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"One Free Rape": The Consequences of the Post-Notice Approach to Title IX's Deliberate Indifference Requirement*

When students are sexually assaulted at school, Title IX provides victims with recourse against their institutions for failing to protect them. However, the U.S. Circuit Courts of Appeals are split on when exactly schools need to take action. Some circuits hold that institutions are required to address the harassment after a victim notifies the school. Others hold that after notifying the school, students must undergo further harassment before a court can find the institution liable. This Recent Development advocates for the former approach, and also presents a third possible method of analysis, with the ultimate goal of centering victims and reconciling the legal system with the #MeToo movement.

INTRODUCTION

On March 8, 2017, Oakton High School band students took a nine-hour bus ride from Vienna, Virginia, to Indianapolis, Indiana, for a music festival.[1] During the bus ride, one female student, Jane Doe, was harassed repeatedly by an older male student, Jack Smith.[2] Smith touched Doe's breasts and genitals without her consent.[3] He then "penetrated her vagina with his fingers despite her efforts to physically block him," and forced her to touch him as well.[4] Despite the fact that the incident was immediately reported to school administrators, the assistant principals did not address the assault at all over the course of the five-day-long trip.[5] Upon the students' return to Virginia, school officials conducted an investigation.[6] Although there was an abundance of evidence to suggest that a sexual assault had occurred, the school "concluded

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

2. *Id.* During the 2010–11 school year, forty-eight percent of the students in grades seven through twelve experienced sexual harassment at school. CATHERINE HILL & HOLLY KEARL, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 11 (2011). During the 2017–18 school year, "[a]n estimated 1,064 rapes or attempted rapes occurred in 726 schools." U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104341, STUDENTS' EXPERIENCES WITH BULLYING, HATE SPEECH, HATE CRIMES, AND VICTIMIZATION IN SCHOOLS 23 (2021).

3. Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th at 261.

4. *Id.* ("She testified at trial that during this incident, she felt so 'confused,' 'shocked,' and 'scared' that she was 'frozen in fear the whole time.'").

5. *Id.* (noting that school officials "knew that [they were] dealing with the 'possibility' of a 'sexual assault,'" but they "took no action regarding these reports during the trip, and they did not speak to either Doe or her parents about what had happened on the bus ride").

6. *Id.* at 261–62.

that what happened on the bus did not amount to sexual assault."[7] Thus, Smith was never punished.[8] But Doe was forced to deal with the consequences of his actions. She was diagnosed with an adjustment disorder that presented with symptoms of anxiety,[9] and she was unable to properly participate in her band classes for the rest of her high school career.[10] Doe then filed a Title IX claim against the Fairfax County School Board, asserting that school officials acted with deliberate indifference to her report of sexual assault.[11]

Although a jury returned its verdict for the school board, the Fourth Circuit ultimately reversed the judgment and remanded the case for a new trial, holding that the lower court did not instruct the jury on the correct legal standard.[12] In doing so, the Fourth Circuit joined the First and Eleventh Circuits in holding that "a school may be held liable under Title IX based on a single, pre-notice incident of severe sexual harassment, where the school's deliberate indifference to that incident made the plaintiff more vulnerable to future harassment."[13] While this ruling is a small victory for victims of sexual assault, not every federal circuit court agrees that one single incident of harassment is enough; some circuit courts require a showing of post-notice harassment.[14] This post-notice approach has been characterized as giving schools "one free rape" before they are required to address incidents of student-on-student sexual harassment.[15] Further, this approach perpetuates rape culture

7. *Id.* at 262.

8. *Id.*

9. *Id.* An adjustment disorder is a reaction to a stressful event. *Adjustment Disorders*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/adjustment-disorders [https://perma.cc/N72W-PGU4]. An adjustment disorder with anxiety is one of six subtypes, and symptoms include nervousness, worry, and jitteriness. *See id.*; *see also* Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th at 262 n.3.

10. Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th at 262. Jane Doe was a junior in high school at the time of the incident. *Id.* at 261.

11. *Id.* at 262–63.

12. *Id.* at 263.

13. *Id.* at 274; *see* Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1295–97 (11th Cir. 2007).

14. *See* Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000) ("There is no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations."); Escue v. N. Okla. Coll., 450 F.3d 1146, 1156 (10th Cir. 2006) ("At no point does [plaintiff] allege that [the school's] response to her allegations was ineffective such that she was further harassed."); K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1057–58 (8th Cir. 2017) ("The deliberate indifference must, at a minimum, *cause* students to undergo harassment or make them liable or vulnerable to it." (cleaned up) (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999))).

15. *See* S.S. v. Alexander, 177 P.3d 724, 741 (Wash. Ct. App. 2008) (explaining that "[i]n the Title IX context, there is no 'one free rape' rule," and a student does not have to be raped twice before the school must respond).

and victim blaming, placing it in direct opposition to the goals the #MeToo movement brought to the legal forefront in the late 2010s.[16]

This Recent Development argues that the Fourth Circuit's approach—the single instance approach—to the deliberate indifference standard, while better for victims of sexual assault than the post-notice approach, can still go one step further in holding schools accountable. This analysis proceeds in four parts. Part I examines the history and development of Title IX and its jurisprudence. Specifically, Sections I.A, I.B, and I.C explore the circuit split on the correct approach to deliberate indifference in the Title IX context. Part II advocates for all circuits to adopt the Fourth Circuit's approach, given that the Eighth, Ninth, and Tenth Circuits' approach negatively affects victims and inhibits plaintiff success. Part III proposes the adoption of requirements from 34 C.F.R. § 106.44(a) into current Title IX jurisprudence as a third alternative method of analysis. Part IV discusses the *Doe v. Fairfax County School Board*[17] holding and larger Title IX implications on the #MeToo movement.

I. THE HISTORY AND DEVELOPMENT OF TITLE IX JURISPRUDENCE

Title IX was enacted as part of the Education Amendments in 1972.[18] Title IX provides, in part, 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."[19] As gender inequality was a major policy concern in the 1960s and 1970s, the goal of Title IX was to prohibit sex-based discrimination in educational settings.[20]

16. *See* Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, *in* GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 174, 174–75 (Laura L. O'Toole et al. eds., 3d ed. 2020); Natalie Pedersen & Christine Cross, *#MeToo and the Courts: An Analysis of the Movement's Effect on Workplace Sexual Harassment Law*, 53 U. TOL. L. REV. 71, 78–81 (2021). *But see* Danielle Bernstein, *#MeToo Has Changed the World—Except in Court*, ATLANTIC (Aug. 13, 2021), https://www.theatlantic.com/ideas/archive/2021/08/metoo-courts/619732/ [https://perma.cc/45Q6-MF3P (staff-uploaded, dark archive)] ("But as much as the court of public opinion has shifted in favor of victims of workplace sexual harassment, actual courts—where such victims should be able to seek relief for the abuse they have suffered—have not shifted nearly as much.").

17. 1 F.4th 257 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022).

18. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688).

19. 20 U.S.C. § 1681(a). Some types of discrimination that fall under Title IX include "sexual harassment; the failure to provide equal athletic opportunity; sex-based discrimination in a school's science, technology, engineering, and math (STEM) courses and programs; and discrimination based on pregnancy." *Sex Discrimination: Overview of the Law*, U.S. DEP'T EDUC., https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html [https://perma.cc/73UC-6MV2] (last updated Apr. 13, 2023).

20. *Title IX Legal Manual: Synopsis of Purpose of Title IX, Legislative History, and Regulations*, CIV. RTS. DIV., U.S. DEP'T JUST., https://www.justice.gov/crt/title-ix#II._Synopsis_of_Purpose_of_Title

In the years since Title IX's enactment, the Supreme Court has sought to define the contours of the law and its application. First, the Supreme Court delineated the two main congressional objectives of Title IX: (1) avoid the use of federal funds to "support discriminatory practices" in an educational setting and (2) protect individuals who are affected by such discrimination by way of a private right of action.[21] Second, in 1992, the Supreme Court expanded the definition of "sex discrimination" to include sexual assault and sexual harassment claims.[22] Finally, the Supreme Court extended Title IX to apply to peer-on-peer sexual assault and sexual harassment, rather than just teacher-on-student harassment.[23]

In order to succeed on a Title IX claim, plaintiffs must show: (1) the school had actual knowledge of sexual harassment, (2) the harassment was so severe and pervasive as to deprive its victim of an education, and (3) the school reacted to that harassment with deliberate indifference.[24] This part focuses on the third requirement—the deliberate indifference prong—and the differing approaches by the circuit courts.

A. *The Two Approaches to the Title IX Deliberate Indifference Standard*

As first laid out by the U.S. Supreme Court in *Gebser v. Lago Vista Independent School District*[25] and expanded upon in *Davis v. Monroe County Board of Education*,[26] once a school has actual knowledge that severe and pervasive[27]

_IX,_Legislative_History,_and_Regulations [https://perma.cc/7KZK-QP8T] (last updated Sept. 14, 2023). *See generally* Hillary Hunter, Comment, *Strike Three: Calling Out College Officials for Sexual Assault on Campus*, 50 TEX. TECH. L. REV. 277, 282–85 (2018) (providing a brief history of Title IX's enactment).

21. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704, 709 (1979).

22. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) ("When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex. We believe the same rule should apply when a teacher sexually harasses and abuses a student." (cleaned up) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986))). This expansion mirrored the interpretation of similar Title VII legislation, which had extended the definition of "workplace sex discrimination" to include sexual misconduct. *See* Sidney E. McCoy, Comment, *The Safe Campus Act: Safe for Whom? An Analysis of Title IX and Conservative Efforts To Roll Back Progressive Campus Sexual Misconduct Reform*, 122 PENN. ST. L. REV. 763, 771 (2018).

23. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646 (1999) ("Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G.F.'s misconduct, in fact, took place in the classroom—the misconduct is taking place 'under' an 'operation' of the funding recipient.").

24. *Id.* at 650. The Court adopted these requirements from an earlier Title IX case. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) ("We think, moreover, that the response must amount to deliberate indifference to discrimination.").

25. 524 U.S. 274 (1998).

26. 526 U.S. 629 (1999).

27. *See id.* at 652 ("Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender."); Doe v.

peer-on-peer sexual harassment has occurred, Title IX requires schools to take some corrective action to remedy the situation in order to avoid being "deliberately indifferent" to the harassment.[28] Deliberate indifference is "an official decision by the [school] not to remedy the violation."[29] While some circuits have interpreted this standard to apply after just one incident of severe and pervasive sexual harassment, other circuits have held that "*post*-notice harassment is required to show a school's deliberate indifference."[30] For example, some circuits have held that when a student is sexually harassed one time and notifies the school, the institution must attempt to address the incident to avoid Title IX liability.[31] On the other hand, some circuits have held that after this initial notification, the student must be sexually harassed *again* in order for the school to be held liable.[32]

The deliberate indifference prong has been the focus of many Title IX actions. Thus, circuit courts' interpretations of the deliberate indifference standard dictate the level at which students will be protected from harassment at school.

B. *The Eighth, Ninth, and Tenth Circuits' Approach to Deliberate Indifference*

The Eighth, Ninth, and Tenth Circuits'[33] approach to the deliberate indifference standard—the post-notice approach—requires a showing of *post*-notice harassment. This means that a school is not obligated to take action against harassment until a student faces assault *again* after reporting an initial incident. The following cases discuss similar decisions among the circuits, highlighting the post-notice approach and its impact on victims.

Dardanelle Sch. Dist., 928 F.3d 722, 727 (8th Cir. 2019) (holding that despite two separate incidents of peer-on-peer sexual assault, the harassment was not severe enough to deprive Doe of her equal access to education because her "grade point average increased in both her junior and senior years, and she graduated on time"). *But see* Doe v. Pawtucket Sch. Dep't, 969 F.3d 1, 10 (1st Cir. 2020) (finding severe and pervasive harassment after Doe "alleged that she was assaulted in physical education class and then raped two times in the subsequent months," was diagnosed with numerous mental health disorders, and forced to attend a school outside of her district).

28. *Gebser*, 524 U.S. at 277.

29. *Id.* at 290; *see also* Kelly Dixson 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, 1574 (2000) ("The 1999 Supreme Court decision in *Davis*, however, established that severe student-on-student harassment that creates a hostile environment is actionable under Title IX when coupled with deliberate indifference by a school official with authority to remedy the conduct.").

30. Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 273 n.12 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022).

31. *See* discussion *infra* Section I.C.

32. *See* discussion *infra* Section I.B.

33. The Sixth Circuit similarly follows this approach. *See infra* Part II.

The Ninth Circuit first delineated the post-notice approach in *Reese v. Jefferson School District No. 14J*.[34] In *Reese*, four female plaintiffs, high school seniors, were punished for a prank they participated in during a school trip.[35] The plaintiffs threw water balloons at fellow male students.[36] During a meeting with school officials, the students admitted that the reason they planned the prank was to retaliate against the boys, who had committed "several acts of harassment" against the plaintiffs throughout the school year.[37] Nonetheless, the four students were barred from participating in their commencement ceremony.[38] The students filed a Title IX action, claiming the school was deliberately indifferent to the harassment upon receiving notice.[39] The Ninth Circuit ultimately held that the school was not deliberately indifferent.[40] It articulated the deliberate indifference standard to require that a school's lack of action must "cause students to undergo harassment or make them . . . vulnerable to it."[41] The Ninth Circuit reasoned that because there was "no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations," the school did not subject the plaintiffs to further harassment.[42] In other words, because there was no post-notice harassment, the school was not liable for its inaction.

The Tenth Circuit took a similar approach in *Escue v. Northern Oklahoma College*.[43] In *Escue*, the plaintiff, Callie Escue, was a former student at Northern Oklahoma College.[44] She was in multiple classes with Professor Richard Finton, whom she claimed "touched her inappropriately without her consent on multiple occasions and made numerous sexual comments" about her in front of her and her peers.[45] Finton even admitted to making many of these

34. 208 F.3d 736 (9th Cir. 2000).

35. *Id.* at 737–38.

36. *Id.* at 738.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 740. Much of this conclusion stemmed from the fact that the plaintiffs "had never reported any harassment" prior to the meeting with school officials. *Id.* at 738. However, choosing not to report acts of sexual violence is not a new phenomenon amongst victims. *See* Hannah Brenner Johnson, *Standing in Between Sexual Violence Victims and Access to Justice: The Limits of Title IX*, 73 OKLA. L. REV. 15, 21–22 (2020) (citing studies indicating that "more than ninety percent of sexual assault victims on college campuses do not report the assault"); *see also* Jodie Murphy-Oikonen, Karen McQueen, Ainsley Miller, Lori Chambers & Alexa Hiebert, *Unfounded Sexual Assault: Women's Experiences of Not Being Believed by the Police*, 37 J. INTERPERSONAL VIOLENCE NP8916, NP8927 (2022) (describing why victims choose not to report their assaults).

41. *Reese*, 208 F.3d at 739 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999)).

42. *Id.* at 740.

43. 450 F.3d 1146 (10th Cir. 2006).

44. *Id.* at 1149.

45. *Id.*

inappropriate comments.[46] Moreover, Escue's complaint was not the first time that students had alerted the school about Finton's inappropriate behavior—it was simply the first time the school decided to investigate it.[47] In response to Escue's actions, the school permitted her to drop Finton's class.[48] However, it did not immediately fire Finton.[49] Rather, it held off on terminating its relationship with him until the end of the semester when Finton originally planned on retiring.[50] Nonetheless, the Tenth Circuit determined that the school was not deliberately indifferent.[51] It first reasoned that, per *Davis*, the school's actions were not "clearly unreasonable."[52] Second, it noted the significance of the fact that Escue was not sexually harassed *again* despite her claim that the school was deliberately indifferent.[53] Therefore, the Tenth Circuit read the deliberate indifference standard to require a showing of post-notice harassment in order to trigger any school liability. The court did not address the fact that the school's inaction could have made Escue more "vulnerable" to further sexual harassment, thus perpetuating rape culture and a failure to hold harassers accountable, both in and out of the court system.[54]

Most recently, in *K.T. v. Culver-Stockton College*,[55] the Eighth Circuit reaffirmed the idea that a school's deliberate indifference must *subject* a student to further, post-notice harassment.[56] In *K.T.*, the plaintiff was a sixteen-year-old high school student who was visiting Culver-Stockton College as a potential soccer team recruit.[57] During the visit, she attended a fraternity party where one of the fraternity members "physically and sexually assaulted" her.[58] While the plaintiff reported the incident to Culver-Stockton College authorities, "the College did nothing."[59] After K.T. brought suit under Title IX, the court held that K.T. failed to show that there was some "causal nexus between Culver-

46. *Id.*

47. *Id.* at 1150–51, 1155 ("Ms. [Escue] alleges that NOC's investigation into her allegations was not significant until she filed this lawsuit."). *See generally* Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671 (providing a comprehensive study of faculty-involved sexual harassment).

48. *Escue*, 450 F.3d at 1155.

49. *Id.* at 1150.

50. *Id.* See generally Katie Rose Guest Pryal, *The Consequences of Resisting a Professor's Advances*, TOAST (Mar. 23, 2016), http://the-toast.net/2016/03/23/the-consequences-of-resisting-a-professors-advances/ [https://perma.cc/E6SX-JG99], for a discussion about predatory professors and the fall out of their actions.

51. *Escue*, 450 F.3d. at 1156.

52. *Id.* at 1155 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

53. *Id.*

54. *Id.*

55. 865 F.3d 1054 (8th Cir. 2017).

56. *Id.* at 1057.

57. *Id.* at 1056.

58. *Id.*

59. *Id.*

Stockton's inaction and K.T.'s experiencing sexual harassment."[60] Thus, K.T. had failed to demonstrate that the school was deliberately indifferent to her sexual harassment.[61] This case implies, similarly to those in the Ninth and Tenth Circuits, that K.T. needed to show a second, post-notice incident of harassment in order for Culver-Stockton College to be held liable.

C. *The First, Fourth, and Eleventh Circuits' Approach to Deliberate Indifference*

The First, Fourth, and Eleventh Circuits take a different approach in analyzing the deliberate indifference prong of Title IX cases—the single instance approach. In *Williams v. Board of Regents of the University System of Georgia*,[62] Tiffany Williams, a student at the University of Georgia, was raped and sexually assaulted by three male student-athletes.[63] Williams immediately notified the school police and, shortly after, permanently withdrew from the University of Georgia.[64] Despite a prompt and thorough investigation by the police, the University "waited . . . eight months before conducting a disciplinary hearing to determine whether to sanction the alleged assailants."[65] The Eleventh Circuit held that this conduct by the school, in addition to the fact that it was aware of one of the athlete's prior history of sexual assault, amounted to deliberate indifference.[66] The court reasoned that the school's response to the incident was "clearly unreasonable," and left Williams "vulnerable" to the sexual assault and further assaults.[67]

In *Fitzgerald v. Barnstable School Committee*,[68] the First Circuit was persuaded by the Eleventh Circuit's rationale.[69] In *Fitzgerald*, a kindergarten student, Jacqueline Fitzgerald, claimed she was subjected to "grotesque" harassment at the hands of a third-grade boy, Briton Oleson.[70] While the district

60. *Id.* at 1058.

61. *See id.* at 1057–58.

62. 477 F.3d 1282 (11th Cir. 2007).

63. *Id.* at 1288. The incident began when Williams had consensual sex with Tony Cole, a student-athlete, in Cole's room. *Id.* Unbeknownst to Williams, another student-athlete, Brandon Williams, was hiding in Cole's closet. *Id.* The two men had planned for Brandon Williams to rape Tiffany Williams, which he attempted to do when Cole left the room. *Id.* Meanwhile, Cole called a third student, Steven Thomas, who also came to Cole's room and raped Williams. *Id.*

64. *Id.* at 1289.

65. *Id.* at 1296.

66. *Id.* at 1296–97. Tony Cole was accused of two prior instances of sexual assault, one incident at the Community College of Rhode Island and one incident involving a store clerk. See Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 96 (2010), for a more in-depth discussion of Cole's past.

67. *Williams*, 477 F.3d at 1295–96.

68. 504 F.3d 165 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).

69. *Id.* at 172–73.

70. *Id.* at 168–69 ("Jacqueline . . . informed her parents . . . that each time she wore a dress to school—typically, two to three times a week—an older student on her school bus would bully her into

court applied the post-notice approach, the First Circuit did not agree.[71] The court reasoned that "a single instance of peer-on-peer harassment . . . might form a basis for Title IX liability if that incident were vile enough" and the school's response to it "unreasonable enough to have the combined systemic effect of denying [the student] access" to education.[72] Thus, the First Circuit adopted a more expansive reading of *Davis* than the other circuits. Rather than requiring a showing that schools directly *cause* further harassment, *Fitzgerald* found that a school may be subject to Title IX liability if it simply makes students "liable or vulnerable" to further harassment.[73]

With the First and Eleventh Circuit decisions as examples, the Fourth Circuit applied the single instance approach in *Doe v. Fairfax County School Board*. First, the court recognized that just one incident of sexual harassment "can inflict serious lasting harms on the victim—physical, psychological, emotional, and social."[74] When these "lasting harms" result in the loss of educational opportunities, Title IX provides recourse for students.[75] Second, the court analyzed whether the school's response was unreasonable and if it had the effect of making Doe "liable or vulnerable" to future harassment.[76] The court concluded that a reasonable jury could find that the school's response was "clearly unreasonable," as school officials failed to take immediate action and made several unprofessional comments throughout the investigation.[77] Moreover, officials did nothing to discipline Smith.[78] He was never suspended or expelled, leaving Doe vulnerable.[79] She was "terrified of seeing or being near Smith," leading her to go out of her way to avoid him and sitting out of band class rather than participating—the exact harm that Title IX was created to remedy.[80]

lifting her skirt. . . . [I]n addition to pressing her to lift her dress, Briton had bullied her into pulling down her underpants and spreading her legs.").

71. *See id.* at 172 ("In the district court's view, the plaintiffs' claim turned on a point of law: 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.").

72. *Id.* at 172–73.

73. *Id.* at 172.

74. Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 274 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022).

75. *See id.*

76. *Id.* at 273–74.

77. *Id.* at 271–73 ("[W]hen Assistant Principal Taylor emailed Banbury asking how many inches of snow Oakton was expected to get in the coming days, Banbury responded, 'How many inches under the blanket or on the ground?' (Banbury admitt[ed] during trial that this comment was alluding to 'Doe stroking [] Smith's penis' under the blanket and thus was 'inappropriate')." (third alteration in original)).

78. *Id.* at 262.

79. *Id.*

80. *Id.*

Thus, the post-notice approach requires a second instance of harassment before schools are liable under Title IX, while under the single instance approach, schools may be liable after one severe incident of harassment.[81] The next part discusses the negative effects of the post-notice approach and advocates for the single instance approach as the better of the two options.

II. THE NEGATIVE EFFECTS OF THE POST-NOTICE APPROACH ON VICTIMS AND WHY THE FOURTH CIRCUIT'S APPROACH IS BETTER

The post-notice approach has a negative impact on victims, specifically because it leaves them vulnerable to further harassment, as their schools are not required to take any immediate action. *Kollaritsch v. Michigan State University Board of Trustees*[82] demonstrates this exact situation. In *Kollaritsch*, Emily Kollaritsch was a student at Michigan State University when she was sexually assaulted by another student, John Doe.[83] After reporting the incident, Michigan State University conducted an investigation, ultimately prohibiting Doe from contacting Kollaritsch.[84] However, Doe and Kollaritsch lived in the same dormitory, and Doe violated the no contact order at least nine times.[85] While Kollaritsch also reported these subsequent encounters as retaliatory "stalking, harassing, and intimidating," the Sixth Circuit held that because Kollaritsch could not demonstrate further *physical* harassment, the school was not liable.[86] *Kollaritsch* demonstrates that the school's failure to adequately respond to Kollaritsch's sexual assault complaint—for example, by not removing Doe from the dorms—left her liable or vulnerable to further harassment. This inadequate response would have been enough to hold the school liable in the First, Fourth, and Eleventh Circuits, as Kollaritsch faced severe and pervasive harassment, notified her school, and failed to see any response. Yet, this was not enough in the Sixth Circuit because Kollaritsch failed to demonstrate a post-notice incident of harassment. A person's ability to seek justice and remedies should not be dependent on their location. However, this circuit split makes a

81. As this holding deepened the circuit split on the deliberate indifference issue, some believed the Supreme Court would take up this case to resolve the disagreement. *See* Jeanne Meyer & Dan Fotoples, *U.S. Supreme Court Seems Likely To Review "One Free Rape Rule" Under Title IX*, ASS'N TITLE IX ADM'RS., https://www.atixa.org/blog/u-s-supreme-court-seems-likely-to-review-one-free-rape-rule-under-title-ix/ [https://perma.cc/HH7J-B4M4]. However, the Supreme Court denied certiorari. Fairfax Cnty. Sch. Bd. v. Doe, 143 S. Ct. 442 (2022).

82. 944 F.3d 613 (6th Cir. 2019).

83. *Id.* at 624.

84. *Id.*

85. *Id.*

86. *See id.* at 624–25 ("Kollaritsch has not pleaded further actionable sexual harassment."). While the Sixth Circuit explicitly noted that harassment need not be physical in order to constitute "severe harassment," *id.* at 620 n.2, it implied that the lack of physical contact is what left Kollaritsch without any recourse, *id.* at 624–25.

plaintiff's safety, and chances of succeeding on their claim, integrally intertwined with what federal circuit court's jurisdiction they reside in.

It was possible that Doe could have sexually assaulted Kollaritsch again on any of the nine times the two encountered each other. Furthermore, as the two lived in the same dorm, Doe presumably had the opportunity to break into her room as a direct result of Michigan State's inaction. However, because Doe chose not to offend again during any of those opportunities, Kollaritsch could not hold her school accountable, despite her documented feelings of fear and anxiety.[87] This case demonstrates the troubling results of the post-notice approach: schools get "one free rape" before they must act.

Thus, the Fourth Circuit's single instance approach is better than the post-notice approach, as it allows students to hold their schools accountable when they fail to protect students from sexual harassment. Allowing schools to avoid accountability and putting the onus on victims to demonstrate why they deserve protection from their institutions is antithetical to Title IX's purpose. The single instance approach is a small step toward better effectuating the goals of this important legislation, but, as the next part demonstrates, the judicial system can go one step further.

III. ANOTHER ALTERNATIVE TO THE CURRENT DELIBERATE INDIFFERENCE ANALYSIS

While the Fourth Circuit's approach in *Doe v. Fairfax County School Board* is the better of the two prominent methods for analyzing deliberate indifference in the Title IX context, there is an alternative that may strike a more even balance between holding schools rightly accountable and recompensing victims—the factors from 34 C.F.R. § 106.44(a).[88] Under the current standard in the Fourth Circuit, just one incident of "severe sexual harassment" is enough to form the basis of Title IX liability.[89] This approach better serves plaintiffs, as they are not required to show "*post*-notice harassment" in order for their school to be liable.[90]

However, the Fourth Circuit approach creates a different obstacle for plaintiffs. Courts may analyze the severity of the single instance of harassment and decide that it is not serious enough to trigger Title IX liability.[91] While this has not been a deciding factor in Title IX cases, the Fourth Circuit's approach

87. *Id.* at 624–25.

88. 34 C.F.R. § 106.44(a) (2022).

89. Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 274 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022).

90. *Id.* at 273 n.12.

91. *Id.* at 276 n.15 ("We respectfully disagree with our dissenting colleague's assertion that the sexual assault Doe allegedly suffered was not sufficiently severe to be actionable under Title IX because it was 'an isolated, one-time incident.'").

opens the door for courts to decide whether they deem harassment bad enough to warrant a remedy. Thus, the Fourth Circuit approach may also leave victims with no recourse. However, there is a third alternative method of analysis that courts may use.

That alternative is to adopt the factors from 34 C.F.R. § 106.44(a)[92] into current Title IX jurisprudence. In 2020, the Department of Education (the "Department") amended the Code of Federal Regulations to "specify how recipients of Federal financial assistance covered by Title IX . . . must respond to allegations of sexual harassment" in order to properly effectuate the goals of Title IX.[93] The Department made the amendments "in response to . . . concerns that the standard of deliberate indifference gives [schools] too much leeway in responding to sexual harassment, and in response to [those] who requested greater clarity about how the Department will apply the deliberate indifference standard."[94] While the Department relied on the Supreme Court's decisions in *Gebser* and *Davis*, it adapted the holdings to "impose[] mandatory, specific obligations" on schools that *Gebser* and *Davis* did not require.[95]

These amendments specified that a school's response to a sexual harassment claim must be prompt, consist of offering supportive measures to a student-victim, ensure that the Title IX Coordinator contacts each student-victim to discuss supportive measures, consider the student's wishes regarding supportive measures, inform the student of the availability of supportive measures with or without the filing of a formal complaint, and explain to the student the process for filing a formal complaint.[96] If a school makes its best effort to satisfy some or all of these regulations, then it cannot be found to be deliberately indifferent.[97]

Given the disagreement amongst federal circuit courts as to what deliberate indifference means, these new regulations provide clear factors a court can look for when assessing whether a school was deliberately indifferent. Thus, courts should adopt the factors from 34 C.F.R. § 106.44(a) into their deliberate indifference inquiry, creating a "totality of the circumstances" approach to the third prong of a Title IX claim—specifically, considering all

92. 34 C.F.R. § 106.44(a) (2022).

93. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

94. *Id.* at 30044.

95. *Id.*

96. 34 C.F.R. § 106.44(a) (2022).

97. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30044 ("By using a deliberate indifference standard to evaluate a recipient's selection of supportive measures and remedies, and refraining from second guessing a recipient's disciplinary decisions, these final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident.").

"relevant facts and circumstances," not just the number of times harassment occurred, when analyzing deliberate indifference.[98]

One court has already applied these factors in its deliberate indifference analysis. In *Doe v. Syracuse University*,[99] Jane Doe, a student at Syracuse University, began a relationship with a student-athlete, Chase Scanlan.[100] Scanlan quickly became both physically and mentally abusive toward Doe.[101] After reporting these actions to school officials, Syracuse "fully informed Doe of her rights under Title IX . . . including her ability to file an official complaint, and the fact that she could have a[] [no contact order] put in place, a right she chose to exercise."[102] The court, looking for the specific responses outlined in 34 C.F.R. § 106.44(a), found that Syracuse was not deliberately indifferent.[103] The court reasoned that the university responded promptly to Doe's complaint and considered her wishes throughout the investigation of the incident.[104] While the court was not explicit in its consideration of the new regulations—only citing them twice, in passing[105]—this type of analysis is one step closer to a more balanced deliberate indifference inquiry.

This totality of the circumstances approach would also change the outcome of other Title IX cases. As applied to *Escue v. Northern Oklahoma College* and discussed in Section I.B, for example, the Tenth Circuit would likely have found that Northern Oklahoma College acted with deliberate indifference. In *Escue*, the college's actions were not "prompt" in response to complaints from Escue

98. *See* Jodi Levine Avergun, Note, *The Impact of* Illinois v. Gates*: The States Consider the Totality of the Circumstances Test*, 52 BROOK. L. REV. 1127, 1129 (1987) (describing the "totality of the circumstances" test in the criminal procedure context as requiring "a court to examine all the relevant facts and circumstances" when analyzing an issue); Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75, 75 (2014) (describing the "totality-of-the-circumstances" test as rejecting "rigid," bright line rules).

99. No. 21-cv-977, 2022 WL 4094555 (N.D.N.Y. Sept. 7, 2022), *aff'd in part, vacated in part*, No. 22-2674, 2023 WL 7391653 (2d Cir. Nov. 8, 2023).

100. *Id.* at *1.

101. *Id.* ("Scanlan shoved Doe to the ground, 'aggressively monitor[ed Doe]'s personal belongings to prevent [her] from controlling her reproductive health,' stalked Doe, entered her bedroom without her permission in the middle of the night, abused and threatened to kill his dog in Doe's presence, and stole and damaged Doe's personal property." (alterations in original)).

102. *Id.* at *5.

103. *Id.* at *5–6.

104. *Id.*

105. *Id.* (discussing 34 C.F.R. § 106.44(a) when analyzing whether the school considered Doe's wishes when responding to her complaint). Upon review of the lower court's decision, the Second Circuit tacitly approved of the use of the federal regulations in a deliberate indifference analysis. Doe v. Syracuse Univ., No. 22-2674, 2023 WL 7391653, at *2 (2d Cir. Nov. 8, 2023) (citing Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30190 (May 19, 2020)) ("[Syracuse] did not act with deliberate indifference by declining to conduct an independent investigation after Doe decided not to pursue further action. The relevant federal regulations caution against school intervention when a complainant declines to pursue further action."). This implies the Second Circuit may adopt this method of analysis if given the opportunity to review another Title IX case.

and other students, as demonstrated by the fact that the school waited until Escue's complaint to properly investigate the claims.[106] Moreover, the college failed to "consider" Escue's "wishes with respect to supportive measures."[107] Escue made it clear that she wanted the school to "remove[] Mr. Finton from the classroom, and specifically instruct[] him to keep away from her"; however, the school did not even terminate its relationship with Finton until the end of the semester.[108] With the implementation of the factors from 34 C.F.R. § 106.44(a), the Tenth Circuit would likely have found the school's conduct to meet the standard of deliberate indifference. Thus, adopting these regulations into Title IX jurisprudence would protect victims in a way that the current rigid standard cannot.

With this type of analysis, schools would be held accountable, as they would have specific requirements to fulfil in order to avoid Title IX liability. In turn, victims of sexual assault would expect a more adequate response from their educational institutions. Further, this would eliminate the problematic aspect of the post-notice standard: that victims must be assaulted multiple times before a school can be held accountable. Finally, it would close the loophole created by the Fourth Circuit's approach in which courts can deem that one single incident of sexual assault is not severe enough.

IV. TITLE IX AND THE *DOE* HOLDING'S IMPLICATIONS ON THE #METOO MOVEMENT

The single instance approach in *Doe v. Fairfax County School Board* indicates progress for the #MeToo movement and its permeation into the legal field as courts begin to hold schools accountable, confront biased behaviors, and acknowledge victims' experiences.[109] The #MeToo movement is "a global, and survivor-led, movement against sexual violence."[110] While the movement gained widespread popularity in 2017, as victims of sexual assault came forward in droves to talk about their experiences, the phrase was first coined, and the

106. Escue v. N. Okla. Coll., 450 F.3d 1146, 1150–51, 1155 (10th Cir. 2006).

107. 34 C.F.R. § 106.44(a) (2022).

108. *Escue*, 450 F.3d at 1150, 1155.

109. *See* Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 272–73 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022) ("Based on this evidence . . . a jury could reasonably conclude that the school officials improperly trivialized and dismissed the reports of sexual assault; that they simply assumed, without adequate investigation, that the bus incident was a consensual sexual encounter between teenagers; that they neglected to take even the minimal step of checking in on Doe to make sure she was okay; that they tried to sweep the reports under the rug so as not to cause trouble for Smith, one of their star students who went on to attend a prestigious public university; that they engaged in a 'blame-the-victim' mentality in investigating and dealing with the bus incident; or that their decision to believe Smith's story over Doe's—even after Smith had initially lied to them about whether he had touched Doe—was likely attributable to bias.").

110. *Me Too*, ME TOO MOVEMENT, https://metoomvmt.org/ [https://perma.cc/44J7-MMFF].

movement first conceived, in 2006 by Tarana Burke.[111] Ms. Burke, a lifetime activist, started the movement to "facilitate healing" and "train survivors to work in communities of color."[112]

In 2022, people began to see the positive effects of the movement.[113] Research indicates that seven-in-ten U.S. adults say that "people who commit sexual harassment or assault in the workplace are now more likely to be held responsible for their actions," and "those who report harassment or assault at work are now more likely to be believed."[114] Although society has come a long way from not believing victims, institutional change has been gradual, and many policies, including Title IX policies, are not 100% victim centered.[115]

Schools are at the forefront of institutional change, and their approach to Title IX investigations can help further the #MeToo movement. While a salient tension exists between the mantra "believe women" and the presumption of innocence for alleged harassers,[116] some scholars who have explored this tension do not interpret "believe women" so literally. One interpretation is to simply "trust women more than we do."[117] This means taking what victims say seriously enough to conduct a thorough investigation[118] and treating both the accusation and the denial neutrally in order to discover the truth.[119] This approach can afford victims the respect that "believe women" is meant to ensure, while properly effectuating Title IX's goal of "promoting impartiality."[120] Thus, believing victims is an important step schools can take when investigating Title IX claims. The Fourth Circuit's approach to deliberate indifference ensures that schools conduct a thorough investigation, in which they believe the victim—by

111. Kerri Lee Alexander, *Tarana Burke*, NAT'L WOMEN'S HIST. MUSEUM (2020), https://www.womenshistory.org/education-resources/biographies/tarana-burke [https://perma.cc/R764-WH44].

112. *Id.*

113. Anna Brown, *More than Twice as Many Americans Support than Oppose the #MeToo Movement*, PEW RSCH. CTR. (Sept. 29, 2022), https://www.pewresearch.org/social-trends/2022/09/29/more-than-twice-as-many-americans-support-than-oppose-the-metoo-movement/ [https://perma.cc/3D84-3TWL].

114. *Id.*

115. *See* Leah Asmelash, *In 5 Years of #MeToo, Here's What's Changed – And What Hasn't*, CNN (Oct. 27, 2022, 11:17 AM), https://www.cnn.com/2022/10/27/us/metoo-five-years-later-cec/index.html [https://perma.cc/PF2A-BXSH].

116. See generally Kimberly Kessler Ferzan, *#BelieveWomen and the Presumption of Innocence: Clarifying the Questions for Law and Life*, *in* TRUTH AND EVIDENCE 65 (Melissa Schwartzberg & Philip Kitcher eds., 2021), for further discussion of this tension.

117. Renée Jorgensen Bollinger, *#BelieveWomen and the Ethics of Belief*, *in* TRUTH AND EVIDENCE, *supra* note 116, at 109, 110.

118. *Id.* at 110–11.

119. Pa. Att'y Gen. et al., Comment Letter on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), https://www.attorneygeneral.gov/wp-content/uploads/2019/01/2019-01-31-Title-IX-Comments-Final.pdf [https://perma.cc/H8SC-UABN].

120. *Id.*

requiring only a single instance of harassment—and do their due diligence. These small changes in approach and attitude toward victims will allow for further progress of the #MeToo movement as well as greater support from the judicial system for victims of assault.

A second barrier to progress arises when school officials who are in charge of investigations and protecting victims participate in victim blaming. Victim blaming, in the context of sexual harassment, is when victims of such assault are blamed in some way for the assaulter's actions.[121] This attitude further contributes to inadequate investigations. The #MeToo movement has made significant strides in combatting this mentality toward victims by allowing space and support for women to speak out about their experiences.[122] The Fourth Circuit's single instance approach also helps combat this mindset by placing a greater burden on schools to conduct thorough investigations soon after they are notified about an instance of sexual assault.

In *Doe v. Fairfax County School Board*, the Fourth Circuit found that the school engaged in "'blame-the-victim' mentality" and "that their decision to believe Smith's story over Doe's—even after Smith had initially lied to them about whether he had touched Doe—was likely attributable to bias."[123] Moreover, the assistant principal asked Doe "what she was wearing and why she did not scream" during the assault.[124] When Doe responded that she "did not want to be embarrassed," the assistant principal "asked her in a sarcastic manner, 'Oh, well, how do you feel now?'"[125] All of these failings on the school's part contributed to the court's decision to find that a reasonable jury could be persuaded that the school was deliberately indifferent, thus implying that the Fourth Circuit's standard does not condone victim blaming. Conversely, the Tenth Circuit's ruling in *Escue* did not yield the same results, even though there was evidence of victim blaming in that case as well.[126] This difference in outcome underscores the benefits of applying the single instance approach in

121. *See* Michael Vitiello, *Victim Blaming: When Is It Legally Appropriate?*, 41 QUINNIPIAC L. REV. 37, 44 (2022); Kayleigh Roberts, *The Psychology of Victim Blaming*, ATLANTIC (Oct. 5, 2016), https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/ [https://perma.cc/SE93-TC4M (staff-uploaded, dark archive)]; *Victim Blaming*, SEXUAL ASSAULT CTR. EDMONTON, https://www.sace.ca/learn/victim-blaming/ [https://perma.cc/R6V4-QTJP] ("Some victim blaming examples: 'What did you expect going out dressed like that?,' 'You shouldn't have gone home with them.'").

122. Swagata Sen, *MeToo: A Movement Helped Women Dismantle Victim Blaming*, RTS. EQUAL. (Jan. 15, 2019), https://www.rightsofequality.com/me-too-movement/ [https://perma.cc/A9Q9-B753].

123. Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 273 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 442 (2022).

124. *Id.* at 272.

125. *Id.*

126. Escue v. N. Okla. Coll., 450 F.3d 1146, 1150 (10th Cir. 2006) ("[Escue's friend] testified that, after hearing about the sexual harassment claims . . . he had told a friend that he believed 'whatever happened was as much [Escue's] fault as Finton's.'").

the context of deliberate indifference and how continuing to push for victim-centered jurisprudence will better accomplish the goals of both Title IX and the #MeToo movement.

CONCLUSION

Doe v. Fairfax County School Board signifies a step in the right direction for plaintiffs asserting Title IX claims against their educational institutions. Students in the Fourth Circuit will be able to establish that a school was deliberately indifferent based on a single instance of harassment as long as they can make a showing that the school's inaction made them more "liable or vulnerable" to further harassment. While an alternative to the current deliberate indifference standard—the requirements from 34 C.F.R. § 106.44(a)—could better effectuate the goals of Title IX and favor victims, the Fourth Circuit's holding is far better for plaintiffs than the post-notice approach. Victims of sexual assault should not need to be assaulted multiple times in order to have a viable claim against their schools. With the continuing proliferation of the #MeToo movement, all courts should aim to align with the Fourth Circuit and support victims.

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