Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation

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ABSTRACT: A jurisdictional divide has arisen at a critical point in the evolution of Title IX litigation. Though the text of Title IX only provides for administrative enforcement of its gender discrimination clause, the Supreme Court has established a private cause of action for students who experience sexual harassment at an institution that receives federal funding. This private cause of action has evolved to allow for the recovery of monetary damages when the institution manifests a deliberate indifference to the harassment of a student after the institution had been notified of previous harassment. However, courts have divided over whether a student may recover such damages if the institution's deliberate indifference does not actually *result* in post-notice harassment. More specifically, it remains unclear whether a student may recover damages under Title IX simply because the student was *vulnerable* to potential harassment because of the institution's deliberate indifference. Given the broad applicability of Title IX to approximately 16,500 local school districts and 7,000 postsecondary institutions, the answer to this question is crucial for future litigation.

Courts should reject deliberate indifference claims under Title IX for monetary damages that are not supported by evidence of actual post-notice harassment. The Supreme Court's natural-language definition of "subjected" makes clear that the Court was describing only acts of commission and omission that actually *result* in post-notice harassment. The nature of Title IX as Spending Clause legislation should also lead such courts to conclude that it would be inappropriate to find that an institution is presumably on notice that it could be held financially liable to a student based on the construct of potential harassment.

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Finally, courts should look to Eighth Amendment deliberate indifference jurisprudence, which supports the notion that deliberate indifference under Title IX may result in damages claims only when the indifference causes some separate harm to the plaintiff.

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INTRODUCTION

A jurisdictional divide has arisen at a critical point in the evolution of Title IX[1] litigation regarding whether a private cause of action can exist against an institution when there is no post-notice harassment of the student. Though the text of Title IX only provides for administrative enforcement of its gender discrimination clause,[2] the Supreme Court has established a private cause of action for students who experience sexual harassment at an institution that receives federal funding.[3] This private cause of action has evolved to allow for the recovery of monetary damages when the institution manifests a deliberate indifference to the harassment of a student after being notified of previous harassment.[4] However, courts have divided over whether a student may recover such damages if the institution's deliberate indifference does not actually *result* in post-notice harassment.[5] More specifically, it remains unclear whether a student may recover damages under Title IX simply because the student remained *vulnerable* to potential harassment as a result of the institution's deliberate indifference.

The divide stems from one very short definition provided by the Supreme Court in *Davis v. Monroe County Board of Education.*[6] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be *subjected to* discrimination under

1. Educational Amendments of 1972, 20 U.S.C. § 1681 (2012).
2. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255 (2009).
3. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (explaining the evolution of the Title IX private cause of action in Supreme Court case law).
4. *Compare* Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171-73 (1st Cir. 2007), *overruled on other grounds*, 555 U.S. 246 (2009), *and* Williams v. Bd. of Regents, 477 F.3d 1282, 1295-97 (11th Cir. 2007), *with* Escue v. N. Okla. Coll., 450 F.3d 1146, 1155-56 (10th Cir. 2006), Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000), Bernard v. E. Stroudsburg Univ., No. 3:09-CV-00525, 2016 U.S. Dist. LEXIS 22573, at *46-50 (M.D. Pa. Feb. 24, 2016), Staehling v. Metro Gov't of Nashville & Davidson Cty., No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at *32-33 (M.D. Tenn. Sept. 12, 2008), *and* Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007).
5. *See supra* note 4.
6. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 645 (1999).

any education program or activity receiving Federal financial assistance."[7] Drawing on multiple dictionaries, the *Davis* Court provided a definition of the term "subjected" in the context of a private claim for deliberate indifference. In order to qualify, "the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[8]

Courts have divided over whether the second, vulnerability-based component of this definition provides a private cause of action against an institution for monetary damages if the institution's deliberate indifference left the student *vulnerable* to harassment, even if that vulnerability did not *result* in further harassment. The First and Eleventh Circuits have concluded that a private cause of action exists based on vulnerability alone,[9] whereas leading cases from the Ninth and Tenth Circuits, as well as a number of federal district courts, have held that the *Davis* Court's definition of "subjected" still requires that vulnerability result in further harassment in order to be actionable.[10]

Given the broad applicability of Title IX to educational institutions across the country, the answer to this liability question is crucial. Title IX applies to institutions that receive federal financial assistance from the United States Department of Education, which, as of 2015, included "approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums."[11] Clearly, the potential volume of litigation under Title IX is enormous if all such institutions can be held liable based on the mere potential for future harassment.

Though precise data regarding the amount of Title IX litigation is unavailable, data regarding administrative complaints for alleged Title IX violations demonstrate a staggering volume of potential litigation, which continues to grow each year. The Department of Education's Office for Civil Rights (OCR) is "[t]he government agency now in charge of administratively enforcing Title IX."[12] OCR received 5,800 Title IX-related complaints for administrative enforcement during the 2013 and 2014 fiscal

7. 20 U.S.C. § 1681(a) (2012) (emphasis added).

8. *Davis*, 526 U.S. at 645.

9. *Fitzgerald*, 504 F.3d at 171-73; *Williams*, 477 F.3d at 1295-97.

10. Escue v. N. Okla. Coll., 450 F.3d 1146, 1155-56 (10th Cir. 2006); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000); Bernard v. E. Stroudsburg Univ., No. 3:09-CV-00525, 2016 U.S. Dist. LEXIS 22573, at *46-50 (M.D. Pa. Feb. 24, 2016); Staehling v. Metro Gov't of Nashville & Davidson Cty., No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at *32-33 (M.D. Tenn. Sept. 12, 2008); Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007).

11. Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP'T EDUC. (Apr. 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

12. Frederick v. Simpson Coll., 160 F. Supp. 2d 1033, 1035 n.3 (S.D. Iowa 2001); *see also* Office for Civil Rights, *supra* note 11.

years.[13] In keeping with this trend, OCR received 2,939 Title IX-related complaints for administrative enforcement in fiscal year 2015.[14]

The current jurisdictional divide endures because leading courts have not provided adequate analysis supporting their differing interpretations of the *Davis* Court's "subjected" definition. Because extensive and ever-growing litigation is dependent upon those interpretations, future courts must provide a more substantive analysis of whether Title IX authorizes a cause of action based purely upon the *potential* for future harassment.

This Article provides such an analysis. First, the Article considers the evolution of the judicially created cause of action under Title IX. It then surveys the current judicial divide by outlining the leading cases on each side. This foundation informs the Article's analysis of the post-notice harassment requirement, which considers: 1) the ambiguity of the *Davis* Court's "subjected" definition; 2) a complete interpretation of the *Davis* Court's "subjected" definition with an anchor in the natural understanding of the term; 3) how Title IX's status as Spending Clause legislation limits courts' ability to broaden financial liability beyond what recipient institutions contemplated when they agreed to receive funding; and 4) the requirements of a similar deliberate indifference claim under the Eighth Amendment.

This Article concludes that the *Davis* Court's definition of "subjected" should be interpreted to require that a private cause of action for monetary damages be supported by evidence of post-notice harassment. A natural reading of the *Davis* Court's complete definition of "subjected" makes clear that the Court was describing only acts of commission and omission that result in actual post-notice harassment. The nature of Title IX as Spending Clause legislation should lead courts to conclude that institutions are not on notice that they could be held financially liable to students based on the construct of potential harassment alone. Finally, courts should look to Eighth Amendment deliberate indifference jurisprudence for support in holding that deliberate indifference may result in damages claims only when the indifference causes some separate harm to the plaintiff.

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13. Catherine E. Lhamon, *Protecting Civil Rights, Advancing Equity: Report to the President and Secretary of Education*, U.S. DEP'T EDUC. OFF. FOR CIV. RTS. 28 (Apr. 2015), http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf.

14. Catherine E. Lhamon, *Delivering Justice: Report to the President and Secretary of Education*, U.S. DEP'T EDUC. OFF. FOR CIV. RTS. 26 (May 2016), http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf.

I. TITLE IX: PURPOSE, SCOPE, AND APPLICATION

A. Title IX: Purpose.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[15] According to Congress, "Title IX was passed to address the growing problem of sex discrimination in educational programs."[16] Specifically, "Congress enacted Title IX in response to its finding—based on extensive hearings held in 1970 by the House Special Subcommittee on Education—of pervasive discrimination against women with respect to educational opportunities."[17] Title IX had two central objectives: "'to avoid the use of federal resources to support discriminatory practices,' and 'to provide individual citizens effective protection against those practices.'"[18] Though Title IX only expressly prohibits "sex discrimination,"[19] courts have determined that the term "discrimination" also encompasses sexual harassment,[20] hostile educational environment,[21] and sexual assault.[22]

15. 20 U.S.C. § 1681(a) (2012).

16. Winter v. Penn. State Univ., 172 F. Supp. 3d 756, 773 n.3 (M.D. Pa. 2016) (citing 118 CONG. REC. 5804-15 (1972); H.R. Rep. No. 92-554, at 1-3 (1972)).

17. Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996) (citing 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh)); *see* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n.13 (1982)).

18. *Cohen*, 101 F.3d at 165 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

19. 20 U.S.C. § 1681(a).

20. Yap v. Nw. Univ., 119 F. Supp. 3d 841, 848 (N.D. Ill. 2015) ("Title IX prohibits sexual harassment and sex discrimination in connection with educational programs or activities that receive federal funding."); Terry v. Young Harris Coll., 106 F. Supp. 3d 1280, 1297 (N.D. Ga. 2015) ("[Title IX] prohibits sexual harassment.")

21. *See, e.g.*, Morgan v. Town of Lexington, 823 F.3d 737, 745 (1st Cir. 2016) ("Sexual harassment in schools can constitute prohibited sex-based discrimination actionable under Title IX where there is a 'hostile environment,' such that 'acts of sexual harassment [are] sufficiently severe and pervasive to compromise or interfere with educational opportunities normally available to students,' and relevant school officials with actual knowledge of the harassment 'exhibit[] deliberate indifference to [the harassment].'" (citing Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 65-66 (1st Cir. 2002))).

22. *See, e.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1180 (10th Cir. 2007) (holding a public university responsible under Title IX for sexual assaults that occurred in the victim's apartment); Doe v. Brown Univ., 166 F. Supp. 3d 177, 185 (D.R.I. 2016) ("It is well established that a school's failure to prevent or remedy sexual harassment of a student, including sexual assault, may violate Title IX." (citing Doe v. Columbia Univ., 101 F. Supp. 3d 356, 366 (S.D.N.Y. 2015))).

B. Title IX: Enforcement

1. Express enforcement through administrative procedures regarding funding

As Spending Clause legislation, Title IX "appl[ies] to schools and educational programs that receive federal funds . . . ."[23] As the Supreme Court put it, "[w]hen Congress enacts legislation under its spending power, that legislation is 'in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'"[24] The structure of Title IX relies solely upon administrative enforcement to accomplish its goals, and "[t]he statute's only express enforcement mechanism, [Section] 1682, is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance."[25] As for the consequences Title IX of noncompliance: "Congress directed all agencies extending financial assistance to educational institutions to develop procedures for terminating financial assistance to institutions that violate Title IX."[26]

2. A judicially created private right of action in specific circumstances

In 1979, the Supreme Court held that Title IX implied a private right of action to enforce its prohibition of intentional sex discrimination.[27] Though this private right of action initially allowed only for injunctive or equitable relief,[28] the Supreme Court later held in *Franklin v. Gwinnett County Public Schools* that it allowed for monetary damages where the Title IX violation was intentional.[29] The Supreme Court has since specified that this judicially implied private right of action applies to a funding recipient's: 1) deliberate indifference to a teacher's sexual harassment of a student;[30] 2) deliberate indifference to sexual harassment of a student by another student;[31] or 3) retaliation against an employee who complains about sexual discrimination against students.[32] The Supreme Court has not established that an *employee* has a private right of action under Title IX against a recipient institution for suffering discrimination or harassment by

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23. S.B. *ex rel.* A.L. v. Bd. of Educ. of Harford Cty., 819 F.3d 69, 75 (4th Cir. 2016).
24. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181-82 (2005) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1984)).
25. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255 (2009).
26. Cohen v. Brown Univ., 101 F.3d 155, 165 (1st Cir. 1996).
27. *See Jackson*, 544 U.S. at 173 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 690-93 (1979)).
28. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (citing *Cannon*, 441 U.S. at 705 n.38, 710 n.44, 711) (explaining that "when the Court first recognized the implied right under Title IX in *Cannon*, the opinion referred to injunctive or equitable relief in a private action . . . but not to a damages remedy.").
29. *Jackson,* 544 U.S. at 173 (citing Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992)).
30. *Id.* at 173 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-91 (1998)).
31. *Id.* (citing Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 642 (1999)).
32. *Id.* at 171.

another employee, however. Though there is a current split among lower federal courts, a slight majority of courts have found that Title IX does not provide an implied right of action for an employee's claim for discrimination against an employer when the employee could have otherwise brought such claim under Title VII of the Civil Rights Act of 1964.[33]

3. *The private right of action for damages requires actual knowledge of the discrimination and a deliberate indifference in response*

The only type of Title IX claim that students can assert against an institution is one for deliberate indifference.[34] In *Gebser*, the Supreme Court established that an institution may only be held liable for an employee's sexual harassment if the plaintiff proves that an appropriate official of the institution had actual notice of the harassment *and* exhibited a deliberate indifference to it.[35] In so doing, the *Gebser* Court rejected the applicability of *respondeat superior* or vicarious liability principles to Title IX claims of sexual harassment perpetrated by an institution's employee.[36] An institution is not responsible for

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33. 42 U.S.C. § 2000e (2012). The majority of federal courts have found that Title VII precludes a claim from being pursued under Title IX if it could have been pursued under Title VII. *See, e.g.*, Delgado v. Stegall, 367 F.3d 668, 670 (7th Cir. 2004) (holding that sexual harassment of university employees is "not actionable under Title IX if the employee could obtain relief under Title VII" (citing Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 861-62 (7th Cir. 1996)), *abrogated on other grounds*, Trentadue v. Redmon, 619 F.3d 648 (7th Cir. 2010); Lakoski v. James, 66 F.3d 751, 754-58 (5th Cir. 1995) ("We are persuaded that Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination."); Arceneau v. Vanderbilt Univ., 25 F. App'x. 345, 349 (6th Cir. 2001) (Batchelder, J., concurring) (agreeing with *Lakoski* that "Congress did not intend for Title IX to provide the route for an end-run around Title VII"); Torres v. Sch. Dist. of Manatee Cty., No. 8:14-cv-1021-T-33TBM, 2014 U.S. Dist. LEXIS 117254, at *11-16 (M.D. Fla. Aug. 22, 2014) (holding that Title VII preempted the plaintiff's claims under Title IX); Towers v. State Univ. of N.Y. at Stony Brook, No. CV-04-5243, 2007 U.S. Dist. LEXIS 37373, at *10-13 (E.D.N.Y. May 21, 2007) (holding that "Title IX cannot be used to circumvent the remedial scheme of Title VII"); Vandiver v. Little Rock Sch. Dist., No. 4:03-CV-00834, 2007 U.S. Dist. LEXIS 98747, at *34-45 (E.D. Ark. Oct. 9, 2007) (holding that Congress did not intend Title IX to allow a bypass to the remedies afforded by Title VII); Urie v. Yale Univ., 331 F. Supp. 2d 94, 97-98 (D. Conn. 2004) (same); Gibson v. Hickman, 2 F. Supp. 2d 1481, 1483-84 (M.D. Ga. 1998) (same); Cooper v. Gustavus Adolphus Coll., 957 F. Supp. 191 (D. Minn. 1997) (same).
A minority of courts have held that Title VII does not preclude a claim under Title IX for an employee. *See e.g.*, Ivan v. Kent State Univ., No. 94-4090, 1996 U.S. App. LEXIS 22269, at *7 n.10 (6th Cir. July 26, 1996) ("[T]he court overrules the conclusion reached by the district court . . . that Title VII preempts an individual's private remedy under Title IX."); Preston v. Virginia, 31 F.3d 203, 205-06 (4th Cir. 1994) ("An implied private right of action exists for enforcement of Title IX. This implied right extends to employment discrimination on the basis of gender by educational institutions receiving federal funds." (citations omitted)); Winter v. Pa. State Univ., No. 3:15-CV-01166, 2016 U.S. Dist. LEXIS 36702, at *35-30 (M.D. Pa. Mar. 22, 2016); AB v. Rhinebeck Cent. Sch. Dist., 224 F.R.D. 144, 153 (S.D.N.Y. 2004); Henschke v. N.Y. Hosp.-Cornell Med. Ctr., 821 F. Supp. 166, 172-73 (S.D.N.Y. 1993.

34. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288-91 (1998) ("[W]e conclude that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official.").

35. *Id.* at 289-91; *see also* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1175 (10th Cir. 2007) (explaining the two-prong requirement).

36. *Gebser*, 524 U.S. at 285.

discrimination or harassment perpetrated by its employee; it is liable only for its own deliberate indifference to such discrimination or harassment.[37]

As will become important in the causation analysis of this Article, one of the primary reasons the *Gebser* Court rejected the imposition of vicarious liability against a school was the contractual nature of Title IX.[38] In contrast to Title VII—which is an outright prohibition designed to "eradicate discrimination throughout the economy" regardless of funding status—Title IX was established narrowly as a condition for federal funding.[39] The purpose of Title VII is "centrally to compensate victims of discrimination," whereas the purpose of Title IX is to "protect" against discrimination being aided by federal funding.[40] The thrust of Title IX is therefore to ensure that the institution itself is working to eliminate discrimination—not to punish the institution for the acts of its employees, or even to compensate students who suffer discrimination.[41] According to the *Gebser* Court, this is why the original understanding of Title IX limited plaintiffs to injunctive or equitable relief, "but not to a damages remedy."[42]

More important, however, is the effect the "contractual nature" of Title IX has on the judiciary's "construction of the scope of available remedies."[43] A private right of action stemming from a statute passed pursuant to Congress' spending powers demands close scrutiny of the scope and applicability of monetary damages against the recipient institution because the non-party judiciary is essentially interpreting a contract between the federal government (via Congress) and the institution.[44] The "central concern . . . is with ensuring 'that the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'"[45] Actual knowledge is the key consideration.[46] If the institution is not aware of the discrimination, it is not fair to presume it has notice that it will be liable for a monetary award.[47] If the recipient institution has knowledge of the discrimination, however, and does nothing to prevent further discrimination, it is fair to conclude that institution is aware of the potential for monetary damages.[48] *Respondeat superior* or vicarious liability was rejected on

37. *Id.* at 285-91.

38. *Id.* at 286-87 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 254 (1994)).

39. *Id.*

40. *Id.* at 287.

41. *Id.* at 285-87.

42. *Id.* at 287.

43. *Id.*

44. *Id.* at 287-88.

45. *Id.* at 287 (quoting Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 74 (1992)).

46. *See id.* at 290.

47. *See id.* at 287 (noting that, under the analogous Title VI, if discrimination is unintentional, relief against the institution should only be "prospective" because "'it is surely not obvious that the grantee was aware that it was administering the program in violation of the [condition]'" (quoting Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598 (1983))).

48. *Id.*

this basis because the *Gebser* Court concluded that an institution might not be aware of the underlying discrimination in such cases.[49]

The *Gebser* Court further explained that Title IX's own express administrative process confirms that Title IX requires actual notice of the discrimination at issue.[50] Title IX regulations for agency enforcement provide that an enforcement hearing may not be initiated until the institution is made aware of the violation and the action to effect compliance, and the institution proves unwilling or unable to voluntarily secure such compliance.[51] The *Gebser* Court explained that

> [i]t would be unsound . . . for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.[52]

The Court reemphasized this point in its conclusion rejecting constructive notice: "Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions."[53]

The Title IX private cause of action therefore requires "actual knowledge of discrimination" or harassment by an appropriate official of the institution and a "deliberate indifference" to such discrimination or harassment.[54] As the *Gebser* Court put it,

> [I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond. . . .
>
> [T]he response must amount to deliberate indifference to discrimination. . . . The premise, in other words, is an official decision by the recipient not to remedy the violation.[55]

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49. *Id.*
50. *Id.* at 290.
51. *Id.* at 288 (citing 34 C.F.R. §§ 100.7(d), 100.8(c)-(d) (2016)).
52. *Id.* at 289.
53. *Id.* at 290.
54. *Id.* at 290-91.
55. *Id.* at 290.

C. Does A Title IX Claim Require Post-Notice Harassment?

If a Title IX claim can only be based on an institution's deliberate indifference, does this mean that no claim is possible when no harassment takes place *after* the institution is placed on notice? That is, does Title IX provide a cause of action for the act of deliberate difference alone, or only when such deliberate indifference leads to further harassment?

In *Davis v. Monroe County Board of Education*, the Supreme Court held that Title IX's implied private cause of action extended to student-on-student sexual harassment.[56] The Supreme Court was again faced with the question whether an institution had fair notice that it could be liable for damages based on allegations stemming from harassment.[57] As in *Gebser*, the primary argument against a finding of liability for damages was that an institution cannot be held liable under Title IX for the actions of another.[58]

The *Davis* Court, however, found that *Gebser* itself provided the basis for establishing liability for student-on-student harassment.[59] Again, the key was a claim of deliberate indifference on behalf of the institution.[60] While an institution could not be vicariously liable for a student's harassment of another student, it could be liable for its own action in failing to adequately respond to the known harassment of a student by another student, if such student was further harassed.[61] The *Davis* Court in effect held that, under certain circumstances, the same deliberate indifference cause of action that existed for teacher-on-student harassment also existed for student-on-student harassment.[62]

As in *Gebser*, the *Davis* Court emphasized that a claim for deliberate indifference under Title IX must establish that the institution had actual notice of the harassment.[63] The Court further explained that the environment in which the harassment occurs is critical because Title IX enforcement has always been based upon allowing an institution to remedy the discriminatory situation:[64]

> Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.
>
> The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title

56. 526 U.S. 629, 643 (1999).
57. *Id.* at 640-45.
58. *Id.* at 641-45.
59. *Id.* at 641-44.
60. *Id.* 642-43.
61. *Id.*
62. *Id.*
63. *Id.* at 643-45.
64. *Id.* at 644.

> IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.[65]

The *Davis* Court's following explanation of the deliberate indifference standard is what led to the current jurisdictional divide. The Court took the opportunity to connect the deliberate indifference standard to Title IX's actual prohibition of discrimination.[66] After all, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be *subjected* to discrimination under any education program or activity receiving Federal financial assistance . . . ."[67]

The *Davis* Court explained that "[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference '*subject[s]*' its students to harassment."[68] For the Court, the operative term in this statement was "subjects." The Court offered the following definition of the verb "subject": "the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[69] This definition was drawn from two separate dictionaries, which the court also cited:

> Random House Dictionary of the English Language 1415 (1966) (defining "subject" as "to cause to undergo the action of something specified; expose" or "to make liable or vulnerable; lay open; expose"); Webster's Third New International Dictionary 2275 (1961) (defining "subject" as "to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE").[70]

The *Davis* Court also emphasized that Section 1681(a)'s use of the phrase "*under* any education program" limits where actionable harassment may occur:[71] "because the harassment must occur 'under' 'the operations of' a funding recipient . . . the harassment must take place in a context subject to the school district's control . . . ."[72] The Court again offered two dictionary definitions for the term "under" in support of its interpretation: "Webster's Third New International Dictionary . . . (defining 'under' as 'in or into a condition of

65. *Id.*
66. *Id.* at 644-45.
67. 20 U.S.C. § 1681(a) (2012) (emphasis added).
68. *Davis*, 526 U.S. at 644 (emphasis added).
69. *Id.* at 645.
70. *Id.*
71. *Id.* (emphasis added).
72. *Id.*

subjection, regulation, or subordination'; 'subject to the guidance and instruction of'); Random House Dictionary . . . (defining 'under' as 'subject to the authority, direction, or supervision of')."[73]

The *Davis* Court concluded, based on its definitions of the terms "subjected" and "under," that a Title IX cause of action for damages under the theory of deliberate indifference was limited to cases where harassment by a person under the control of the institution had occurred within an environment that was under the control of the institution.[74] Importantly, the Court explained that "[o]nly then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs."[75]

III. THE JURISDICTIONAL DIVIDE OVER THE *DAVIS* COURT'S DEFINITION OF "SUBJECTED": CAN AN INSTITUTION FACE MONETARY DAMAGES IF NO SEXUAL HARASSMENT RESULTS FROM ITS DELIBERATE INDIFFERENCE?

The *Davis* Court's definition of "subjects"—and especially that definition's second component regarding the "vulnerability" of students caused by deliberate indifference—has led to confusion and disagreement among courts regarding the scope of a Title IX claim. Some courts have concluded, based on the *Davis* Court's language, that vulnerability alone can form the basis for a Title IX claim. To those courts, vulnerability can be its own harm. Other courts have disagreed, concluding that the vulnerability caused by deliberate indifference must actually cause harm in the form of further harassment.

A. Cases Finding Title IX Liability Even When No Further Harassment Occurs After Notice

1. Fitzgerald v. Barnstable School Committee

In *Fitzgerald v. Barnstable School Committee*, the First Circuit applied the leading rationale for the conclusion that Title IX liability requires only the *possibility* of post-notice harassment. In *Fitzgerald*, a kindergarten student claimed that a third-grade student made her lift up her dress on the bus.[76] The parents of the kindergarten student reported this allegation to the school's principal, who immediately opened an investigation into the matter.[77] The kindergarten student's allegations were not corroborated.[78]

73. *Id.*
74. *Id.*
75. *Id.*
76. 504 F.3d 165, 169 (1st Cir. 2007).
77. *Id.*
78. *Id.*

Shortly thereafter, the parents of the kindergarten student informed the principal that their daughter had now reported that the alleged perpetrator had also asked her to pull down her underwear and spread her legs.[79] The principal immediately followed up on these new allegations by interviewing the alleged perpetrator again and meeting with other prior interviewees.[80] The local police department had also conducted its own investigation and found that there was insufficient evidence to proceed against the alleged perpetrator.[81] The principal, relying upon his own investigation and the conclusion of the police department, decided not to proceed with disciplinary measures.[82]

Since the alleged perpetrator was not disciplined or removed from the school, it remained possible that the two students would have chance encounters.[83] The kindergarten student did not experience any further incidents of alleged sexual harassment on the bus after her parents reported the allegations to the principal.[84] The kindergarten student did have several "unsettling" encounters with the alleged perpetrator in the halls and, on one occasion, was required by a gym teacher to give the student a "high five" during a mixed-grade gym class.[85] However, she did not make any allegations of further harassment.[86]

The parents of the kindergarten student brought suit against the school system and superintendent in part for violation of Title IX.[87] The district court granted summary judgment in favor of the defendants on the Title IX claim.[88] The court held that "a Title IX defendant could not be found deliberately indifferent as long as the plaintiff was not subjected to any acts of severe, pervasive, and objectively offensive harassment *after* the defendant first acquired actual knowledge of the offending conduct."[89] This holding "dictated the outcome because the [district] court found that the later interactions between [the kindergarten student] and [the alleged perpetrator]—even when viewed in light of the allegations about [the alleged perpetrator's] previous conduct—did not constitute continued sexual harassment."[90]

The First Circuit rejected the district court's holding and reversed.[91] The *Fitzgerald* court acknowledged that "Title IX does not make an educational institution the insurer either of a student's safety or of a parent's peace of

79. *Id.*
80. *Id.* at 169-70.
81. *Id.*
82. *Id.* at 170.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 172.
90. *Id.*
91. *Id.* at 172-73.

mind,"[92] and that "'deliberate indifference' requires more than a showing that the institution's response to harassment was less than ideal."[93] The First Circuit, however, rejected the district court's holding that an institution could be liable for its deliberate indifference only if sexual harassment occurred *after* it had received notice of past harassment.[94]

The *Fitzgerald* court agreed with the holdings of other courts that "ha[d] found (or countenanced the possibility of finding)" that liability for damages under a Title IX private cause of action can be found "even though the plaintiff alleged only a single incident of pre-notice harassment."[95] The court noted that in *Williams v. Board of Regents*, the "Eleventh Circuit . . . held that Title IX discrimination can occur even after a student has withdrawn from school and left the campus."[96] The First Circuit explained that, "[t]hough removed from the vicinity of her harassers, the victim in *Williams* could still be subject to the *university's* discrimination, which in that case took the form of a failure 'to take any precautions that would prevent future attacks.'"[97]

The First Circuit then analyzed *Davis*'s definition of "subjected."[98] The *Fitzgerald* court interpreted the *Davis* Court's definition as allowing for two distinct circumstances that could create liability: "the [*Davis*] Court stated that funding recipients may run afoul of Title IX not merely by 'caus[ing]' students to undergo harassment but also by 'mak[ing] them liable or vulnerable' to it."[99] According to the *Fitzgerald* court, the *Davis* Court's "broader formulation clearly sweeps more situations than the district court acknowledged within the zone of potential Title IX liability."[100] The *Fitzgerald* court believed that the *Davis* Court's "vulnerability" language had established a cause of action not only where "the institution's deliberate indifference . . . caused the student to undergo [post-notice] harassment," but also where deliberate indifference "made her more vulnerable to it, *or made her more likely to experience it*," even if it did not actually occur.[101]

The *Fitzgerald* court held that "a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program

92. *Id.* at 171.
93. *Id.*
94. *Id.* at 172-73.
95. *Id.* at 172 (citing Vance v. Spencer Cty. Pub. Sch. Dist., 231 F.3d 253, 259 (6th Cir. 2000)).
96. *Id.* (citing Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007)).
97. *Id.* (quoting *Williams*, 477 F.3d at 1297).
98. *Id.* (quoting Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 645 (1999)).
99. *Id.* (citing *Davis*, 526 U.S. at 645).
100. *Id.* (citing Wills v. Brown Univ., 184 F.3d 20, 27 (1st Cir. 1999) ("On some cases, merely to maintain a harasser in a position of authority over the victim, after notice of prior harassment, could create new liability.").
101. *Id.* at 171 (emphasis added) (citing *Davis*, 526 U.S. at 645).

or activity."[102] The facts of the *Fitzgerald* case "theoretically could form a basis for Title IX liability, given that post-notice interactions between the victim and the harasser have been alleged."[103] Even though the student in *Fitzgerald* had not experienced additional harassment after the school system was first notified of the alleged harassment, the school system could potentially be liable for damages simply because the student *could* have been subject to harassment given that the alleged perpetrator still had contact with her at school.[104] According to the First Circuit, the district court's error was "in truncating its analysis and declining to conduct a broader deliberate indifference inquiry."[105]

2. Williams v. Board of Regents

The *Fitzgerald* court's rule of liability based on the possibility of post-notice harassment appears to stem from the Eleventh Circuit's conclusion in *Williams v. Board of Regents* that liability was supported by the notion that the very *possibility* of harassment might prevent a victim from returning to school.[106] In *Williams*, a female student was allegedly sexually assaulted by three student-athletes in the apartment of one of the aggressors.[107] The next day, the female student reported the incident to the police, who in turn reported the incident to the university.[108] The female student withdrew from the university immediately after reporting the incident and did not return.[109] The university charged the three student-athletes with disorderly conduct under the university's code of conduct.[110] Criminal charges against two of the three aggressors were dropped, and the third was acquitted at trial.[111] A university judiciary panel held a hearing on the disciplinary matter one year after the incident took place.[112] The university panel decided not to sanction the student-athletes,[113] two of whom had by this time left the university.[114]

The *Williams* court explained Title IX's two principal requirements for a deliberate indifference claim: 1) "Title IX requires that the plaintiff prove that the deliberate indifference occurred in response to discrimination she faced"; and 2) "a Title IX recipient may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate

102. *Id.* at 172-73.
103. *Id.* at 173.
104. *Id.*
105. *Id.*
106. 477 F.3d 1282, 1297 (11th Cir. 2007).
107. *Id.* at 1288.
108. *Id.* at 1289.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*

indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[115] The court found that the university had been deliberately indifferent *before* the student's alleged assault because officials had ignored prior incidents of harassment by one of the student-athletes at other colleges during recruitment, and because the university had failed inform student-athletes about or enforce the university's sexual harassment policy.[116]

More relevant for the purposes of this Article, the *Williams* court separately concluded that the university was also deliberately indifferent *after* the student's alleged assault.[117] The *Williams* court found that the university had exhibited deliberate indifference by waiting eight months to hold a disciplinary hearing regarding the incident, long after it received police reports that could have corroborated the female student's allegations.[118] The court found that the pending criminal charges were not an adequate excuse to delay the disciplinary hearing because such charges should not have prevented the university from securing its own campus.[119] More importantly, the court held that the university's failure to take action against the student-athletes was itself "discrimination" against the female student because it "effectively [denied the female student] an opportunity to continue to attend [the university]."[120] The court reached this conclusion even though the female student had withdrawn from the university only one day after the incident and had not alleged any further harassment.[121] The court essentially concluded that the university had allowed the female student to be vulnerable to further harassment:

> Viewing the evidence in the light most favorable to [the female student], [the university] failed to take any precautions that would prevent future attacks from [the student-athletes], or like-minded hooligans should [the female student] have decided to return to [the university], either by, for example, removing from student housing or suspending the alleged assailants, or implementing a more protective sexual harassment policy to deal with future incidents. Considering what had already occurred, [the university's] failure was inexplicable and discriminatory.[122]

In sum, the *Fitzgerald* and *Williams* courts have concluded that post-notice vulnerability, even in the absence of actual harassment, can form the basis of a Title IX claim for damages because vulnerability by itself can constitute a harm.

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115. *Id.* at 1295-96 (citing Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644-45 (1999).
116. *Id.* at 1296.
117. *Id.* at 1297.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

B. Escue v. Northern Oklahoma College *and Other Cases Rejecting Title IX Liability Where Further Harassment Does Not Occur After Notice*

1. Escue v. Northern Oklahoma College

The Tenth Circuit provides the leading rationale for requiring actual, post-notice sexual harassment in order to support Title IX liability.[123] In *Escue v. Northern Oklahoma College*, a female college student alleged that a professor had sexually harassed her.[124] The student claimed that the professor had, on multiple occasions, made inappropriate sexual comments about her in front of others and had inappropriately touched her.[125] After a number of alleged incidents, the student and her father met with the university president to report the student's complaint.[126] The student had no further contact with the professor after this meeting.[127] No further sexual harassment or discrimination was alleged after this meeting.[128]

The student had been in two courses taught by the professor.[129] In response to the student's allegations, the university allowed the student to transfer out of one course.[130] In the other course, the university allowed the student to take the grade that she had on the date when she reported the sexual harassment.[131] The university determined that it would end its relationship with the professor at the end of the semester.[132]

The student brought a Title IX claim against the university based on the sexual harassment she had suffered.[133] The *Escue* court emphasized the point, drawn from *Davis* and *Gebser*, that an institution "is not vicariously liable to its students for all sexual harassment caused by teachers, and . . . a student may hold a school liable 'only for its own misconduct.'"[134] One of the university's defenses was that it could not be liable for damages for a Title IX deliberate indifference claim because "its response to the harassment did not 'cause [the student] to undergo harassment or make [her] vulnerable to it.'"[135]

The student argued that the university should have immediately removed the professor from the classroom instead of allowing him to finish the semester and

123. Escue v. N. Okla. Coll., 450 F.3d 1146, 1155-56 (10th Cir. 2006).
124. *Id.* at 1149-50.
125. *Id.*
126. *Id.* at 1150.
127. *Id.*
128. *Id.*
129. *Id.* at 1149.
130. *Id.* at 1150.
131. *Id.*
132. *Id.*
133. *Id.* at 1152.
134. *Id.* (quoting Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999).).
135. *Id.* at 1155 (quoting *Davis*, 526 U.S. at 643, 648).

should have instructed him to stay away from the student.[136] The *Escue* court first established that "[s]chool administrators need not 'engage in particular disciplinary action'" in response to a Title IX complaint and that "'[v]ictims do not have a right to seek particular remedial demands . . . .'"[137] The *Escue* court found it "significant[]" that the student did not allege that she had experienced any sexual harassment after she notified the university of the professor's harassment.[138]

The *Escue* court emphasized the *Davis* Court's standard for "subjecting" a student to discrimination under Title IX: "'the deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.'"[139] The court distinguished the facts of *Theno v. Tonganoxie Unified Sch. Dist. No. 464,* in which the district court had held a school liable for deliberate indifference where the school should have been aware that its efforts were insufficient because the student was continuing to experience harassment.[140] In contrast to *Theno*, the student in *Escue* did not "allege that [the university's] response to her allegations was ineffective such that she was further harassed."[141] The court reasoned that "[a]lthough [the professor] attempted to contact [the student] once the day that she reported her allegations to [the university president], [the professor] was unsuccessful and this incident did not lead to sexual harassment."[142] The *Escue* court therefore affirmed summary judgment in favor of the university on the student's Title IX claim because there had been no post-notice harassment.[143]

2. *Other courts rejecting a Title IX deliberate indifference claim when there is no evidence of further discrimination or harassment after notice*

In line with the Tenth Circuit's opinion in *Escue*, a number of other courts have held that damages claims for deliberate indifference must be supported by evidence that harassment occurred *after* the institution was notified of a prior incident. In *Reese v. Jefferson School District No. 14J*, the Ninth Circuit held that female students' Title IX claim against the school based on sexual harassment by fellow students failed under the *Davis* standard because "[t]here [wa]s no evidence that any harassment occurred after the school district learned

136. *Id.*
137. *Id.* (citing *Davis*, 526 U.S. at 648; Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 965 (D. Kan. 2005)).
138. *Id.*
139. *Id.* (quoting *Davis*, 526 U.S. at 643, 648).
140. *Id.* at 1155-56 (citing *Theno,* 377 F. Supp. 2d at 965).
141. *Id.* at 1156.
142. *Id.*
143. *Id.*

of the plaintiffs' allegations."[144] As the *Reese* court explained, because no post-notice harassment had occurred, the school district could not "be deemed to have 'subjected' the plaintiffs to the harassment" under *Davis*.[145] Similarly, in *Bernard v. East Stroudsburg University*, the district court held that the university had not caused further discrimination or made the plaintiffs more vulnerable to discrimination because, although post-notice harassment was alleged, the plaintiffs did not become aware of that post-notice harassment until after graduation.[146]

In *Ross v. Corporation of Mercer University*, the district court specifically interpreted the *Davis* Court's standard for "subjecting" a student to harassment to require post-notice harassment.[147] The *Ross* court explained that the Supreme Court held "in *Davis* that courts can find deliberate indifference either when a defendant's actions make its students vulnerable to harassment or when a defendant's actions actually cause its students to undergo harassment."[148] "In other words," the *Ross* court said, "a court can find a Title IX violation when a university exhibits deliberate indifference before an attack that makes a student more vulnerable to the attack itself, or when a university exhibits deliberate indifference after an attack that causes a student to endure additional harassment."[149] The *Ross* court therefore concluded that the vulnerability component of the standard was not an invitation for suit on the basis of an alleged vulnerability to *potential* harassment that did not take place.[150] Rather, the *Ross* court interpreted the vulnerability component to provide for liability only when the vulnerability actually led to further harassment.[151] The district court in *Staehling v. Metropolitan Government of Nashville & Davidson County* joined the *Reese* and *Ross* courts in their interpretation of the *Davis* Court's "subjected" definition to "mean that a school is not liable under Title IX if no harassment occurs after a school receives notice of the [initial] harassment."[152] Under this standard, the plaintiffs in that case could not "survive summary judgment because there [was] absolutely no evidence that [the student] was subjected to sexual harassment . . . after [the reported] incident."[153]

144. 208 F.3d 736, 740 (9th Cir. 2000).
145. *Id.*
146. No. 3:09-CV-00525, 2016 U.S. Dist. LEXIS 22573, at *46-50 (M.D. Pa. Feb. 24, 2016).
147. 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007).
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at *32-33 (M.D. Tenn. Sept. 12, 2008).
153. *Id.*

3. *The potential for a split within the Tenth Circuit*

In *Rost v. Steamboat Springs RE-2 School District*, the Tenth Circuit reaffirmed its holding in *Escue* by affirming summary judgment in favor of the school district in part because the plaintiff did "not contend that further sexual harassment occurred as a result of the district's deliberate indifference after" the school district was first notified of harassment.[154] However, the *Rost* court then seemed to consider in dicta whether mere vulnerability to potential harassment *could* have formed the basis of a Title IX claim.[155] The *Rost* court "acknowledge[d] that . . . sister circuits have rejected a strict causation analysis which would absolve a district of Title IX liability if no discrimination occurs after a school district receives notice of discrimination."[156] The court did not specifically adopt that rule, though; instead, it found that the vulnerability determination was inapplicable to the case at hand because the student would not have returned to the school under any circumstances after the first incident.[157]

However, the *Rost* court then made the puzzling hypothetical statement that, had the student "expressed interest in returning to the school and school officials had not provided a safe educational environment, then she would likely have a Title IX claim."[158] It is unclear what the Tenth Circuit meant by this statement. While it does not directly express any intention to overrule or abrogate *Escue*, this statement might demonstrate a conflict within the Tenth Circuit's own understanding of whether the *Davis* Court's vulnerability component allows for a Title IX claim for damages based solely upon the *potential* for harassment in a post-notice environment.[159]

IV. ANALYSIS: TITLE IX SHOULD NOT BE INTERPRETED TO PROVIDE A PRIVATE CAUSE OF ACTION FOR DAMAGES WHERE NO FURTHER HARASSMENT HAS OCCURRED AFTER NOTICE

A. *The* Davis *Court's Vulnerability Component Creates a Potential for Ambiguity Regarding Post-Notice Harassment*

The fundamental problem with the current jurisdictional divide is that neither side addresses the potential ambiguity in the vulnerability component of the *Davis* Court's definition of "subjected." The *Davis* Court held that, in order for an institution to be liable for damages under Title IX (for having "subjected" a student to discrimination), its deliberate indifference "must, at a minimum,

154. 511 F.3d 1114, 1123 (10th Cir. 2008).
155. *Id.* at 1123-24.
156. *Id.* at 1123 (citing Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (2007)).
157. *Id.* at 1124.
158. *Id.*
159. *Id.*

'cause [the student] to undergo' harassment or 'make [the student] liable or vulnerable' to it."[160] The vulnerability component is separated by the disjunctive "or," suggesting a separate basis for liability. Still, the vulnerability component inarguably relies upon the causation component for the action to which the student is made vulnerable. That is, any interpretation of the vulnerability component must deal with its inclusion of the term "harassment," which potentially requires further harassment to take place. The vulnerability component of this definition could be read to mean, as the *Fitzgerald* and *Williams* courts held, that an institution is liable for damages under Title IX if its failure to respond to a report leaves a student vulnerable to further harassment, even if such harassment does not occur.[161] Alternatively, as the *Escue* line of cases held, this statement could be read to mean that an institution is liable for damages under Title IX only if a student experiences *further* harassment as a result of the institution's deliberate indifference.[162]

None of the leading cases in the jurisdictional divide acknowledge this ambiguity or attempt an in-depth analysis of what the vulnerability statement could or should mean in context. Courts on both sides of the split rest their conclusions on what they feel to be the only potential interpretation of the vulnerability component. For example, in *Fitzgerald*, the First Circuit reversed the district court's reading of the vulnerability component as requiring further harassment based on the conclusory explanation that the *Davis* Court's "broader formulation clearly sweeps more situations than the district court acknowledged within the zone of potential Title IX liability."[163] The *Ross* court, which specifically defined the interpretation of the vulnerability statement reached by the *Escue* line of cases, stated in a similarly conclusory fashion that "a court can find a Title IX violation when a university exhibits deliberate indifference before an attack that makes a student more vulnerable to the attack itself, or when a university exhibits deliberate indifference after an attack that causes a student to endure additional harassment."[164]

These courts do not attempt to address any opposing interpretation or justify their own interpretation with detailed analysis. Future courts presented with this issue must acknowledge the potential ambiguity and provide justification, whether it be based in language or law, for why the *Davis* Court's vulnerability component either requires or does not require further harassment to support

160. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 645 (1999).

161. *See* Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007); Williams v. Bd. of Regents, 477 F.3d 1282, at 1296-97 (11th Cir. 2007).

162. *See* Escue v. N. Okla. College, 450 F.3d 1146, 1155-56 (10th Cir. 2006); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000); Bernard v. E. Stroudsburg Univ., No. 3:09-CV-00525, 2016 U.S. Dist. LEXIS 22573, at *46-50 (M.D. Pa. Feb. 24, 2016); Staehling v. Metro. Gov't of Nashville & Davidson Cty., No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at *32-33 (M.D. Tenn. Sept. 12, 2008); Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007).

163. *Fitzgerald,* 504 F.3d at 172.

164. *Ross*, 506 F. Supp. 2d at 1346.

damages claims. Resolution of this ambiguity is critical, as Title IX applies to thousands of educational institutions across the country.[165]

B. The Complete Language of the "Subjected" Definition Supports an Interpretation Requiring Post-Notice Harassment for a Damages Claim

Perhaps the most fundamental principle of interpretation is that a court must look to "the language surrounding [a] term to ascertain its meaning."[166] Indeed, the first step in the Supreme Court's framework for interpretation is that a court must seek the "natural reading of the full text."[167] The *Davis* Court's definition of the term "subjected" contains two inseparable components, causation and vulnerability: "the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[168] The *Fitzgerald* line of cases has chosen to parse the second (vulnerability) component of this definition to stand completely on its own terms.[169] However, if the definition is read as a whole for its natural meaning, one must conclude that the vulnerability component relies upon the causation component for the action to which the student is subjected. Rather than beginning an entirely separate idea, the vulnerability component completes the idea that began within the causation component.

The first segment of the definition, regarding causation ("'cause [students] to undergo' harassment"), requires that the institution's deliberate indifference be the cause of further harassment.[170] The vulnerability language that follows ("or 'make them liable or vulnerable' to it") borrows the resulting harassment from the causation component, while substituting the *causation trigger* for the harassment with a *vulnerability trigger* for the harassment. Thus, an institution would "subject" a student to harassment if its response to the notice of harassment actually placed the student in a position to experience further harassment (causation) *or* if the institution failed to take action and left the student in a place of vulnerability where further harassment occurred (vulnerability).

The *Davis* Court described wrongful conduct of both *commission* (directly causing further harassment) and *omission* (creating vulnerability that leads to further harassment). The definition presumes that post-notice harassment *has* taken place; vulnerability is simply an alternative pathway to liability for harassment, not a freestanding alternative ground for liability. In sum, the

165. Office for Civil Rights, *supra* note 11.

166. United States v. Barraza, 576 F.3d 798, 806 (8th Cir. 2009).

167. United States *ex rel.* A+ Homecare, Inc. v. Medshares Mgmt. Grp., 400 F.3d 428, 442 (2005) (citing United States v. Wells, 519 U.S. 482, 490-92 (1997)).

168. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 645 (1999).

169. *See* Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007); Williams v. Bd. of Regents, 477 F.3d 1282, 1296-97 (11th Cir. 2007).

170. *Davis*, 526 U.S. at 645.

vulnerability component of the *Davis* Court's "subjected" definition was not an attempt at creating broad liability for damages for the *possibility* of harassment, but rather an effort to ensure that a student who experiences post-notice harassment may obtain damages regardless of whether the harassment resulted from the institution *placing* the student in a position to experience that harassment or *leaving* the student vulnerable to it.

This interpretation is further supported by the dictionary definitions upon which the *Davis* Court relied for its own definition of "subjected":

> Random House Dictionary of the English Language 1415 (1966) (defining "subject" as "to cause to undergo the action of something specified; expose" or "to make liable or vulnerable; lay open; expose"); Webster's Third New International Dictionary of the English Language 2275 (1961) (defining "subject" as "to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE").[171]

The manifest goal of these definitions is to describe how an individual is made to experience a concrete "action." The "action" is not described in hypothetical terms or terms of potential, but rather as a tangible "action" or "effect" that the individual "undergo[es]" or to which the individual "submits." This fits with a natural understanding of the term "subjected," as it would not be typical for someone to say that that they were "subjected" to an action that had not yet happened. For example, one would not conclude that they been "subjected" to the cold of a snow storm at the point when it was possible that they were going to have to go outside to perform a task. They could only make such a claim if they already had gone outside and had actually experienced the cold from the storm.

The point is that "subjected" connotes a past experience with or exposure to a concrete action or event. This is the natural reading of the actual language of Title IX: "[n]o person in the United States shall, on the basis of sex ... be *subjected to* discrimination under any education program or activity receiving Federal financial assistance."[172] This is also the natural reading of the *Davis* Court's interpretation of the term "subjected": to "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[173] A student may be "subjected" to harassment or discrimination through an institution's deliberate indifference only when the institution takes action that causes the harassment, or when its indifference leaves the student in a place of vulnerability that results in harassment. For Title IX to permit damages claims, the institution's deliberate indifference must have resulted in harassment.

171. *Id.*
172. 20 U.S.C. § 1681(a) (2012) (emphasis added).
173. *Davis*, 526 U.S. at 645.

The impact of this natural reading is not merely academic or technical. To detach the meaning of the "vulnerable" term in *Davis* from actual harassment would be to alter the substance of Title IX itself and transform it into to a kind of strict-liability statute for hypothetical or potential harassment. The approximately 16,500 school districts and 7,000 postsecondary institutions subject to Title IX could be held financially responsible for the *potential* for harassment.[174] If demonstrating mere *potential* for harassment were the standard for Title IX deliberate indifference claims, it would be extremely difficult for institutions to fend off lawsuits at the motion-to-dismiss or summary judgment phase, meaning each lawsuit would be extremely costly to the institutions, even if the institutions did not cause or allow any actual harassment.

An alternative to reading *Davis* naturally to require actual harassment would be to simply eliminate the "subjected" term altogether from Title IX. This term is problematic not only from an interpretive perspective, but from a constitutional one as well, as it threatens the understanding of the contractual nature of Title IX under the Spending Clause.

C. Interpreting the Vulnerability Component of the Davis *Court's "Subjected" Definition to Require Post-Notice Harassment Best Comports with* Gebser*'s Limitation of Judicially Created Remedies for Title IX as Spending Clause Legislation*

Interpreting the *Davis* Court's vulnerability component to require that a student demonstrate post-notice harassment in order to obtain damages under Title IX is also a more reasonable conclusion because it presumes that the *Davis* Court sought to align its definition with the nature of Title IX as Spending Clause litigation, "applying to schools and educational programs that receive federal funds . . . ."[175] The Supreme Court has stated that "[w]hen Congress enacts legislation under its spending power, that legislation is 'in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'"[176]

In rejecting vicarious liability under Title IX, the *Gebser* Court stressed the limiting effect that the "contractual nature" of Title IX has on the judiciary's "construction of the scope of available remedies."[177] As the *Gebser* Court emphasized, a private right of action stemming from a statute passed pursuant to Congress' spending powers demands close scrutiny regarding the scope and applicability of monetary damages, given that the non-party judiciary is essentially interpreting a contract between the federal government (via Congress)

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174. Office for Civil Rights, *supra* note 11.

175. S.B. *ex rel.* A.L. v. Bd. of Educ., 819 F.3d 69, 75 (4th Cir. 2016).

176. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181-82 (2005) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

177. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

and the recipient institution.[178] The "central concern in that regard is with ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'"[179] Actual knowledge is the key consideration in such determination.[180] The *Gebser* Court established the principle that if the institution is not aware of the discrimination, it is not fair to presume it had notice that it will be liable for a monetary award.[181] As evidenced by *Gebser*'s rejection of vicarious liability, the thrust of this principle is to protect against constructive bases for monetary liability under Title IX's private cause of action. To find that an institution is liable for monetary damages for the *potential* of harassment would violate this principle.

It is one thing to conclude that an institution should presumptively be on notice that it must financially compensate a student who has actually experienced post-notice harassment because of the institution's deliberate indifference. However, it is a much further leap to conclude that an institution should presumptively be on notice that it must financially compensate a student because there remained some hypothetical *potential* for harassment after notice, even though no harassment occurred. It is liability based upon a construct rather than the tangible terms of Title IX. An institution enters into an agreement with the federal government for educational funding under the concrete provision that a student shall not "be subjected to discrimination under any education program or activity receiving Federal financial assistance."[182] The natural understanding is that Title IX places the institution on notice only that there will be consequences for actual discrimination within educational programs that receive federal funding. It would be unfair to hold that an institution is on notice that it will be financially liable for even the *potential* for harassment.

Indeed, this would be a large step beyond the vicarious liability for pre-notice harassment that was rejected in *Gebser*. In that case, the Court said that the problem with such liability was that the institution would likely not know about the harassment perpetrated by its employee until it was later notified.[183] In the case of liability on the sole basis of the potential for future harassment, the harassment exists only hypothetically. If it would be unfair for a court to hold an institution financially liable through the Spending Clause based on constructive notice for *actual* harassment, it must be unfair for a court to hold an institution financially liable on the construct of *potential* harassment. Accordingly, it is reasonable to interpret the vulnerability component of the *Davis* Court's definition of "subjected" to require actual post-notice harassment.

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178. *Id.* at 287-88.
179. *Id.* at 287 (quoting Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 74 (1992)).
180. *See id.* at 287-88.
181. *See id.*
182. 20 U.S.C. § 1681(a) (2012).
183. *Gebser*, 524 U.S. at 287-88.

D. Deliberate Indifference in Other Contexts Must Cause Some Tangible Post-Notice Harm in Order to Justify Monetary Damages

A private cause of action for "deliberate indifference" of an institution is not unique to Title IX. Eighth Amendment cruel and unusual punishment claims also give rise to litigation involving a deliberate indifference standard. These cases typically allege that a correctional institution manifested some deliberate indifference to a prisoner's safety, usually in the context of medical care.[184] It is well established in the case law that monetary damages for deliberate indifference are limited to the actual harm suffered.[185] For example, it is not enough to simply allege that there was deliberate indifference in the delay of medical care that *could* have caused harm; rather, "the delay must cause some harm."[186] Specifically, a plaintiff in this context "cannot rely upon hypothetical future harms to state a claim for deliberate indifference."[187] As one district court explained, "[t]here is little point to discussing the absence of evidence of a defendant's hypothetical deliberate indifference to the prospect of harm when plaintiff cannot prove that any harm exists."[188]

There is no inherent reason to treat the deliberate indifference standard in the Title IX context differently than in the Eighth Amendment context. Though they both involve victims and harms, both areas at their foundation are concerned primarily with institutional controls to prevent actual harm to a constitutional right. There is no reason that Title IX liability should not also require that something more than a hypothetical harm be caused by the institution's alleged indifference. The decision making processes of either type of institution could be paralyzed in the same way by liability that only requires hypothetical harm, since a damages claim would become viable at the moment of any decision pertaining to the safety of the plaintiff. That standard would also contradict the notion that courts largely defer to the expertise of both educational institutions and penological institutions in their administrative roles.

An institution's deliberate indifference, though certainly a vehicle for potential harm, is not the harm itself. Just as a monetary claim for negligence is not actionable until the negligence results in harm, a deliberate indifference claim

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184. *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment.").

185. *See* Sealock v. Colorado, 218 F.3d 1205, 1210 (10th Cir. 2000) ("Delay in medical care only constitutes an Eighth Amendment violation where the plaintiff can show that the delay resulted in substantial harm."); Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993) (explaining that "delay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference, which results in substantial harm").

186. Bailey v. Pa. Dep't of Corr., No. 2:10-cv-1039, 2011 U.S. Dist. LEXIS 150243, at *13 (W.D. Pa. Nov. 29, 2011).

187. Brandon v. Allbert, No. C10-0360-JCC, 2011 U.S. Dist. LEXIS 55045, at *5 (W.D. Wash. May 9, 2011).

188. Albert v. Yost, No. 3:09-cv-116-KRG-KAP, 2011 U.S. Dist. LEXIS 6025, at *15 (W.D. Pa. Jan. 5, 2011).

for monetary damages is not actionable until the indifference actually results in further harassment of the plaintiff. An analogy to Eighth Amendment deliberate indifference claims reinforces the principle that courts must separate the wrong from the resulting harm for which the plaintiff may seek compensation. Though the deliberate indifference of an institution is certainly a wrong, it is not yet a tangible harm on which to base a private cause of action for monetary damages.

CONCLUSION

In the future, courts should reject deliberate indifference claims under Title IX for monetary damages if they are not supported by evidence of post-notice harassment. Courts that address the jurisdictional divide on the vulnerability component of the *Davis* Court's definition of "subjected" should recognize the definition's potential for ambiguity and seek a more substantive analysis regarding its proper interpretation. A natural reading of the *Davis* Court's complete definition should cause courts to determine that the *Davis* Court was describing only acts of commission and omission that result in actual post-notice harassment. The nature of Title IX as Spending Clause legislation further implies that it would be inappropriate to find that an institution is on notice that it could be held financially liable to a student based on the construct of potential harassment. Finally, courts should look to Eighth Amendment deliberate indifference jurisprudence for support in holding that deliberate indifference under Title IX may result in damages claims only when the indifference causes some separate harm to the plaintiff.