argument did not win the day in *Davis*, it will arise again and more strongly if a court were to overtly change the standards. Today schools know (or should know) that they are liable under Title IX when they are deliberately indifferent to severe sexual harassment that they actually knew of, but they do not know they are liable under different standards. While there is some room for expansion under *Davis*,<sup>183</sup> that expansion can only go so far before creating the same notice problem as entirely new standards would.

While in theory Congress could change the standards with new legislation amending Title IX, the divisive fights over due process in sexual harassment investigations would likely frustrate any attempt to change the standards.<sup>184</sup> Furthermore, there is a real concern about the numerosity of suits against schools if they could be liable for their response to lesser, more prevalent sexual harassment. Though this concern may not be victim-focused, there is a practical need, as the Court recognized, for limiting liability.

To effectively decrease the rate of sexual harassment in schools, there must be new educational programs working in tandem with Title IX to cover the holes left by *Davis*'s standards and presumptions.

#### A. The Hole Left by Title IX Liability

Until 1979, it was not settled what remedies existed for Title IX violations.<sup>185</sup> That year the Court recognized that victims of sex discrimination had an implied right of action under Title IX.<sup>186</sup> "Unfortunately . . . , individual monetary damages can come at the expense of the kind of broad, systemic transformation originally

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181. *Id.* at 637.

182. *Id.* at 654–57 (Kennedy, J., dissenting).

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

184. States could create similar liability. However, this is rather unlikely because they would have to waive many of the immunities currently enjoyed by schools under state law. See, e.g., *School Discipline Laws & Regulations by Category & State*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, [https://safesupportivelearning.ed.gov/discipline-compendium/choose-state/results?field\\_sub\\_category\\_value=Professional+immunity+or+liability](https://safesupportivelearning.ed.gov/discipline-compendium/choose-state/results?field_sub_category_value=Professional+immunity+or+liability) (last visited Oct. 27, 2019) (providing an overview of each state's immunities for school employees).

185. AAUP, *supra* note 146, at 72.

186. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

envisioned by Title IX.”<sup>187</sup> As schools focus on preventing liability, they lose focus of the Title IX mandate to end their own discriminatory practices. “The idea that there can be civil redress for victims of sexual misconduct focuses on the individual perpetrator’s misbehavior but does not necessarily address the structures of discrimination that make such conduct possible.”<sup>188</sup>

Addressing the structures of discrimination will likely fill the holes left by *Davis*. Education about sexual harassment—both for students and for school employees—will address those structures and fill Title IX gaps.

In 2001, the Department of Education, issued a guidance document for schools on how to handle sexual harassment of students.<sup>189</sup> Many times, that guidance recommended training employees, students, and even communities about sexual harassment.<sup>190</sup> Yet the reality is that that training is not happening. For instance, the Office of Civil Rights investigated the Hawaii Department of Education from 2011 until 2018 and found that it did not even designate Title IX directors to handle allegations of student-on-student sexual harassment.<sup>191</sup> The whole state of Hawaii was without Title IX directors.<sup>192</sup>

A Los Angeles high school student, a victim of student-on-student harassment, explained that she and her friends feel like they are on their own when it comes to sexual harassment.<sup>193</sup>

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187. AAUP, *supra* note 146, at 72.

188. *Id.*

189. U.S. DEP’T OF EDUC., OFF. FOR C.R., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. In 2017, the Department of Education rescinded the 2001 guidance document in whole, but they remained in effect until the Title IX regulations were changed in 2020. *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP’T OF EDUC. (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>. This guidance may be restored by the Biden administration. See *supra* notes 38–41 and accompanying text.

190. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 189, at 13, 16, 17, 18, 19, 21.

191. Mangel, *supra* note 158, at 4–5.

192. *Id.* The Hawaii Department of Education is a single, state-wide school district. *Id.* at 2. It did have someone designated to handle teacher-student sexual harassment allegations. *Id.* at 6.

193. Samantha Schmidt, ‘If Not Us, Who Will?’, WASH. POST (June 14, 2019), <https://www.washingtonpost.com/graphics/2019/local/teenagers-fight-sexual-harassment-high-schools-in-metoo-era/>.

"We haven't really been taught about what we should say, and what we should do," she said.<sup>194</sup> "[T]hey just don't tell us."<sup>195</sup>

Of course, the Title IX regulations do *require* that schools designate an employee to handle Title IX complaints, tell students who that employee is, and tell students what the school's complaint procedure is.<sup>196</sup> But as the Los Angeles student and the Chicago and Hawaii investigations show, that bare minimum requirement is not often met.

When the AAUW asked students what they wanted schools to do about sexual harassment, many responded that they wanted a designated person to talk to about sexual harassment, online resources, and class discussions.<sup>197</sup> Some states' sex education programs do include discussion about healthy relationships, self-discipline, refusal skills, personal boundaries, consent, and violence prevention.<sup>198</sup> However, even the best of these programs are not focused on sexual harassment prevention but rather are included in comprehensive sexual education courses that cover a high number of important issues.<sup>199</sup> For instance, in California, sex education is taught only once in junior high and once in high school and includes topics such as sexually transmitted diseases, local sexual and reproductive health resources, contraception, parenting, adoption, abortion, prenatal care, sexual harassment, sexual assault, relationship abuse, and sex trafficking.<sup>200</sup>

Education about sexual harassment should certainly be included in sex education courses, but it needs to exist outside of those courses as well. If training students about sexual harassment is tangled in sex education reform battles, it may never happen. Furthermore, sex education courses are not taught to all students

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194. *Id.*

195. *Id.*

196. 34 C.F.R. § 106.8 (2020).

197. Hill & Kearn, *supra* note 2, at 4.

198. *Sex and HIV Education*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> (last updated Sept. 1, 2020) (overview of state laws and policies concerning sex education).

199. See Stephen Sawchuk, *Could the #MeToo Movement Change Sex Ed?*, EDUC. WEEK (Jan. 26, 2018), <https://www.edweek.org/ew/articles/2018/01/26/what-do-schools-teach-about-sexual-harassment.html>.

200. A.B. 329, 2015 Leg. (Cal. 2015); see also Melissa Goodman, *Let's Stop Sexual Harassment and Violence Before They Begin with Comprehensive Sex Ed*, ACLU (Jan. 29, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-education/lets-stop-sexual-harassment-and-violence-they-begin>.



yearly,<sup>201</sup> but schools should teach students about sexual harassment at least yearly (though not as a regular course of study). And it needs to focus on the immediate sexual harassment problems students face.<sup>202</sup>

*B. Supplementing Title IX Liability with Education*

*Davis* was a good step forward in the effort to address the reality of sexual harassment and provide remedies for at least some victims, but as this Note has explained, it has not reduced the problem's prevalence in schools. Education will help remedy the problems of *Davis*'s standards and presumptions. Education will help prevent sexual harassment in schools and address the harassment for which there is no *Davis* protection.

*1. The Davis standards would be more effective if schools educated students about sexual harassment.*

The first *Davis* standard is actual knowledge.<sup>203</sup> Educating students about how to report and empowering them to do so would lessen concerns about this standard. Likewise, training employees to report suspected and known sexual harassment up the ladder to the school's Title IX coordinator would also lessen concerns about the actual knowledge standard.

Step one is to tell students what sexual harassment is.<sup>204</sup> The next is to tell students who will help them if they are sexually harassed. They need to know how to properly report harassment<sup>205</sup> and what will happen when they do.<sup>206</sup> Though some uncertainty

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201. See, e.g., A.B. 329, 2015 Leg. (Cal. 2015) (requiring California schools to teach sex education classes once in junior high and once in high school).

202. See Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do*, N.Y. TIMES: UPSHOT (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html> ("The most effective training, researchers say, is . . . tailored for the particular workplace—a restaurant's training would differ from a law firm's.").

203. *Supra* Section I.A.

204. Students may not recognize sexual harassment for what it is. Furr, *supra* note 155; Hill & Kearn, *supra* note 2, at 10 (explaining that "sexual harassment is so common for girls that many fail to recognize it as sexual harassment").

205. Redmond, *supra* note 23, at 414–15 (explaining that students and parents do not always know whom they are supposed to report sexual harassment to).

206. Furr, *supra* note 155 (explaining that students are unlikely to report because they are uncertain of the consequences); Keierleber, *supra* note 159 (reporting about students

about the consequences of reporting is inevitable, the more school administrators and teachers explain about the process, the more students will trust the adults in the school.

Education about reporting is helpful not only for victims but also for bystanders. Bystander training has proven very effective.<sup>207</sup> Student victims are less likely to report because they are intimidated, fear isolation, blame themselves, and downplay what happened.<sup>208</sup> Their peers may be more likely to report. For example, when a substitute teacher berated a fifth-grade boy about how he should not be grateful that his two dads were officially adopting him, three other students told the substitute teacher to stop and eventually left the classroom to get the principal.<sup>209</sup> The boy himself was afraid to talk about it, but other students were able to tell the school what had happened.<sup>210</sup> In *L.E. v. Lakeland*, the coach first heard that the student was upset from others, and it was only when the coach asked what was wrong that the student told him about the sexual assault.<sup>211</sup>

*Lakeland* also demonstrates why schools should train their employees about reporting sexual harassment up the ladder. In response to hearing that three students sexually assaulted L.E., the coach "chastised them for 'screwing around,' and had them apologize."<sup>212</sup> That was it. The coach did not tell any other school employee.<sup>213</sup> Had the coach done so, school administrators may have responded differently and prevented subsequent harassment.<sup>214</sup> Instead, the school was sued.

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being punished after reporting sexual harassment); Kingkade, *supra* note 159 (reporting that schools punish students of color who report sexual assaults); Stuart, *supra* note 159 (reporting that a school suspended a student who was raped at school).

207. Miller, *supra* note 202; Stefanie K. Johnson, Jessica F. Kirk & Ksenia Keplinger, *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (Oct. 4, 2016).

208. Furr, *supra* note 155.

209. Courtney Tanner, *A Utah Substitute Told Fifth Graders That 'Homosexuality Is Wrong.' She Was Escorted Out After 3 Students Spoke Up.*, SALT LAKE TRIB. (Nov. 29, 2019), <https://www.sltrib.com/news/education/2019/11/29/utah-substitute-told-th/>.

210. *Id.*

211. *L.E. v. Lakeland Joint Sch. Dist. #272*, No. 2:17-cv-00512, 2019 BL 301042, at \*1 (D. Idaho Aug. 13, 2019).

212. *Id.*

213. *Id.*

214. The school district officially reprimanded the coach for not reporting but retracted that reprimand over a year later. *Id.* at \*2.

Moreover, when school employees know about the prevalence and the consequences of student-on-student sexual harassment, they may be more proactive in learning about the harm caused by and happening to their own students. They might begin to notice the sexual harassment that is happening in their hallways, lunchrooms, and classrooms. This may begin to close the gap between an actual knowledge standard and a constructive notice standard.<sup>215</sup>

The next *Davis* standard is deliberate indifference. If schools proactively teach their students and employees about sexual harassment, they are far less likely to be deliberately indifferent. As school officials implement education plans about sexual harassment, those same school officials are likely to be more thoughtful and caring in how they manage student-on-student sexual harassment because they will also learn more about its prevalence, the consequences, and the recommended management.

A study about bully prevention found that when middle school teachers are trained about how to intervene, those teachers better handle bully intervention.<sup>216</sup> Tailored training about student-on-student sexual harassment should likewise help teachers respond better.

Moreover, training may get educators to respond in a manner well above the *Davis* threshold of “clearly unreasonable.”<sup>217</sup> More robust and timely responses will help protect students in a way Title IX liability on its own simply cannot do.

The third standard is sufficient severity. Education serves two primary functions here: (1) to encourage school officials to be proactive about all sexual harassment and (2) to decrease overall incidents.

As school officials learn to respond better than the *Davis* deliberate-indifference threshold regarding sufficiently severe harassment, they will also likely learn to respond better to all the incidents of harassment that are not sufficiently severe for Title IX liability. Education that focuses on the real impacts of *all* sexual

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215. See *supra* text accompanying notes 21–26.

216. Dawn Newman-Carlson & Arthur M. Horne, *Bully Busters: A Psychoeducational Intervention for Reducing Bullying Behavior in Middle School Students*, 82 J. COUNSELING & DEV. 259, 263 (2004).

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

harassment will encourage school officials to do their part to lessen its impacts in their schools.

Employers have a number of financial reasons to decrease workplace sexual harassment, including legal costs, employee turnover, increased absences, and reduced productivity.<sup>218</sup> With the exception of legal costs, the incentives for schools may not be financial, but they are similar. Sexual harassment may lead to higher rates of absenteeism, lower grades, suicidal ideation, self-harm, substance abuse, eating disorders, and the feeling that school is not safe.<sup>219</sup> Presumably, educators would like to prevent as best they can such consequences, but they first need to understand that this is a real problem with these real effects.

Students will likely harass each other less if they too understand what sexual harassment is and what its consequences are—for both them and for victims. A study that compared workplace rates of sexual harassment before the #MeToo movement with rates two years later found that the most blatant types of harassment decreased.<sup>220</sup> It explained that the increased scrutiny on sexual harassment likely led to this decrease.<sup>221</sup> Education will help keep

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218. In the employment context, organizations have a number of financial reasons to decrease workplace sexual harassment. See ELYSE SHAW, ARIANE HEGEWISCH & CYNTHIA HESS, INST. FOR WOMEN'S POL'Y RSCH., *SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS* (2018), [https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief\\_FINAL.pdf](https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf) (explaining the costs of sexual harassment in the workplace.)

219. Susan Fineran & Larry Bennett, *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, 43 SOC. WORK 55, 55 (1998) ("Many students report school performance difficulties as a result of sexual harassment, including absenteeism, decreased quality of schoolwork, skipping or dropping classes, lower grades, loss of friends, tardiness, and truancy."); Chiodo et al., *supra* note 136, at 246 ("For girls, sexual harassment victimization... [is] associated with elevated risk of self-harm, suicidal thoughts, maladaptive dieting, early dating, substance abuse, and feeling unsafe at school."). Of course, the dissent in *Davis* acknowledged the consequences for victims but dismissed them because bullying generally also negatively affects victims' education. *Davis*, 526 U.S. at 678 (Kennedy, J., dissenting). The obvious difference is that there are no federal protections from bullying in schools and there are federal protections from discrimination on the basis of sex in schools.

220. Ksenia Keplinger, Stefanie K. Johnson, Jessica F. Kirk & Liza Y. Barnes, *Women at Work: Changes in Sexual Harassment Between September 2016 and September 2018*, PLOS ONE 3, 6 (July 17, 2019), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0218313&type=printable>. This study did find that some lesser forms of harassment increased as backlash to the movement. *Id.* at 6.

221. *Id.* at 1.

up discussion about sexual harassment, which will, in turn, decrease the frequency of harassment.

As schools address sexual harassment—no matter the level of severity—students will be better protected even while the *Davis* severity standard continues to apply in only the worst circumstances.

## 2. Education can help remedy the *Davis* presumptions.

While the flawed presumptions may be written into the *Davis* decision, they do not have to continually plague school policy regarding sexual harassment.

Rather than simply accepting sexual harassment as inevitable, education will remind school officials that the victims here are children and will motivate schools to do what they can to prevent sexual harassment. Instead of relying on Title IX liability after the fact, education will encourage prevention to ultimately decrease the frequency and severity of student-on-student sexual harassment. Students will no longer graduate from high school without learning what sexual harassment is and why it is a problem.<sup>222</sup> Rather than saying that children do not know any better,<sup>223</sup> schools can teach them better.

The *Davis* severity standard is not elastic enough to meet today's expectations,<sup>224</sup> but education can help cover the difference. Rather than asking the courts to find Title IX liability when the harassment is something less than what Congress intended to address in 1972, we can address the expectations at the frontlines—the classrooms.

The #MeToo movement shed light on the barriers to reporting.<sup>225</sup> Understanding those barriers now, schools can train their students and teachers on how to report as bystanders.<sup>226</sup> A

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222. See Lu, *supra* note 4. One reason sexual harassment “prevails in adulthood [is] because these behaviors aren’t being addressed in childhood—a pivotal time when kids are learning social norms and developing their sense of identity.” *Id.* See generally Brittney Herman, *Sexual Education as a Form of Sexual Assault Prevention: A Survey of Sexual Education Among States with the Highest and Lowest Rates of Rape*, 2020 BYU EDUC. & L.J. (forthcoming 2020) (on file with author) (arguing that sexual education in K-12 schools decreases states’ rates of rape).

223. See *supra* text accompanying notes 139–142.

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

225. See *supra* text accompanying 153–154.

226. Johnson et al., *supra* note 207.

2016 Harvard Business Review study explained that the reasons why people do not report sexual harassment – “fear of retaliation, the bystander effect,<sup>227</sup> and a masculine culture that permits sexual harassment” – can be counteracted when organizations (1) implement bystander training, (2) develop clearer reporting systems, and (3) improve the organization’s culture.<sup>228</sup>

Finally, if the law presumes that schools know how to best handle sexual harassment, it is time to expect schools to actually prevent and remedy sexual harassment. As school officials strive to learn more about sexual harassment’s effects on students, they will know better how to handle the problem. Robust education and training programs in schools will earn the trust courts already accord them. More important than the courts’ trust in schools is the trust of students, parents, and communities.

It is high time that schools embrace the recommendations proffered by the Department of Education in 2001 to train employees, students, and even communities about sexual harassment.<sup>229</sup>

### *C. Implementing Education Programs*

Mandated education about sexual harassment is a more palatable solution than rehashing the current liability standards, and it would likely be more effective in reducing student-on-student sexual harassment because students and educators would know what sexual harassment is and why it is never okay. While it may be easier to create such education requirements independent from sex education reform, there remain reasons for hesitancy. Will it help? Will it overburden schools? Who is responsible for this change?

Workplaces have sexual harassment training, and research has shown that while such training does give workers basic information, it can actually make the problem worse by “mak[ing] [participants] uncomfortable, prompting defensive jokes, or reinforc[ing] gender stereotypes.”<sup>230</sup> The last thing schools need is a worse sexual harassment problem. However, the reason why

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227. The bystander effect “says that we are less likely to help a victim when others are also present.” *Id.* at 3.

228. *Id.* at 2, 4–5.

229. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 189.

230. Miller, *supra* note 202 (summarizing research about the effectiveness of sexual harassment trainings).

such training is often ineffective is because of *how* it is taught in these trainings.<sup>231</sup> Training is most effective when it is taught frequently and seriously, when it includes information about what bystanders should do and about positive behaviors, and when it encourages reporting.<sup>232</sup> Workplace culture is what makes the biggest difference, and training done right can help foster that culture.<sup>233</sup>

For schools, that basic information is desperately needed. Children are often given a pass for their bad behavior because they supposedly do not know any better. Basic information can change that—at least to some extent. Schools, if they are serious about not wanting their students sexually harassed, can provide the type of training that is effective. As schools teach what behaviors are appropriate and what behaviors are inappropriate and *why*, the schools will be fostering more respectful cultures.

A lot is already expected from schools. Tacking on another thing to their regular programs may overburden schools and educators. In Oakland, California, a math teacher left her job because she “regularly addressed sexual harassment and assault between students,” and it eventually burned her out.<sup>234</sup> That teacher was noble for taking on that role, and it understandably took a toll on her. However, if the effort was organized and assigned to the appropriate school officials, that emotional burnout would be less—especially if the frequency of harassment decreased. Training will take up time and resources, but the problem is severe and needs addressing. Children deserve that time and those resources.

School boards should recognize its in their interest and their students’ interest to implement such educational training.<sup>235</sup> The likelihood that schools will be found deliberately indifferent will decrease if they have a sexual harassment prevention program, and their students will likely be safer and better prepared for adulthood.

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231. *Id.*

232. *Id.*

233. *See id.*

234. Charlie Stuipe, *Students Drive New Policies as K-12 Sexual Assault Investigations Rise*, NPR (Aug. 8, 2017), <https://www.npr.org/sections/ed/2017/08/08/541670513/students-pressure-reform-as-k-12-sexual-assault-investigations-rise>.

235. *See supra* text accompanying note 218.

However, it is unlikely that school boards will implement such a program independently, so states<sup>236</sup> need to mandate it and see that it is actually done. All fifty states currently have some sort of anti-bullying law, and all but eight states require bully-prevention education,<sup>237</sup> and a sexual harassment program can likely be an extension of, or patterned after, the existing law.

It is unknown precisely what the effects of such education programs would be. However, teaching students about sexual harassment will raise students' and educators' recognition of sexual harassment and its effects. It will empower students to report harassment and seek out victim resources. It will help students better navigate schools' Title IX harassment allegation processes. And it will help dismantle the idea that the harassment did not matter because they were only kids.

The solution is victim-centered, but because it aims at prevention, all are benefited. Early education about harassment and early correction will help train the future college students, workforce, and policymakers not to sexually harass others.

While this Note focused on student-on-student harassment, this solution may even help children who have been sexually abused outside this context learn how to recognize the abuse for what it is and report it.<sup>238</sup>

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236. The federal government is the last resort. Ultimately, an amendment to Title IX, additional Title IX regulations, or additional funding and conditions could establish such a requirement. However, a federal education solution would likely be seen as an intrusion into matters reserved to states. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973) ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States . . ."). Furthermore, it is likely to be less effective as a federal regulation because the federal government does not have the capacity to effectively oversee every school's compliance with Title IX regulations as it is. *See supra* text accompanying note 196. And finally, this is a ripe opportunity for states to "try novel social . . . experiments without risk to the rest of the country." *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

237. *Laws, Policies & Regulations*, STOPBULLYING.GOV, <https://www.stopbullying.gov/resources/laws> (last reviewed Jan. 7, 2018). All but eleven states require staff training. *Id.*

238. Roffman, *supra* note 138, at 323.



## CONCLUSION

Recognizing liability for a school's knowing and deliberate indifference to severe peer sexual harassment was a starting point in addressing the pervasive problem of sexual harassment in schools. With all we now know about sexual harassment, we cannot afford to leave children so unprotected from it. In addition to the Title IX liability established by *Davis*, every school should implement preventive and informative training or educational programs about sexual harassment. The time is up for the mistaken belief that nothing can be done.