Sexual Harassment in Education

Berkeley Center on Comparative Equality and Anti-Discrimination Law

October 28 - 29, 2021

WRITTEN CLE MATERIALS

DAY 1

DAY 2

Federal Title IX Regulations and University Policy

Suzanne Taylor, Systemwide Title IX Director,
University of California

2020 Amendments to Title IX Regulations – Trump Administration

- published for public comment November 2018
- 120,000+ comments
- issued in final form May 2020
- effective August 14, 2020
- prescriptive about grievance process schools must provide

2020 Amendments to Title IX Regulations – Biden Administration

- Executive Order April 2021
- Public Hearings June 2021
- Q&A July 2021
- Amended regs for public review and comment anticipated May 2022

Problematic Regulatory Provisions -- Examples

- narrow definition of sexual harassment
- schools held to lower standard
- cross-examination requirements
- exclusionary rule
- confidentiality requirements
- hearings for employees

Tenets Guiding Sexual Harassment Policy Development -- Examples

- encourage complainants to come forward
- treat parties both fairly and kindly
- provide just and reliable outcomes
- promote accountability
- minimize burden on parties, employees and institution
- provide clarity
- reflect institutional values

Due Process Rights -- Examples

- detailed notices
- advisors
- identify witnesses and submit evidence
- pose questions
- review and respond to evidence

Shifting Legal Landscape

- resource drain
- confusion
- human toll
- undermines credibility and integrity of work
- divisive

NATIONAL WOMEN'S LAW CENTER

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The Trump Title IX Rule

(Brief) Summary of Trump Title IX policies

- Rescinded 2001, 2011, and 2014 guidances
- Relies on toxic stereotypes and rape myths
- Created many harmful requirements that don't apply to any other type of student or staff misconduct—only sexual harassment
  - Schools can (sometimes must) ignore or dismiss survivors' complaints
  - Schools can (sometimes must) mistreat survivors whose complaints are not dismissed
  - Schools can (sometimes must) use uniquely unfair and traumatizing procedures to investigate sexual harassment.

Lawsuits Challenging the Trump Title IX rule

- **There have been 5 lawsuits challenging the Title IX rule**
  - 3 have been dismissed on technical grounds
  - 1 has been put on hold
  - 1 has issued a decision (NWLC)

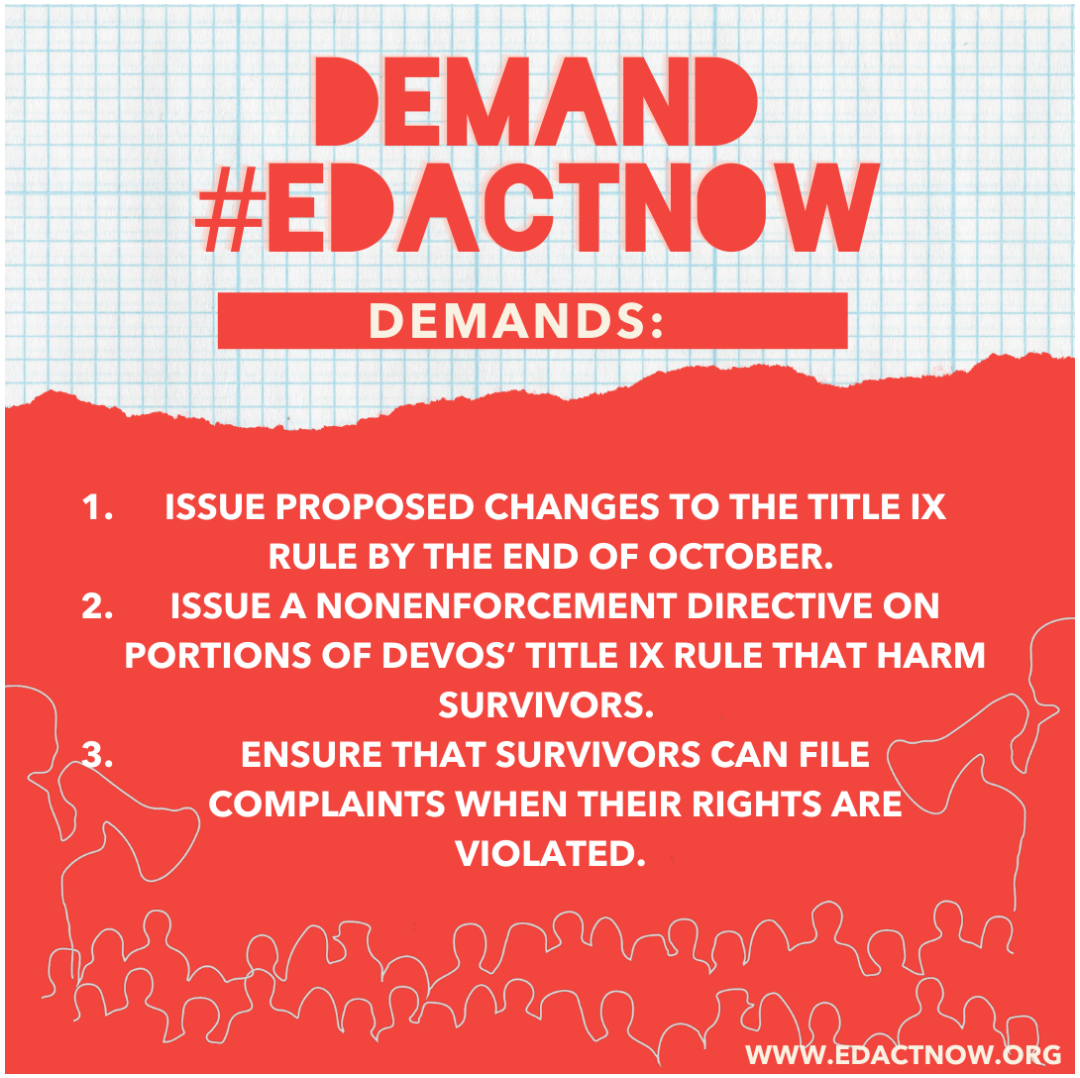
- **NWLC lawsuit**
  - Argument: the rule is illegal because it is "arbitrary and capricious" and is motivated by the toxic and false sex stereotype that survivors, especially women and girls, lie about rape => violates federal law, including the Constitution
  - **July/August 2021: The judge vacated one provision of the Trump rule because it was arbitrary and capricious.** This provision, which was part of 34 CFR 106.45(b)(6)(i), had required postsecondary schools to ignore all oral or written statements made by any party or witness who did not submit to cross-examination at a live hearing.

What’s Next?

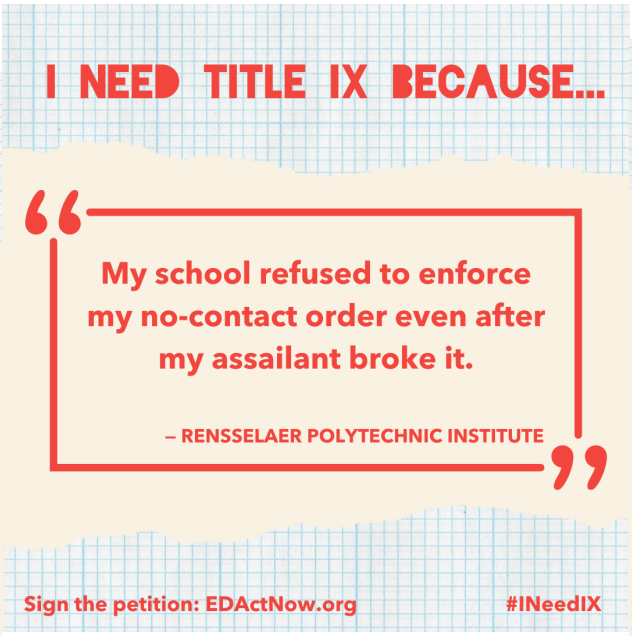
President Biden and the Department of Education's Actions:

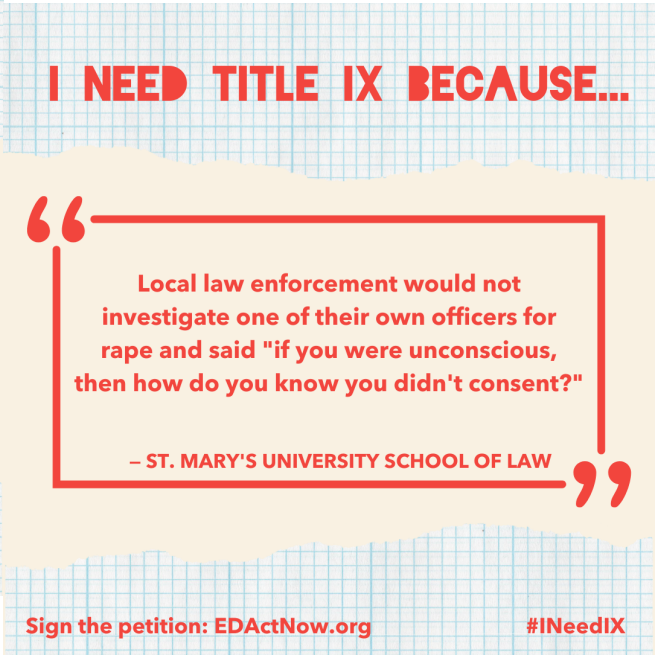
- **3/8/21:** Biden ordered Dept of Education to review all Title IX policies in 100 days and to "consider" rescinding the Trump Title IX rule
  - Those 100 days ended on 6/16
- **4/6/21:** Dept of Education announced plans to (1) hold a public hearing, (2) issue a Q&A doc about the Trump rule, and (3) propose a new Title IX rule
- **6/7-6/11:** Dept of Education held 5 days of public hearings to hear from members of the public about how to improve Title IX enforcement
  - Majority of commenters were strongly pro-survivor
- **6/10/21:** Dept of Education issued its regulatory agenda, which indicates they plan to propose a new Title IX rule in May 2022
- **7/20/21**: Dept of Education issued Q&A on Title IX regulations
- **8/24/21**: Dept of Education issued letter in light of decision in *VRLC v. Cardona*.

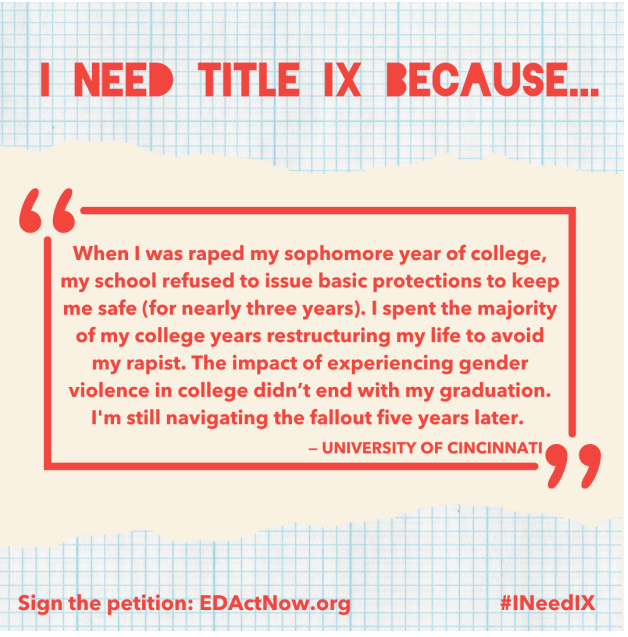
#ED Act Now

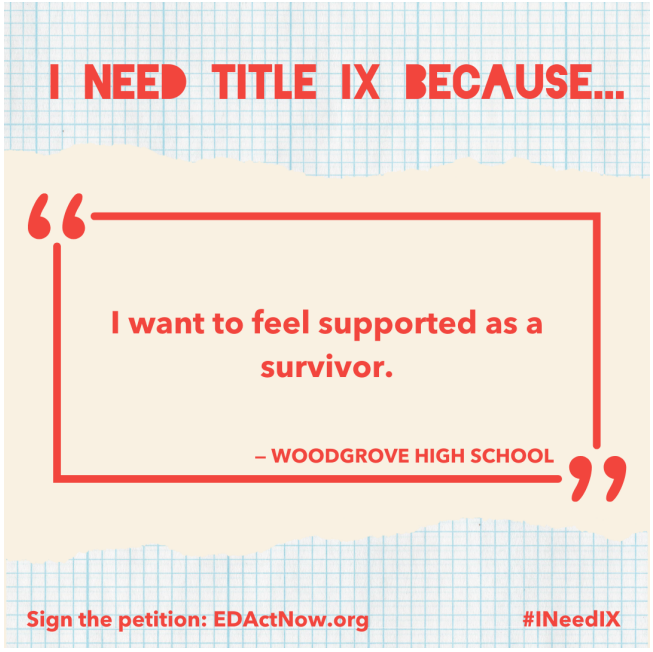

DEMAND
#EDACTNOW
DEMANDS:
1. ISSUE PROPOSED CHANGES TO THE TITLE IX RULE BY THE END OF OCTOBER.
2. ISSUE A NONENFORCEMENT DIRECTIVE ON PORTIONS OF DEVOS' TITLE IX RULE THAT HARM SURVIVORS.
3. ENSURE THAT SURVIVORS CAN FILE COMPLAINTS WHEN THEIR RIGHTS ARE VIOLATED.
WWW.EDACTNOW.ORG


I NEED TITLE IX BECAUSE...
Had I waited a little longer, I wouldn't have been able to report my sexual assault under the new rule.
– ITHACA COLLEGE
Sign the petition: EDActNow.org
#INeedIX


I NEED TITLE IX BECAUSE...
My school refused to enforce my no-contact order even after my assailant broke it.
– RENSSELAER POLYTECHNIC INSTITUTE
Sign the petition: EDActNow.org
#INeedIX


I NEED TITLE IX BECAUSE...
Local law enforcement would not investigate one of their own officers for rape and said "if you were unconscious, then how do you know you didn't consent?"
– ST. MARY'S UNIVERSITY SCHOOL OF LAW
Sign the petition: EDActNow.org
#INeedIX


I NEED TITLE IX BECAUSE...
When I was raped my sophomore year of college, my school refused to issue basic protections to keep me safe (for nearly three years). I spent the majority of my college years restructuring my life to avoid my rapist. The impact of experiencing gender violence in college didn't end with my graduation. I'm still navigating the fallout five years later.
– UNIVERSITY OF CINCINNATI
Sign the petition: EDActNow.org
#INeedIX


I NEED TITLE IX BECAUSE...
I want to feel supported as a survivor.
– WOODGROVE HIGH SCHOOL
Sign the petition: EDActNow.org
#INeedIX


I NEED TITLE IX BECAUSE...
When I experienced sexual assault in 2016, nearly nothing was done. We had laws in place but no one to enforce them and nearly 4 years later, I am still dealing with the repercussions of what happened to me.
–LOYOLA UNIVERSITY NEW ORLEANS
Sign the petition: EDActNow.org
#INeedIX

Title IX 50th Anniversary and Statutory Amendment?

- Title IX's 50th Anniversary – June 2022
- Title IX Take Responsibility Act
- Intersectional responses to harassment

MUNGER TOLLES & OLSON LLP

Berkeley Center of Comparative Equality and Anti-Discrimination Law

Sexual Harassment in Education

Plenary I

October 28, 2021

Hailyn Chen

MUNGER TOLLES & OLSON LLP

Overview

- What is the legal and regulatory landscape facing K-12 schools, colleges, and universities?

- What trends do we see in the case law and regulatory enforcement?

MUNGER TOLLES & OLSON LLP

Enforcement Agencies and Regulators

- U.S. Department of Education's Office of Civil Rights
- The U.S. Department of Health and Human Services' Office of Civil Rights
  - Resolution agreement with Michigan State University (August 2019) link
- The U.S. Department of Justice
  - Settlement with San Jose State University (September 2021) link
- State Auditors, State Law Enforcement and State AG Monitors
  - California State Auditor Report re UC and Cal State (2014) link
  - St. Paul's School Settlement with New Hampshire AG (2018) and Independent Compliance Overseer's Reports (2020-2021) link
- U.S. SafeSport
  - link

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Independent Internal Investigations

- Ohio State (2019)
  - "Ohio State released a report from independent investigators that details acts of sexual abuse against at least 177 former students by Dr. Richard Strauss during his employment with the university from 1978 to 1998."
  - Link
- UCLA (2020)
  - "The incidents described in this report are deeply upsetting and reflect alleged conduct that his completely antithetical to our values."
  - link
- University of Michigan (2021)
  - "Although the information these [University] individuals received varied in directness and specificity, Dr. Anderson's misconduct may have been detected earlier and brought to an end if they had considered, understood, investigated, or elevated what they heard."
  - link
- Louisiana State (2021)
  - LSU's handling of sexual misconduct complaints was a "serious institutional failure."
  - link

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Respondent Litigation

- Writ petitions
  - Seek to vacate findings and sanction
  - Basis for relief
    - Lack of a fair hearing or due process
    - School acted in excess of jurisdiction (failed to follow its own policies)
    - Findings not supported by substantial evidence
    - Severity of sanction
- Claims for damages
  - Gender discrimination (Title IX)

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Complainant and Survivor Litigation

- Extended statutes of limitation for civil claims of sexual assault
  - California Code of Civil Procedure § 340.1 (child); § 340.16 (adult)
- Treble damages for sexual assault resulting from entity's "cover up" – any effort to conceal evidence of sexual assault
  - California Code of Civil Procedure § 340.1
- Title IX
  - Pre-assault theory: Karasek v. Regents (9th Cir. 2020)
- Class action and mass tort cases involving serial perpetrators

Best Practices and Common Errors in Investigation – A Simulation

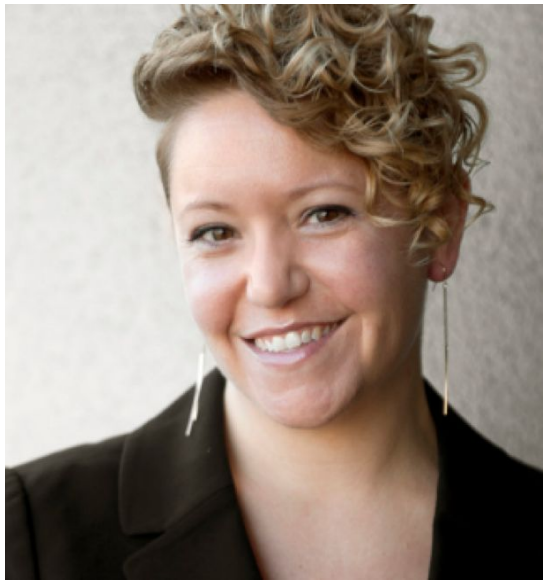
Alezah Trigueros, Oppenheimer Investigations Group LLP

Brenda Star Adams, Equal Rights Advocates

Marcie Fitzsimmons, Gordon & Rees Scully Mansukhani

About us

Alezah Trigueros
(she/her)
Partner
Oppenheimer Investigations Group LLP



Brenda Star Adams
(she/her)
Senior Counsel, Education Equity & Litigation
Equal Rights Advocates

Marcie Isom Fitzsimmons
(she/her)
Partner
GRSM

Overview

- Mock investigation scenario
- Overview of the investigation process
  - Investigation planning
  - Evidence gathering
  - Making findings
  - Evaluating credibility
- Evaluating liability in investigations
  - Investigation scope
  - Advisors
  - Timing
  - Supportive measures
  - Concurrent criminal investigations
  - Outcomes

Our Investigation

- Complainant: Abbie Allen
- Respondent: Ben Brown
- Investigation conducted by ABC Investigations for XYZ City University

Summary of Allegations

- Abbie Allen alleged that on Saturday, October 16, 2021, at an off-campus house party, Ben Brown, an XYZ City junior, put his arm around Allen, made unwelcome sexual comments to her, physically blocked her exit from a room, and grabbed her arm to prevent her from walking away. Allen further alleged that Brown later sent Allen an unwanted nude photo over Snapchat.

Investigation Planning

Policy Considerations

- Be clear on the scope of your investigation ***before*** sending the Notice of Investigation
- Keep in mind the need to re-notice if additional allegations are raised during the investigation process
- Keep in mind the timing and deadlines imposed by the applicable Title IX policy and make sure you are sending out timely notices if extensions are needed
- Right to a support advisor

Supportive Measures

- The Title IX Coordinator is responsible for coordinating the effective implementation of Supportive Measures
- Be alert to requests that might be raised during interviews direct that information to the Title IX Coordinator

Our Investigation

- Complaint is filed September 6, 2021
- XYZ City University issues a mutual No Contact Order against both Allen and Brown
- XYC City University retains ABC Investigations October 26, 2021
- Notice letters issued to parties October 26, 2021

Evidence Gathering

Trauma Informed Practices

- Supportive measures
- Create a safe, comfortable environment
- Advocate or support person
- Allowing complainant to pace, fidget, take breaks
- Giving complainant space to tell their story in a less directed, nonconfrontational manner
- Understand effects of trauma on memory formation
- Try to trigger complainant’s sensory memories
- Giving complainant some control in the process

Identifying Witnesses

- Who to interview?
- Deciding not to interview a named witness
- Allowing witnesses to review their statements
- Reluctant witnesses

Authenticating Evidence

- Perils of relying on screenshots
- How to authenticate
- Limitations

Our Investigation

- Brown requested that the investigator interview all nine other students who were part of the same mentor group as Allen so that they could provide their recollection and assessment of Brown and Allen's interactions.
- Allen mentioned that one of her roommates, Davey Dune, would be reluctant to be interviewed as part of the investigation because she is seeking an executive board position for a sorority that is closely affiliated with the fraternity of which Brown is vice president.
- On Sunday, September 5, 2021, Brown sent Allen an inappropriate/obscene Snapchat photo, subsequently apologizing and saying the message was meant for someone else. Allen did not respond and blocked Brown on Snapchat. She no longer has access to those messages.

Making Findings

How Much Evidence is Sufficient?

- Evidence review by the parties
- Is there evidence that a party requested you gather that you have found to be unavailable? What steps did you take?
- Decision not to interview a particular witness – document reasoning

Evaluating Credibility

- Necessity of making credibility determinations
- Credibility factors to consider
  - Plausibility
  - Motive
  - Corroboration
  - Ability to perceive/recall
  - History of honesty/dishonesty
  - Habit/consistency
  - Inconsistent statements
  - Manner of testimony/demeanor
- Remember to consider the effects of trauma
  - Complainant's memory might not be linear
  - Trauma might impact demeanor
  - Factor this in when assessing credibility

Types of Findings/ Investigation Reports

- Evidence report
- Factual findings
- Policy determinations
- Resolution/outcome

Evaluating Liability in Title IX Investigations

General concepts to consider when evaluating liability

TOP 8

1. **Prompt** investigation and resolution
2. Timely provision and **effectiveness of interim measures**
3. Entitled to process that promotes **accountability**
4. Effectiveness of school's efforts to **end harassment**, **prevent its recurrence**, and **remedy its effects** is the measure.
5. What was **sloppy or incomplete** v. thorough and transparent?
6. Any **conflicts** of interest?
7. Credentials/ **experience of investigators**?
8. Ignored **credibility markers**? Trauma-informed approach?

New investigators: *highly recommend you read the ABA Recommendations on adjudicating gender-based misconduct cases*

What are the red flags in our mock investigation?

Scope of the Investigation

1. **Scope of the Investigation**
   - Was this properly routed outside of T9 policy?
   - What was the school's reasoning for this?
   - Is it documented?
   - When should this assessment be made?

Advisor

2. **Right to an Advisor**
   - Has complainant been notified of their right to an advisor?
   - Have they been copied on all correspondence? Connected with an advocate?
   - Has this been documented? What happens when advisor was on a list of recommended advisors but party thinks they are insufficient?

Timing

3. **Timing**
   - Delay of 1.5 months before initiating investigation - better to collect evidence and interview witnesses closer to the event
   - Delays can be reasonable
   - Important to document reason

Mutual NCO

4. **Mutual No-Contact Order**
   - Can constitute unlawful retaliation.
   - Often used as retaliatory tool by Respondent. What factors?
   - Look at SB 493 - prohibits mutual NCO's unless specific reasons
   - What enforcement?
   - How should T9 offices handle NCO violation allegations during pendency of investigation?
   - Consider violation in context of investigation?

Other Supportive Measures

5. Other supportive measures

- School should provide any measures necessary to end/prevent recurrence of/remedy effects of harassment.
- Examples of what this can look like:
  - Academic accommodations
  - Housing accommodations
  - Additional support (emotional; reach out to professors)
  - Remove him as her mentor/from the mentorship program
    - What training was provided to the mentors in this program? What consideration did the school give to the position of authority and power they had over these vulnerable populations? What training provided to the mentees?
- Who is the party that gets moved/changed?
- Can be difficult while the investigation is ongoing – case by case basis.

Ongoing Criminal Investigation

6. **Ongoing Criminal Investigation**
   - Should not delay investigation, but often can for logistical reasons
     - Note SB 493 prohibits consideration of evidence at a hearing by a party who did not participate in the investigation if they plead 5th
   - Tricky situation when law enforcement directs school to stop investigating
   - To what degree should schools be relying on police reports? It depends…
     - Be aware of unconscious bias.

Physical Evidence

7. **Physical Evidence**

- School's responsibility to gather relevant evidence and to assess whether conduct occurred by preponderance of the evidence - burden not on the parties
- Is there a dispute as to snapchat messages? If so, gathering evidence could help with credibility. If no dispute, what will snapchat show us?
- Practical considerations when it comes to gathering evidence: cost, time, ability, access to information. Consider other ways to corroborate evidence.

Outcome

8. **Is it supported by the evidence?**
   - Is the support well-documented?
9. **Does it promote accountability?**
   - Good case for early resolution? C seeks safety and not punishment; however consider the school's duty (and complainant's desire) to protect other mentees - can that be included in the agreement?
   - Is the complainant being notified of the sanctions and are they being offered an opportunity to object to them?
   - What if complainant changes her mind?
10. **Were there procedural issues with the case?**
    - Did the investigator refuse to consider evidence that was clearly relevant?
    - Did they spend significantly more time interviewing one party or their witnesses than the other?
    - Did they show a copy of one party's statement to the other party before interviewing them?
    - Did they fail to follow the school's prescribed policies?

Outcome (cont'd)

11. **Did investigator exhibit bias?**
    - Bias = inequitable = Title IX violation
    - Why only consider Respondent's proposed witnesses?
    - How to balance these? What to do with evidence about the victim's past sexual conduct?
        - SB 493's prohibition on considering past sexual conduct of victim.
12. **Was there new evidence?**
    - Was this evidence properly excluded?
        - Note: SB 493 prohibits parties from introducing evidence at a hearing or before another decision-maker if that evidence could have been but was not provided earlier in the process.
    - Communicating the outcome timely and appropriately

Questions?

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Litigating Title IX from a Survivor Perspective

Lauren Groth
Hutchinson Black and Cook LLC

Intro

- Plaintiff's Attorney
- Represent students/parents in Title IX administrative proceedings
- Represent students in federal civil litigation
- Advise students on their Title IX rights

The Basics

Federal law, which allows litigation across the country.

Primary claims arise from deliberate indifference to known sexual harassment

Also utilize state law claims and Section 1983 as compliments.

Also increasing use of Title IX official policy claims and class actions

Why Do Survivors Pursue Litigation?

- ❏ Institutional and Systemic Change
- ❏ Protect Other Students From Similar Experiences
- ❏ Have Their Story Heard
- ❏ Fight Back Against Institutional Betrayal
- ❏ Broaden the Discussion

What's New In the World of Litigation

- ❏ Culture/Official Policy Claims
- ❏ Utilizing Erroneous Outcome
- ❏ Rise of K-12 Litigation
- ❏ Increasing Polarization of Federal Circuit Courts

Thanks!

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GIVING *DAVIS* ITS DUE: WHY THE TENTH CIRCUIT HAS THE WINNING APPROACH IN TITLE IX'S DELIBERATE INDIFFERENCE CONTROVERSY

LAUREN E. GROTH,[†] LUCY WALKER,[††] COLLEEN M. KOCH,[†††] & JULIA ISHIYAMA[††††]

ABSTRACT

Civil claims under Title IX are an increasingly effective legal mechanism for addressing sexual harassment and discrimination in educational settings. Because a private right to action under Title IX was only established by the Supreme Court in 1992, Title IX jurisprudence is often subject to conflicting and varied interpretations, leading to inconsistencies in how it is applied across different jurisdictions. This Article addresses one such conflict—whether plaintiffs who experience sex discrimination must plead that an educational institution's failure to address such harassment led them to experience further harassment, or if a plaintiff's vulnerability to further harassment is sufficient under Title IX. After reviewing the history and intent of Title IX, as well as the recent development of a circuit split on this issue between the Tenth and Sixth Circuits, this Article argues for the adoption of the Tenth Circuit standard, which permits plaintiffs to plead further harassment or vulnerability to further harassment. This standard is most consistent with the plain language of Title IX and the policy considerations that led to Title IX's adoption, and this approach best protects students from ongoing discrimination in their educational environment.

TABLE OF CONTENTS

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† Lauren Groth is a Title IX litigator and member at Hutchinson Black and Cook, LLC in Boulder, Colorado. All of the Authors wish to thank the *Denver Law Review* staff for their support, professionalism, and excellent feedback throughout the editing process.

†† Lucy K. Walker is a senior associate at Hutchinson Black and Cook, LLC, focusing in real estate, construction, and Title IX litigation.

††† Colleen Koch joined Hutchinson Black and Cook, LLC as an associate in 2017. Her practice focuses on commercial, real estate, and Title IX litigation.

†††† Julia Ishiyama is a recent graduate of Stanford Law School. She joined Hutchinson Black and Cook's Title IX practice in 2019.

INTRODUCTION

In the last few decades, our society's response to complaints of sexual assault and sexual violence has shifted. While these issues were once relegated to shameful whispers and reputational stigma, the incredible work of the #MeToo movement, Times Up, and countless other activist organizations has brought sexual violence into the light and continues to demand safer communities, workplaces, and educational experiences for women across the country.[1]

Buttressing these collective efforts are a myriad of laws and statutes promising women equality in public spaces and the right to be free from sex-based discrimination.[2] Within the educational realm, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*, has increasingly been recognized as an important means of providing redress for young women who experience discrimination in K–12 educational settings, as well as on university campuses.[3] Applicable wherever an educa-

1. *See* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 47, 51–53, 110 (2019).

2. *#MeToo, Time's up and the Legislation Behind the Movement*, BILLTRACK50 (Feb. 15, 2018), https://btfgatsby.revivedesignstudios.com/blog/social-issues/civil-rights/metoo-times-up-and-the-legislation-behind-the-movement/.

3. *See, e.g.*, Lee Green, *Nine Ways Title IX Protects High School Students*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (May 15, 2018), https://www.nfhs.org/articles/nine-ways-title-ix-protects-high-school-students/. The Authors recognize that Title IX applies to all genders and that survivors

tional institution receives federal funding, Title IX provides a private right of action for individual plaintiffs who have experienced discrimination by an educational institution or its employees, including in instances where students are subjected to discrimination by virtue of a school's failure to respond to known discrimination or harassment by a third party.[4]

For many, Title IX conjures ideas of equality in sports and the right to an equal opportunity to participate in extracurricular activities traditionally offered exclusively, or at least disproportionately, to male students. Only in the last two decades has Title IX emerged as an effective means of combating sexual violence.[5] As a result, despite some measure of guidance by several significant U.S. Supreme Court decisions, Title IX jurisprudence remains enigmatic at times; different and often conflicting interpretations of the statute continue to emerge within the lower courts.[6]

This Article addresses one such controversy, one in which the Tenth Circuit has taken on a significant role. A circuit split has emerged between the Tenth Circuit and Sixth Circuit in the context of claims based on a school's failure to respond to known harassment.[7] Specifically, the question is (a) whether plaintiffs bringing Title IX claims must show that after their initial reports placing the school on notice of assault, harassment, or both, they continued to experience acts of harassment, or (b) whether it is sufficient for plaintiffs to allege that the school's deliberate indifference simply made them vulnerable to further harassment.[8] While the disagreement of the courts hinges on the interpretation of one small phrase[9] set forth by the Supreme Court, the implications of these differing interpretations are enormous, and resolution of the circuit split will

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of sexual harassment and assault are not exclusively female. However, because a significant majority of survivors are female, this Article refers to "women" and uses the pronouns "she" and "her."

4. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281, 290 (1998).

5. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (concluding that Title IX protections include sexual harassment and abuse as a form of sex discrimination).

6. *See, e.g.*, *Current Circuit Splits*, 14 SETON HALL CIR. REV. 91, 104–05 (2017) (describing a split between the Fifth and Seventh Circuits and the First, Third, and Fourth Circuits regarding whether Title IX provides a remedy to individuals alleging employment discrimination on the basis of sex in federally funded educational institutions).

7. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1109 (10th Cir. 2019); Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623–24 (6th Cir. 2019).

8. *Farmer*, 918 F.3d at 1106; *Kollaritsch*, 944 F.3d at 623–24.

9. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999) ("If 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. That is, the deliberate indifference must, at a minimum, '*cause [students] to undergo*' harassment or '*make them liable or vulnerable*' to it." (emphasis added) (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966))).

likely impact the willingness of plaintiffs to bring Title IX claims for decades to come.[10]

To provide context for the close evaluation of this circuit split, this Article begins by providing background on the legislative intent that drove the passage of Title IX, including the hope that it would serve to eliminate a broad swath of discriminatory behaviors within educational institutions.[11] The Article then turns to the early Supreme Court interpretations of the statute that established a private right of action for damages under Title IX and articulated the standards plaintiffs must meet in bringing such claims.[12] In particular, the Article focuses on the Supreme Court's language in *Davis v. Monroe County Board of Education*,[13] which requires that when a school does not engage in harassment directly, Title IX plaintiffs must show that the school's deliberate indifference to third-party harassment "'cause[d] [students] to undergo' harassment or '[made] them liable or vulnerable' to it."[14] Although the language may appear straightforward, courts have struggled since 1999 to reach a consensus on how it should be interpreted, for reasons described below.[15]

The remainder of the Article focuses on the circuit split that has emerged between the Tenth Circuit and the Sixth Circuit and why, in the context of both the statutory purposes and current events, the Tenth Circuit's approach should be adopted by the majority of the circuit courts, or by the Supreme Court, moving forward. The Article will look closely at the reasoning behind the Tenth Circuit's decision in *Farmer v. Kansas State University*[16] as well as the Sixth Circuit's reasoning in *Kollaritsch v. Michigan State University Board of Trustees*,[17] examining the ways these opinions are consistent and inconsistent with the purpose and intent of Title IX.[18] In light of principles of legal and statutory interpretation, as well as the practical implications of the two decisions for victims of sexual violence, the Article argues the Tenth Circuit's approach conforms

10. As discussed below, the phrase at issue is the language in *Davis* indicating that plaintiffs must be made "liable or vulnerable" to further harassment. *Id.* at 645.

11. *See infra* Part I.

12. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281, 290 (1998); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992); Cannon v. Univ. of Chi., 441 U.S. 677, 716–17 (1979).

13. 526 U.S. 629 (1999).

14. *Id.* at 645.

15. *Compare* Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019) ("Davis, then, clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively either that KSU's deliberate indifference to their reports of rape caused Plaintiffs 'to undergo harassment or ma[d]e them liable or vulnerable' to it." (emphasis omitted) (quoting *Davis*, 526 U.S. at 645)), *with* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623–24 (6th Cir. 2019) ("We hold that the plaintiff must plead, and ultimately prove . . . some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment.").

16. 918 F.3d 1094 (10th Cir. 2019).

17. 944 F.3d 613 (6th Cir. 2019).

18. *See* 20 U.S.C. § 1681 (2018).

best with the legislative intent that drove the adoption of Title IX and the legal analysis of the Supreme Court in *Davis*. This approach best ensures female students are broadly protected from sex discrimination during their pursuit of an education, whether in primary school or at college.

I. TITLE IX: A BRIEF HISTORY

A year after the Supreme Court brought the force of the Equal Protection Clause to bear on arbitrary gender distinctions,[19] and a year before that same Court affirmed a woman's right to terminate her pregnancy,[20] Congress passed Title IX of the Education Amendments of 1972, just as states began considering ratification of the Equal Rights Amendment.[21] Title IX, which prohibits educational institutions receiving federal financial assistance from discriminating on the basis of sex, was enacted at the height of second-wave feminism, during a historic push to enshrine gender equity in law and institutions.[22] Once primarily known for placing female scholar-athletes on equal footing with their male counterparts, Title IX has also become a powerful means of addressing gender discrimination in the form of sexual harassment and assault at educational institutions across the country.[23]

The relevant statutory text is brief in phrasing but broad in scope: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[24]

Because "federal financial assistance" includes receiving funds from federal student financial aid programs, Title IX applies to K–12 schools and school districts as well as nearly all U.S. colleges and universities—both public and private.[25] In 1971, Congresswoman Patsy Mink, an early author and champion of Title IX, explained:

> Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access . . . . If we really believe in equality, we must begin to insist that our institutions of higher learn-

19. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

20. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

21. 20 U.S.C. §§ 1681–88.

22. *See* Sarah T. Partlow Lefevre, *Second Wave Feminism*, *in* THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS 1579, 1579–80, 1582–83 (Mike Allen ed., 2017).

23. *See Title IX Frequently Asked Questions*, NCAA, http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions (last visited Dec. 26, 2020) ("[I]t is the application of Title IX to athletics that has gained the greatest public visibility . . . ."); *Title IX and Sexual Violence in Schools*, ACLU, https://www.aclu.org/title-ix-and-sexual-violence-schools (last visited Dec. 26, 2020).

24. 20 U.S.C. § 1681(a).

25. *See Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Jan. 20, 2020); *Title IX Frequently Asked Questions*, *supra* note 23.

> ing practice it or not come to the Federal Government for financial support.[26]

Senator Birch Bayh, Title IX's chief Senate sponsor, introduced the legislation noting that "the impact of this amendment would be far-reaching," offering women "an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work."[27] Senator Bayh's remarks clearly situate Title IX within the larger push for women to achieve their full educational and professional potential. Moving beyond tokenism, he emphasized that women's mere presence on campus was not enough; equality meant full participation and the opportunity to engage meaningfully in one's education.[28] Anything less, he recognized, hurt not only women's schooling but their future careers and economic horizons as well.[29] Thus, schools allowing discrimination or placing additional obstacles in the way of women's ability to get the most out of their education—to "develop the skills they want"—runs counter to the spirit and intent of Title IX and its broad directive to ensure a national policy that prohibits sex-based discrimination in education.[30]

II. "A SWEEP AS BROAD AS ITS LANGUAGE": TITLE IX IN THE SUPREME COURT

It is in this spirit that the Supreme Court recognized schools' failures to address sexual harassment and sexual assault as actionable sex discrimination prohibited under Title IX. In 1979, the Court found a judicially-implied private right of action in Title IX, acknowledging that the statute "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."[31] This legal conclusion acknowledges a more practical reality: while Title IX targets schools as potentially discriminatory actors, the consequences of that discrimination are borne by individuals whose advocacy on their own behalf is essential. Moreover, the statutory text's focus on ensuring that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination" clearly centers the potential victim of discrimination and her needs.[32]

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26. 117 CONG. REC. 39,252 (1971).
27. 118 CONG. REC. 5,808 (1972).
28. *See id.*
29. *See id.*
30. *Id.*
31. Cannon v. Univ. of Chic., 441 U.S. 677, 704 (1979).
32. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (quoting 20 U.S.C. § 1681(a)).

In 1992, the Court further strengthened Title IX enforcement when it unanimously held in *Franklin v. Gwinnett County Public Schools*[33] that victims may seek monetary damages to remedy a violation of rights—there, a Georgia school district failed to respond to plaintiff's sexual assault at the hands of her high school teacher despite knowledge of the abuse.[34] The court in *Franklin* both acknowledged teacher-on-student harassment as a form of sex-based discrimination under Title IX and spoke plainly about the financial consequences of inaction in the face of such discrimination: "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[35] Justice Stevens's dissent in *Gebser v. Lago Vista Independent School District*,[36] a later teacher-on-student harassment case, echoed this notion that Title IX tasks schools with "an affirmative undertaking that is more significant than a mere promise to obey the law."[37] Past decisions, he noted, gave the far-reaching statute "a sweep as broad as its language."[38]

III. *DAVIS* AND THE MODERN TITLE IX STANDARD

The broad sweep of Title IX finally encompassed student-on-student harassment with the 1999 Supreme Court case *Davis v. Monroe County Board of Education*.[39] There, the Court held that a plaintiff seeking damages stemming from harassment by a fellow student must establish that:

> [T]he funding recipient act[ed] with deliberate indifference to known acts of harassment in its programs or activities . . . . [And] that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit.[40]

Specifically, plaintiff's daughter suffered such severe and prolonged harassment at the hands of a fifth grade classmate that her grades dropped, and her fear that she "didn't know how much longer" she could keep her assailant at bay led her to write a suicide note.[41] As she suffered for months on end, the school did nothing about her complaints other than allowing her to move to a different seat in class and verbally reprimanding the perpetrator.[42] Such "deliberate indifference," the court

33. 503 U.S. 60 (1992).
34. *Id.* at 63–64.
35. *Id.* at 75.
36. 524 U.S. 274 (1998).
37. *Id.* at 297 (Stevens, J., dissenting).
38. *Id.* at 296 (internal quotations omitted) (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).
39. 526 U.S. 629 (1999).
40. *Id.* at 633.
41. *Id.* at 634.
42. *Id.* at 635.

found, was unacceptable in light of the "concrete, negative effect" on the victim's "ability to receive an education."[43] Significantly, the *Davis* court further elaborated on its deliberate indifference requirement: "If 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. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.[44]

In the years since *Davis*, lower courts have adopted divergent interpretations of this standard, ultimately creating a conflict over whether Title IX requires a student to undergo additional harassment as a result of her school's indifference. This split over how much suffering the law requires young women to undergo before the impact on their education is cognizable goes to the very heart of Title IX—a piece of legislation enacted to move women forward, not hold them back.

IV. *SUBJECTED* TO INTERPRETATION – COURTS DIFFER ON *DAVIS* CRITERIA

Some circuits, looking to the language in *Davis*, have held that vulnerability to further harassment is sufficient for Title IX liability and that victims need not actually undergo further harassment due to a school's deliberate indifference.[45] In 2007, the First Circuit adopted this view in *Fitzgerald v. Barnstable School Committee*,[46] a case brought by the parents of kindergartener Jacqueline Fitzgerald.[47] Plaintiffs' daughter alleged that an older student was bullying her into lifting her skirt and spreading her legs on the school bus.[48] Her school conducted an investigation but took no disciplinary action against the other student, offering only to move the victim to a different bus.[49] While plaintiffs stopped the skirt-lifting by driving their child to school, she continued to encounter the bully throughout the school year and was at one point required to interact with him in gym class; she subsequently stopped attending that class altogether.[50] The district court held that the school was not liable as "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

43. *Id.* at 653–54.

44. *Id.* at 644–45 (first quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966); then quoting *Subject*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)) (providing definitions of "subject").

45. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 171 (1st Cir. 2007), *cert. granted*, 553 U.S. 1093 (2008), *rev'd*, 555 U.S. 246 (2009).

46. 504 F.3d 165 (1st Cir. 2007), *cert. granted*, 553 U.S. 1093 (2008), *rev'd*, 555 U.S. 246 (2009).

47. *Id.* at 169.

48. *Id.*

49. *Id.* at 169–70.

50. *Id.* at 170.

knowledge of the offending conduct," and plaintiffs' daughter's subsequent encounters with the bully did not rise to the level of harassment.[51]

The First Circuit, however, disagreed. It took issue with the district court's reasoning, concluding, "its formulation of the law overly distills the rule set forth by the *Davis* Court. [In *Davis*], the 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."[52] The court found that the victim's continued, albeit minimal, post-notice interactions with her harasser could render her more vulnerable to harassment, satisfying the latter half of *Davis*'s *subjects* definition.[53]

> This broader formulation clearly sweeps more situations than the district court acknowledged within the zone of potential Title IX liability. Under it, 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 or activity.[54]

The plaintiff's Title IX claim ultimately failed when the court found the school's response was not deliberately indifferent.[55] However, the First Circuit's adoption of its "broader formulation" approach notably contemplates a legal universe in which schools must respond to the first known instance of harassment—not wait for more.

The Eleventh Circuit took an even more expansive view of what it means to *subject* students to harassment in the case of Tiffany Williams, a University of Georgia (UGA) student who was assaulted by several of the school's basketball players.[56] After the assault, one of the players called Williams repeatedly.[57] She reported her assault and subsequent harassment to the university and the police and subsequently withdrew from school.[58] The university waited months to conduct a disciplinary hearing—at which point two of the alleged perpetrators were no longer students—and declined to impose any discipline.[59]

In finding that Williams had adequately alleged deliberate indifference by the university, the Eleventh Circuit held that although Williams withdrew from school the day after her assault, "UGA continued to sub-

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51. *Id.* at 172 (citing Hunter *ex rel.* Hunter v. Barnstable Sch. Comm., 456 F. Supp. 2d 255, 263–64 (D. Mass. 2006)).
52. *Id.* (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999)).
53. *See id.* at 172–73.
54. *Id.* (citation omitted) (citing Wills v. Brown Univ., 184 F.3d 20, 27 (1st Cir. 1999)).
55. *Id.* at 173–75.
56. Williams v. Bd. of Regents of Univ. Sys. of Ga, 477 F.3d 1282, 1288 (11th Cir. 2007).
57. *Id.* at 1289.
58. *Id.*
59. *Id.*

ject her to discrimination" when it "failed to take any precautions that would prevent future attacks from [her assailants] or like-minded hooligans should Williams have decided to return."[60] In essence, the *Williams v. Board of Regents of University System of Georgia*[61] court evaluated a student's vulnerability in light of the assumption that she might reenroll, making actions like failing to discipline her assailants a form of deliberate indifference that could make her more vulnerable to future incidents.[62]

While this approach is far-reaching, it is also commonsense; a significant number of college dropouts eventually return to finish their degrees.[63] Sexual assault survivors in particular experience specific barriers to completing their education, such as the continued presence of the perpetrator or a lack of institutional support.[64] It is logical that, absent these barriers, they would return—if schools provide a safe environment for them in which to do so.

Other courts have seemed to suggest a more restrictive approach, requiring victims to have suffered actual harassment after a school's deliberately indifferent response. For example, in *Reese v. Jefferson School District No. 14J*,[65] the Ninth Circuit hinted at such a position.[66] In this case, a group of high school girls was suspended for throwing water balloons at boys; they argued their actions were retaliation for harassment by the boys and sued their school district over the earlier alleged harassment.[67] In holding that the girls failed to allege deliberate indifference by their school, the Ninth Circuit found that the girls had not provided notice of alleged harassment until late in the school year, and "[t]here [was] no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations."[68] Implicit in this conclusion: post-notice harassment, not just vulnerability, is necessary for deliberate indifference.

In contrast to *Fitzgerald*, the Middle District of Tennessee confronted another case of school bus harassment and reached a very different outcome.[69] An autistic middle school student was sexually assaulted on

60. *Id.* at 1297.
61. 477 F.3d 1282 (11th Cir. 2007).
62. *See id.* at 1297.
63. *See* SHAPIRO, D., RYU, M., HUIE, F. & LIU, Q., NAT'L STUDENT CLEARINGHOUSE RSCH. CTR., SIGNATURE REP. 17, SOME COLLEGE, NO DEGREE: A 2019 SNAPSHOT FOR THE NATION AND 50 STATES 1 (2019).
64. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY, https://publicintegrity.org/education/a-lack-of-consequences-for-sexual-assault/ (July 14, 2014, 4:50 PM).
65. 208 F.3d 736 (9th Cir. 2000).
66. *See id.* at 740.
67. *Id.* at 738.
68. *Id.* at 740.
69. *See* Staehling *ex rel.* Staehling v. Metro. Gov't of Nashville & Davidson Cnty., No. 3:07-0797, 2008 WL 4279839, at *4–13 (M.D. Tenn. Sept. 12, 2008).

the school bus by a fellow special education student.[70] As in *Fitzgerald*, the abuse stopped after her parents reported the assault to the school—this time because the school removed the perpetrator from the bus.[71] However, plaintiffs disputed that the school took any other significant action in response to the assault and brought a Title IX claim, alleging that the school's failure to adequately investigate and take remedial measures, such as ensuring bus safety, constituted deliberate indifference.[72]

Rather than evaluating plaintiffs' daughter's vulnerability to further abuse based on the school's inaction, the court reasoned that "a school is not liable under Title IX if no harassment occurs after a school receives notice of the harassment."[73] Plaintiffs' Title IX claim did not survive summary judgment, as the court concluded that their daughter had not been subjected to post-notice sexual harassment.[74]

It is against this backdrop of uncertainty as to exactly how the *subjected* standard in *Davis* should be applied that a definitive circuit split has emerged. Two recent decisions directly address the intent of *Davis*—and in direct opposition: a Tenth Circuit holding in *Farmer* and a Sixth Circuit holding in *Kollaritsch*.

V. TITLE IX IN THE TENTH CIRCUIT

The Tenth Circuit has long been home to groundbreaking opinions concerning the application of Title IX to student reports of sexual harassment and sexual assault. After a lengthy history of adhering closely to the holding in *Davis* without many affirmative steps further, the Tenth Circuit took a stand in its *Farmer* holding.[75]

Prior to its groundbreaking decision in *Farmer*, the Tenth Circuit examined the "vulnerable to" harassment issue in several key cases.[76] Previous Tenth Circuit decisions hinted at the requirement of a victim's being exposed to something more than simply being made vulnerable to further harassment—an interpretation that would later be solidified in *Farmer*.[77]

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70. *Id.* at *1.
71. *Id.* at *12.
72. *Id.* at *11.
73. *Id.* (first citing Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1123 (10th Cir. 2008); then citing Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000); and then citing Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007)).
74. *Id.* at *11–12.
75. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094 (10th Cir. 2019) (holding that student's vulnerability to harassment is sufficient for showing of institution's deliberate indifference).
76. *See* discussion *infra* Sections V.A–C.
77. *Farmer*, 918 F.3d at 1104–05.

A. Murrell v. School District No. 1, Denver, Colorado

The first of these decisions was *Murrell v. School District No. 1, Denver, Colorado*,[78] decided in 1999.[79] In *Murrell*, a mother filed suit against a Denver, Colorado school district following multiple instances of student-on-student sexual harassment and assault of her daughter, a student with cerebral palsy and developmental disabilities that required special-education services.[80] The mother notified the school about the assaults, but the school denied that the assaults could have happened and failed to perform any investigation.[81] When her daughter returned to school, she was immediately battered again by the same student and harassed by others who had learned of the sexual assaults.[82]

In reversing the district court's dismissal on Title IX grounds, the Tenth Circuit did not take up the question of whether a plaintiff must allege more than vulnerability to further harassment.[83] However, the court appeared to base its holding, at least in part, on the severe circumstances of the case, noting that, following the assaults, plaintiff's daughter became such a danger to herself that she required hospitalization and that the school suspended plaintiff's daughter when plaintiff requested an investigation into the assaults.[84] The *Murrell* court also took into consideration the fact that plaintiff's daughter ultimately became homebound as a result of her experience at school, and thus plaintiff's daughter had been "totally deprived" of educational benefits as a result of the school district's deliberate indifference.[85]

Given that plaintiff's daughter was immediately subjected to further harassment and assaults upon her return to school,[86] and the proximity in time between *Murrell* and *Davis*,[87] it is perhaps unsurprising that the Tenth Circuit did not take up the vulnerability analysis. However, this left the door open for later decisions to further explore the language set forth in *Davis*.

B. Escue v. Northern Oklahoma College

The second landmark Title IX opinion to shape the vulnerability analysis in the Tenth Circuit came approximately seven years after *Murrell*. In *Escue v. Northern Oklahoma College*,[88] plaintiff filed suit against Northern Oklahoma College (NOC), alleging that her professor had

78. 186 F.3d 1238 (10th Cir. 1999).
79. *Id.* at 1243.
80. *See id.* at 1242–43.
81. *Id.* at 1244.
82. *Id.*
83. *See id.* at 1246, 1249.
84. *Id.* at 1248–49.
85. *Id.* at 1249.
86. *Id.* at 1244.
87. *Id.* at 1245.
88. 450 F.3d 1146 (10th Cir. 2006).

touched her inappropriately and made inappropriate sexual comments towards her.[89] Before the Tenth Circuit, plaintiff argued that NOC was deliberately indifferent to her allegations of harassment, which deprived her of educational opportunities.[90]

The Tenth Circuit ultimately concluded that NOC's response to Ms. Escue's allegations was not "clearly unreasonable."[91] In so holding, the court detailed the actions NOC took to prevent further harassment: removing plaintiff from her professor's classes, questioning two students about plaintiff's allegations, and permanently ending her professor's tenure at the end of the semester.[92] The Tenth Circuit quoted *Davis* to underscore its finding that NOC was not deliberately indifferent,[93] and stated the following:

> Significantly, we note that Ms. Escue does not allege that further sexual harassment occurred as a result of NOC's deliberate indifference . . . . At no point does she allege that NOC's response to her allegations was ineffective such that she was further harassed. Although [her harasser] attempted to contact her once the day that she reported her allegations to [NOC], he was unsuccessful and this incident did not lead to sexual harassment. Summary judgment on these facts is therefore appropriate, as Ms. Escue has not shown that NOC's response was clearly unreasonable nor has she shown that it led to further sexual harassment.[94]

Based on this language, it appeared that the Tenth Circuit might require something more than vulnerability to further harassment.

C. Rost ex rel. K.C. v. Steamboat Springs RE-2 School District

Not long after *Escue*, the Tenth Circuit decided *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*.[95] In that case, plaintiff filed suit against Steamboat Springs School District RE-2 following years of sexual abuse of her daughter at the hands of several of her classmates.[96] When her daughter disclosed to a school counselor that classmates had coerced her into sexual conduct, the counselor told the school resource officer and principal.[97] Because the principal determined that none of the incidents occurred on school grounds and had occurred before the students matriculated to the high school, he had the school resource officer

89. *Id.* at 1149.
90. *Id.* at 1152–53.
91. *Id.* at 1155.
92. *Id.*
93. *Id.* ("The Supreme Court has stated that 'the deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.'" (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999))).
94. *Id.* at 1155–56.
95. 511 F.3d 1114 (10th Cir. 2008).
96. *Id.* at 1117.
97. *Id.* at 1117–18.

investigate the reports.[98] The school resource officer interviewed some of the students involved, but his investigation was slowed by plaintiff's refusal to allow her daughter to communicate further about the incidents on the advice of counsel; after listening to the officer's report, the district attorney refused to prosecute.[99] A few weeks after reporting the sexual abuse, plaintiff's daughter suffered a series of psychotic episodes, likely resulting from the trauma.[100]

In considering whether the school district was deliberately indifferent to plaintiff's daughter's reports of sexual harassment, the Tenth Circuit appeared to base its decision at least in part on its finding that, following the reports, plaintiff's daughter was not actually subjected to further harassment.[101] Notably, though the Tenth Circuit's reasoning clearly referenced the fact that no further harassment occurred, the court did acknowledge that its "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."[102] Thus, because the school's response "did not cause [plaintiff's daughter] to undergo harassment or make her liable or vulnerable to it," the school district was not deliberately indifferent.[103] More specifically, the court held that the district "took steps to prevent further harassment" by trying to find safe educational alternatives for plaintiff's daughter, and plaintiff's rejection of those alternatives had no bearing on whether the district's response was appropriate.[104]

VI. VULNERABILITY IS SUFFICIENT: *FARMER V. KANSAS STATE UNIVERSITY*

In *Farmer*, the Tenth Circuit finally addressed the vulnerability question and determined that, under the plain language of *Davis*, "Plaintiffs can state a viable Title IX claim by alleging alternatively either that [the school's] deliberate indifference to their reports of rape caused Plaintiffs 'to undergo' harassment or 'ma[d]e them liable or vulnerable' to it."[105]

A. Facts and Procedural History

The Tenth Circuit's analysis came about largely because defendant, Kansas State University (KSU) forced the analysis. Two plaintiffs filed

98. *Id.* at 1118.
99. *Id.*
100. *Id.*
101. *Id.* at 1123 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999)).
102. *Id.* (first citing Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172 (1st Cir. 2007); and then citing Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1297 (11th Cir. 2007)).
103. *Id.* (citing *Davis*, 526 U.S. at 645).
104. *Id.* at 1124.
105. Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019) (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

suit against KSU under theories of Title IX post-assault indifference.[106] Both plaintiffs alleged that they had been sexually assaulted by classmates at KSU and that, after reporting their rapes to KSU, the university failed to investigate or take action to hold the student-assailants responsible.[107] As a result, both plaintiffs' educations were negatively impacted, including a lost sense of security on campus, panic attacks, depression, plummeting grades, and lost scholarships.[108]

KSU filed a motion to dismiss the Title IX claims in each case, which the district court denied in both instances.[109] In rejecting KSU's arguments, the district court concluded:

> [T]he courts in *Escue* and *Rost* did not state that further harassment was a requirement that all Title IX claimants must establish, but simply noted the absence of further harassment, and in *Escue* explained that it was "significant" to its determination on deliberate indifference. Declining to impose a strict further harassment requirement is consistent with *Davis*, in which the Court explained that funding recipients "may be held liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment."[110]

Accordingly, the district court determined that, where the other required elements under Title IX were clearly alleged, it was "not inclined to require that the plaintiff additionally allege that post-report assault or harassment actually occurred," so long as the school's deliberate indifference made the plaintiff "'liable or vulnerable to' further harassment pursuant to *Davis*."[111]

Following the denial of its motions to dismiss, the district court granted KSU's request for interlocutory appeal to the Tenth Circuit pursuant to 28 U.S.C. § 1292(b)[112] to determine the following "controlling questions of law":

> (1) [W]hether Plaintiff was required to allege, as a distinct element of her Title IX claim, that KSU's deliberate indifference caused her to suffer actual further harassment, rather than alleging that Defendant's

106. *Id.* at 1099–1101.

107. Weckhorst v. Kan. State Univ., 241 F. Supp. 3d 1154, 1159–60 (D. Kan. 2017); Farmer v. Kan. State Univ., No. 16-CV-2256-JAR-GEB, 2017 WL 980460, at *3–4 (D. Kan. Mar. 14, 2017).

108. *Weckhorst*, 241 F. Supp. 3d at 1163–64; *Farmer*, 2017 WL 980460, at *5.

109. *Weckhorst*, 241 F. Supp. 3d at 1159–60; *Farmer*, 2017 WL 980460, at *3–4.

110. *Weckhorst*, 241 F. Supp. 3d at 1174 (quoting *Davis*, 526 U.S. at 646–47).

111. *Id.* at 1175; *Farmer*, 2017 WL 980460, at *13.

112. The statute provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b) (2018).

> post-assault deliberate indifference made her "liable or vulnerable to" harassment; and (2) if Plaintiff is required to plead actual further harassment, whether her allegations of deprivation of access to educational opportunities satisfy this pleading requirement.[113]

B. Holding

The Tenth Circuit began its analysis by noting that "[t]he Supreme Court has already answered [this] legal question," quoting *Davis* for the proposition that a funding recipient under Title IX's "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."[114] The court determined that in these cases, the plaintiffs sufficiently alleged that KSU's deliberate indifference made them vulnerable to further harassment, for it allowed the plaintiffs' student-assailants to continue attending KSU without ramifications.[115]

In concluding that a plaintiff need not experience a subsequent sexual assault or further harassment prior to bringing suit, so long as she was made vulnerable to such harassment,[116] the *Farmer* court relied primarily on *Davis*, reasoning that *Davis* "clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively either that KSU's deliberate indifference to their reports of rape caused Plaintiffs 'to undergo' harassment or 'ma[d]e them liable or vulnerable' to it."[117] The court reasoned that KSU's argument—that a plaintiff must state that she underwent actual further harassment before a viable claim ripens—"simply ignores *Davis*'s clear alternative language" providing that the "deliberate indifference must . . . 'cause students to undergo' harassment or make them 'liable or vulnerable to' sexual harassment."[118] The *Farmer* court further noted that this alternative pleading requirement is consistent with Title IX's objectives, including protecting students against discrimination.[119]

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113. Farmer v. Kan. State Univ., 918 F.3d 1094, 1102 (10th Cir. 2019).

114. *Id.* at 1097 (emphasis omitted) (internal quotations omitted) (quoting *Davis*, 526 U.S. at 644–45).

115. *Id.*

116. *Id.* at 1103–05.

117. *Id.* at 1103 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

118. *Id.* at 1104 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645).

119. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)). The *Farmer* court also quoted *Karasek v. Regents of the University of California* for the proposition that:

> The alternative offered by the University—i.e., that a student must be harassed or assaulted a second time before the school's clearly unreasonable response to the initial incident becomes actionable, irrespective of the deficiency of the school's response, the impact on the student, and the other circumstances of the case—runs counter to the goals of Title IX and is not convincing.

Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015). As set forth more fully below, the Tenth Circuit's interpretation, which mirrors that of *Karasek* and other circuits, better fits the purpose of Title IX and the Supreme Court's holding in *Davis*. *See infra* Part IX.

In an effort to address concerns that the vulnerability language would expose schools to expanded liability, as the Sixth Circuit would later argue,[120] the Tenth Circuit placed a significant guardrail on its holding by requiring that a plaintiff's alleged fear or vulnerability must be "objectively reasonable."[121] Thus, plaintiffs merely alleging that a school's deliberate indifference left them vulnerable is insufficient—plaintiffs must allege evidence to show that their fear is an objectively reasonable one.[122] Here, the plaintiffs alleged "that the fear of running into their student-rapists caused them, among other things, to struggle in school, lose a scholarship, withdraw from activities KSU offers its students, and avoid going anywhere on campus without being accompanied by friends or sorority sisters."[123] The Tenth Circuit concluded that "[f]uture cases will undoubtedly be asked to draw lines on when a victim's fear of further sexual harassment is sufficient to deprive that student of educational opportunities," but given the "horrific circumstances alleged here," this was not an issue the Tenth Circuit needed to reach.[124]

VII. FURTHER HARASSMENT IS REQUIRED: *KOLLARITSCH V. MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES*

Nine months after the Tenth Circuit's *Farmer* opinion, the Sixth Circuit reached a dramatically different decision in *Kollaritsch*.[125] As in *Farmer*, *Kollaritsch* presented a Title IX fact pattern involving student-on-student assault and harassment, requiring analysis under the *Davis* test.[126]

A. Facts and Procedural History

In 2017, four female students brought an action against Michigan State University, alleging that "they were sexually harassed or assaulted by other students while they were students at [the university]."[127] Each reported their experiences to the university, which, according to their

120. See *infra* Part VII, for an analysis of *Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019) and its requirement that a plaintiff allege actual further harassment before a colorable Title IX claim arises.

121. *Farmer*, 918 F.3d at 1105.

122. *Id.* at 1104–05.

123. *Id.* at 1105.

124. *Id.* Future plaintiffs would be well-advised to take heed of the court's reasoning underpinning their conclusions that the plaintiffs in this case met their pleading requirements:

> Plaintiffs' allegations are quite specific and reasonable under the circumstances. Plaintiffs allege more than a general fear of running into their assailants. They allege that their fears have forced them to take very specific actions that deprived them of the educational opportunities offered to other students. In addition, they have alleged a pervasive atmosphere of fear at KSU of sexual assault caused by KSU's inadequate action in these cases.

Id.

125. *Kollaritsch*, 944 F.3d at 618–24.

126. *Id.*

127. Kollaritsch v. Mich. State Univ. Bd. of Trs., 298 F. Supp. 3d 1089, 1096 (W.D. Mich. 2017), *rev'd and remanded*, 944 F.3d 613 (6th Cir. 2019).

lawsuit, failed to adequately respond.[128] After the district court refused to dismiss the plaintiffs' Title IX claims, the university sought an interlocutory appeal to address the question of "whether a plaintiff must plead further acts of discrimination to allege deliberate indifference to peer-on-peer harassment under Title IX."[129]

B. Holding

In *Kollaritsch*, the Sixth Circuit acknowledged that the test in *Davis* was the proper analysis of the Title IX claims.[130] Unlike the Tenth Circuit in *Farmer* (and the Sixth Circuit itself in a number of prior actions),[131] however, the *Kollaritsch* court determined that the *Davis* formula "clearly has two separate components, comprising separate-but-related torts by-separate-and-*un*related tortfeasors: (1) 'actionable harassment' by a student; and (2) a deliberate-indifference intentional tort by the school."[132] In so doing, the Sixth Circuit attempted to map traditional tort principles onto an already complicated area of law. Under common law tort application, the Sixth Circuit determined that the "deliberate-indifference-based intentional tort" required "(1) knowledge, (2) an act, (3) injury, and (4) causation."[133] The *Kollaritsch* court found—consistent with *Davis*—that in order to meet the first two elements, the defendant-school must have "had 'actual knowledge' of an incident of actionable sexual harassment that prompted or should have prompted a response," (knowledge) and the school's response must have been "clearly unreasonable in light of the known circumstances" (the act).[134] The *Kollaritsch* court also held the injury required in a Title IX context was "the deprivation of 'access to the educational opportunities or benefits provided by the school,'"[135] a requirement also lifted verbatim from *Davis*.[136]

As to causation, although the *Kollaritsch* court determined that the act must cause the injury, consistent with established tort principles, it proceeded to insert an additional, new, and seemingly unrelated requirement into the causation analysis.[137] Rather than requiring simply that the

128. *Id.*
129. *Kollaritsch*, 944 F.3d at 619.
130. *See id.* at 618.
131. *See* Gordon v. Traverse City Area Pub. Schs., 686 F. App'x 315, 323 (6th Cir. 2017); Stiles *ex rel.* D.S. v. Grainger Cnty., Tenn., 819 F.3d 834, 848 (6th Cir. 2016); Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356, 362 (6th Cir. 2012); Patterson v. Hudson Area Schs., 551 F.3d 438, 444–45 (6th Cir. 2009), *abrogated by* Foster v. Bd. of Regents of Univ. of Mich., No. 19-1314, 2020 WL 7294759 (6th Cir. Dec. 11, 2020); Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 258–59 (6th Cir. 2000); Soper v. Hoben, 195 F.3d 845, 854 (6th Cir. 1999).
132. *Kollaritsch*, 944 F.3d at 619–20 (citation omitted) (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643, 651–52 (1999)).
133. *Id.* at 621.
134. *Id.* (first citing *Davis*, 526 U.S. at 650; and then quoting *Davis*, 526 U.S. at 648).
135. *Id.* at 622 (quoting *Davis*, 526 U.S. at 650).
136. *Davis*, 526 U.S. at 650.
137. *See Kollaritsch*, 944 F.3d at 622.

plaintiff show that a school's unreasonable response (the act) resulted in deprivation of access to educational opportunities (the injury), the Sixth Circuit concluded that the injury must be "attributable to the post-actual-knowledge further harassment, which would not have happened but for the clear unreasonableness of the school's response."[138] The *Kollaritsch* court, therefore, determined that for a school to be liable under a deliberate indifference intentional tort, a plaintiff's injury in the form of lost educational opportunities had to be a result of both a school's deliberate indifference *and* further actionable harassment of the student-victim.[139] Faced with the disjunctive language in *Davis* which suggested no further harassment was required, the Sixth Circuit explained that under its analysis, the Supreme Court was not suggesting that plaintiffs must either experience further harassment or be made vulnerable to it, but that further harassment could occur by virtue of wrongful conduct by "*commission* (directly causing further harassment) [or] *omission* (creating vulnerability that leads to further harassment)."[140] Because the victim-plaintiffs in *Kollaritsch* did not allege that their respective encounters with their assailants on campus *after* the original assaults and school actions had taken place were sexual, severe, pervasive, or objectively offensive, no further harassment had been suffered, and there was no actionable Title IX claim against the university.[141]

Judge Thapar echoed this sentiment in his concurring opinion.[142] Judge Thapar joined with the majority's decision in full and offered further rationale to support the majority's adding further harassment as an element for an actionable deliberate indifference Title IX claim.[143] Relying on the majority's finding that *Davis* requires a showing that a student was subjected to further harassment, either by commission or through omission, Judge Thapar explained that schools can cause harassment directly by sending disparaging emails or cause harassment by omission by failing to respond appropriately.[144] In either scenario, the concurrence argued, the victims could not be said to have been subjected to harass-

138. *Id.* (citing *Davis*, 526 U.S. at 644). Because "*Davis* [did] not link the [defendant school's] deliberate indifference directly to the injury," that is, the deprivation of access to educational opportunities, but rather linked the "school's 'deliberate indifference'" to the plaintiff-student's "harassment," that this "necessarily mean[t] further actionable harassment." *Id.* (citing *Davis*, 526 U.S. at 644).

139. *Id.*

140. *Id.* at 623.

141. *Id.* at 624–25. The Sixth Circuit's departure from the analysis undertaken by other circuits was less surprising in context. The decision followed, and cited, the 2016 decision *Thompson v. Ohio State University*, a Title VI action for deliberate indifference to racial discrimination. Thompson v. Ohio State Univ., 639 F. App'x 333, 334 (6th Cir. 2016). As in *Kollaritsch*, the Sixth Circuit in *Thompson* found that the victim-plaintiff had not alleged any "further harassment or discrimination" subsequent to the allegedly inadequate efforts by the university. *Id.* at 343–44. And as in *Kollaritsch*, the requirement for subsequent harassment was something new in the Title VI arena.

142. *Kollaritsch*, 944 F.3d at 630 (Thapar, J., concurring).

143. *Id.* at 627–29.

144. *Id.* at 628.

ment unless the harassment actually occurred.[145] The problem with Judge Thapar's illustration is that causing harassment directly takes the school's conduct outside of the purview of *Davis* entirely. That is, the standard set forth in *Davis* explicitly addresses circumstances where the school does not *itself* engage in harassment, but rather where the school is deliberately indifferent to the harassment of another.[146] Thus, the alternative explanation of *Davis* offered by the Sixth Circuit is inconsistent with the Supreme Court's focus only on circumstances where a university has no part in the *commission* of the harassment itself.

In sum, the majority opinion and concurrences in *Kollaritsch* reflected an intent to take a narrow reading of Title IX, as opposed to the broad scope articulated by the Tenth Circuit in *Farmer*. Relying on Justice Kennedy's dissent in *Davis* and Title IX's enaction under the Spending Clause, the Sixth Circuit cautioned against expanding liability under Title IX and argued that any ambiguity must be construed in favor of state actors to avoid imposing "more sweeping liability than Title IX requires."[147] Likewise, the *Kollaritsch* court's invocation of tort principles to deny the applicability of Title IX to the claims raised by the victim-plaintiffs did more than merely restrict who can plead a deliberate indifference claim. By explicitly adopting tort theories of recoverability, the Sixth Circuit in *Kollaritsch* attempted to reconstitute Title IX's broad mandate of equal opportunity in education to a narrow, strict construction of causation and harm that has no basis in the statute itself.[148]

VIII. WHERE DO WE GO FROM HERE?

The split between the Sixth Circuit and the Tenth Circuit as to what constitutes being *subjected* to further harassment creates a largely irreconcilable difference in the interpretation of the language set forth in *Davis*. Because the courts' reasonings were so fundamentally different, it is

145. *Id.* at 628–29.

146. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 639 (1999).

147. *Kollaritsch*, 944 F.3d at 629 (Thapar, J., concurring) (quoting *Davis*, 526 U.S. at 652). The Sixth Circuit in *Kollaritsch* argued that Title IX's enactment under the Spending Clause meant that while states agreed to comply with the obligations imposed by Title IX for federal funding, compliance could not be imposed on them if it was ambiguous what exactly was being expected of them. *Id.* Likewise, the Sixth Circuit concluded with Kennedy's recital of the long-held rallying cry of the opposition to Title IX itself: "Particularly prescient here is the *Davis* dissent's comment that '[o]ne student's demand for a quick response to her harassment complaint will conflict with the alleged harasser's demand for due process,'" putting the school in a position where it is "beset with litigation from every side." *Id.* at 627 (Kennedy, J., dissenting) (quoting *Davis*, 526 U.S. at 682).

148. In the months since the *Kollaritsch* opinion, this narrowing has been evident in subsequent decisions out of the Sixth Circuit. *See, e.g.*, Doe v. Univ. of Ky., 959 F.3d 246, 248, 251 (6th Cir. 2020) (citing *Kollaritsch*, 944 F.3d at 622–24 when it stated that a student who brought a Title IX action against her school, alleging deliberate indifference to student-on-student sexual harassment, had to show "that a school's clearly unreasonable response subjected the student to further actionable harassment"); Meng Huang v. Ohio State Univ., No. 2:19-cv-1976, 2020 WL 531935, at *1, *9, *12 (S.D. Ohio Feb. 3, 2020) (holding that the victim-plaintiff in a teacher-on-student sexual harassment Title IX deliberate-indifference action failed to allege further harassment subsequent to the plaintiff's reports to the university and granted the university's motion to dismiss).

unlikely that a common ground will be reached between the two. Rather, it is likely that courts throughout the country will continue to stake their positions at either end of the spectrum. It may be that uniformity emerges among additional circuits and district courts as to the preferred interpretation, giving Title IX plaintiffs some sense of predictability as to the legal standards likely to be applied to their claims. Or a patchwork approach may develop, propelled by the increasingly ideological nature of the judiciary, leaving plaintiffs at the geographical mercy of the court in which they, or their school, reside.[149]

Within the Tenth Circuit, the controlling power of stare decisis is likely to generate increasing uniformity among the district courts as they consider the question of whether further actionable harassment is required. Although a petition for writ of certiorari was filed by the plaintiff in *Kollaritsch*, certiorari was denied.[150] Accordingly, there will be no further Supreme Court review at this stage and *Farmer* will remain the precedential decision within the Tenth Circuit.

Indeed, the District of Colorado has already addressed the question of whether to adopt the *Farmer* or the *Kollaritsch* approach. In *Doe v. Brighton School District 27J*,[151] the plaintiff was raped by a fellow classmate.[152] For almost a week after the rape was reported, the school did not offer the plaintiff any accommodation to protect her from her rapist while at school, and as a result, she faced intimidation from her rapist and his friends.[153] She alleged that she lived in fear of going to school and suffered from such serious stress that she came home in hives.[154] In response to her Title IX lawsuit, the school district filed a motion to dismiss, arguing that the plaintiff had not adequately alleged that the district's deliberate indifference caused her to undergo additional harassment.[155] While the defendant argued in favor of the District of Colorado adopting the *Kollaritsch* approach, the plaintiff advocated for an approach dictated by the precedent of *Farmer*.[156] Judge Martinez concluded that he would follow *Farmer*'s pleading standard, which he summarized as requiring the plaintiff to allege that his or her vulnerability to further harassment required her "to take very specific actions that deprived [her] of the educational opportunities offered to other students,"

149. *See, e.g.*, Petition for Writ of Certiorari, *Kollaritsch*, 944 F.3d 613 (6th Cir. 2020), *cert. denied*, No. 20-10, 2020 WL 6037223 (Oct. 13, 2020) (requesting the U.S. Supreme Court to resolve the circuit split as to what constitutes "vulnerability" to further sexual harassment).

150. Kollaritsch v. Mich. State Univ. Bd. of Trs., 141 S. Ct. 554 (2020) (mem.) (denying the petition for a writ of certiorari).

151. No. 19-cv-0950-WJM-NRN, 2020 WL 886193 (D. Colo. Mar. 2, 2020).

152. *Id.* at *1.

153. *Id.* at *1–3.

154. *Id.* at *2.

155. *See id.* at *5.

156. *Id.* at *4–5, *7.

and that any fear be "objectively reasonable."[157] Rather than simply relying on stare decisis, Judge Martinez stated that "the *Farmer* decision is better-reasoned and legally sounder [than] the Sixth Circuit's approach to this issue."[158]

The *Brighton School District* decision did not discuss at length why it considered *Farmer* the better reasoned of the two, nor did it expound on *Farmer* to provide further clarity to the Tenth Circuit's decision. It is clear that certain aspects of the *Farmer* standard remain unresolved and that questions will continue to arise as lower courts, and perhaps sister circuits, flesh out the nuance of what constitutes sufficient pleading of vulnerability to future harassment. In particular, it remains unclear how courts will determine when a plaintiff's fear is objectively reasonable or unreasonable. Nor is it clear how plaintiffs will adequately meet the *Farmer* standard in factual circumstances such as those set forth in *Williams*, where the plaintiff immediately leaves the school and has no clear plans to return.

Nationally, a circuit split will continue to exist between *Farmer* and *Kollaritsch* until other courts coalesce around a preferred approach, or the issue is ultimately resolved by the Supreme Court. It has not been lost on other courts in recent decisions that the current circuit split is a significant one that is likely ripe for review. In *Karasek v. Regents of the University of California*,[159] for example, the Ninth Circuit skirted directly addressing the question of what causes a plaintiff to undergo further harassment, but noted the existing circuit split between the Sixth and Tenth Circuits.[160]

IX. ENSURING LEGAL FRAMEWORKS CONSISTENT WITH THE PURPOSE AND INTENT OF TITLE IX BY ADOPTING THE TENTH CIRCUIT APPROACH

As circuit courts continue considering this issue, and should the Supreme Court consider it, it is important to ensure the developing case law is consistent with the language and intent of Title IX. This Article proposes that following the Tenth Circuit's approach in *Farmer* best effectuates this purpose and is the best path forward for three reasons. First, the *Farmer* approach is most consistent with standards of legal interpretation and the plain language in *Davis*. Second, the *Farmer* approach best protects the policy goals that were envisioned by Congress, including the intent to provide broad protection from sexual discrimination. Third, this approach is the most logical approach in practice and ensures that victims are not forced to subject themselves to additional harassment.

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157. *Id.* at *7 (internal quotations omitted) (quoting Farmer v. Kan. State Univ., 918 F.3d 1094, 1105 (10th Cir. 2019)).
158. *Id.*
159. 948 F.3d 1150 (9th Cir. 2020).
160. *Id.* at 1162 n.2.

A. Legal

First and foremost, the Tenth Circuit's approach is supported by the fundamental principles of legal interpretation. Where a select word or phrase appears ambiguous, such words must be interpreted through the lens of the full text.[161] In *Davis*, the Supreme Court specifically defined *subjecting* students to harassment as "caus[ing] [students] to undergo" harassment or "mak[ing] them liable or vulnerable to it."[162] This definition is provided by the Court within the context of considering student-on-student harassment and a theory of liability premised on a school's deliberate indifference to such harassment.[163] This is significant because the conduct being considered is not direct discriminatory acts by an educational institution itself, but rather secondary discrimination resulting from the failure to respond appropriately to the discriminatory acts of another. As the Court itself stated, "[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."[164] As such, when the *Davis* Court defined *subjected* as "caus[ing]" or "mak[ing] . . . vulnerable" to future harassment, it was not referencing the school itself causing the harassment, as that would place the conduct at issue outside of the purview of the *Davis* test entirely, but that the institution's deliberate indifference caused further harm or made students vulnerable to further harassment.[165] The *Kollaritsch* decision ignored this broader context by suggesting that the *Davis* definition of *subjected* was intended to address either direct action by a school that causes harassment or a failure to take action thereby subjecting a student to further harassment.[166]

Moreover, the Tenth Circuit's approach adopts an interpretation that ensures that language within the *Davis* decision is not rendered superflu-

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161. *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . .").

162. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999) (internal quotations omitted) (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1966)).

163. *Id.* at 641, 644–45.

164. *Id.* at 644.

165. *Id.* at 645. This is the inherent problem with Zachary Cormier's argument in *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1 (2017). Mr. Cormier posits that if viewed in the context of the entire phrase, the first segment of the *Davis* Court's definition, "'cause [students] to undergo' harassment," should be viewed as a "causation trigger" and the second definition "'make them liable or vulnerable' to it" should be viewed as the "vulnerability trigger" but that both definitions require affirmative discriminatory conduct by the educational institution. *Id.* at 23 (emphasis omitted) (quoting *Davis*, 526 U.S. at 645). That is, he argues that the phrase should be read to mean that an institution subjects a student to harassment where it takes action that causes the student to experience further harassment or fails to take action which leads to further harassment. *Id.* But this contextual argument, ironically, ignores the broader context of the test in which the element of *subjected to* is situated.

166. *See* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 623 (6th Cir. 2019).

ous. As the Tenth Circuit and other courts have noted, the *Davis* test specifically uses the disjunctive "or" in defining what it means to be *subjected* to harassment.[167] Reading the components of the Supreme Court's decision as requiring the school's deliberate indifference to cause additional harassment would render the Court's disjunctive approach as superfluous. Although the Sixth Circuit attempted to circumvent this issue by proposing that *Davis* intended to suggest that an educational institution can either cause further harassment or fail to take action in a way that causes further harassment, this is a distinction without difference.[168] In either situation, the institution's deliberate indifference has not made a student more vulnerable to harassment, it has caused actual harassment, an approach that fails to give any meaning to *Davis*'s use of the alternative more vulnerable definition.

Finally, the Tenth Circuit's approach is also most consistent with the Supreme Court's language that "at a minimum" students must be made liable or vulnerable to sexual harassment.[169] This language suggests that the Supreme Court deliberately set a low threshold for what constitutes being *subjected to* additional harassment. Interpreting *Davis* as requiring plaintiffs to plead specific, actual acts of harassment to satisfy this standard would be inconsistent with the "at a minimum" language.

By contrast, the *Kollaritsch* decision ignored these fundamental approaches to interpretations of legal precedent by interjecting unique tort requirements into the plain language of Title IX.[170] The Sixth Circuit's approach attempted to convert the broad liability of Title IX into the highly specific elements of a "deliberate indifference intentional tort."[171] This is problematic for several reasons. First, it is not at all clear that Title IX can, or should, map cleanly onto the traditional elements of a common law tort claim. Certainly nothing within the statute explicitly suggests that this should be the case.[172] Second, even if the application of tort law was appropriate in this context, the Sixth Circuit wrongly applied the very principles it attempted to impose, as discussed above.[173] Under the Sixth Circuit's tort approach, the analysis should address whether the school (1) had actual knowledge of harassment, (2) to which it responded with deliberate indifference, (3) which caused a student to experience, (4) a deprivation of access to education.[174] This approach, though reductionist, tracks closely with the language of *Davis*. And un-

167. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019).
168. *Kollaritsch*, 944 F.3d at 623.
169. *Davis*, 526 U.S. at 645.
170. *See Kollaritsch*, 944 F.3d at 619–20.
171. *Id.* at 620.
172. *See Civil Rights Law—Title IX—Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims.*—Kollaritsch v. Michigan State University Board of Trustees, *944 F.3d 613 (6th Cir. 2019)*, 133 HARV. L. REV. 2611, 2615–17 (2020).
173. *Id.* at 2617.
174. *See id.* at 2618.

der such a tort analysis, it is clear that deliberate indifference to harassment could result in impact to educational opportunities because it causes a student to experience further harassment *or* because it makes a student vulnerable to additional harassment such that her educational experience is fundamentally altered. To avoid such an outcome, the Sixth Circuit imposed an unrelated and previously unmentioned element into its novel tort claim.[175] Not only must a school's deliberate indifference result in impact to educational opportunities, but according to the Sixth Circuit, that causation must result solely from "further actionable harassment."[176] But actionable is not present anywhere in the statute or the language of *Davis*,[177] and the Sixth Circuit's need to engage in such gymnastics emphasizes how poorly this tort claim approach fits.

B. Policy

Interpreting *Davis*'s requirements consistent with *Farmer* also best effectuates the purpose and policy of Title IX, ensuring that the judiciary gives effect to the intent of Congress and upholds the principle of legislative supremacy.[178] To the extent that the statute and directive of the Supreme Court can even be considered ambiguous, which, as argued above, it does not appear to be, the tenets of purposivism also support the adoption of the *Farmer* approach.[179] Purposivism is guided by the principle that "legislation is a purposive act, and judges should construe statutes to execute that legislative purpose," and that, to the extent that a text is ambiguous, it should be interpreted "in a way that is faithful to Congress's purposes."[180] Here, the purpose of Title IX is broad; Congress wanted to prevent federal funds from being used to support discriminatory practices and it wanted to provide individuals "effective protection against those practices."[181] The Supreme Court recognized the extent of the protections that Congress sought to provide, directing courts "that the text of Title IX should be accorded 'a sweep as broad as its language.'"[182]

The *Farmer* approach recognizes the breadth of the Supreme Court's directive, which aimed to encompass as much potentially dis-

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175. *See id.*

176. *Kollaritsch*, 944 F.3d at 622.

177. *See* 20 U.S.C. § 1681(a) (2018); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640–54 (1999).

178. *See* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542–43 (1940); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("[T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.").

179. ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014).

180. *Id.*

181. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); *see also* 118 CONG. REC. 5,806–07 (1972) (Senator Birch Bayh stating: "The amendment we are debating is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . . As a matter of principle . . . .").

182. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (quoting N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).

criminatory conduct as possible, rather than requiring schools to take action only in the most limited circumstances when a plaintiff can allege that she has alleged additional specific actionable harassment as a result of a school's deliberate indifference, or a deliberate-indifference intentional tort. In *Farmer*, the Tenth Circuit recognized that there are a myriad of ways that a student can be subjected to harassment in an educational program, and the Supreme Court's interpretation of *subjected* as including both "to cause" and "to make . . . vulnerable," was an effort to include as much of that harassment within the protections of Title IX as possible.[183] By contrast, the reductionist approach of the Sixth Circuit in *Kollaritsch*, which seeks to collapse the Supreme Court's broad descriptors into one narrow requirement that a plaintiff show she was subjected to actionable, specific additional harassment, is inconsistent with the broad congressional intent of Title IX.[184]

While the Sixth Circuit noted that private causes of action require a high standard to be met, the Supreme Court has long taken that standard into consideration—finding the sweep of Title IX to be broad even within the context of private remedies and monetary damages.[185] In requiring actual, rather than constructive, knowledge of harassment by defendants and directing that defendants' conduct must be clearly unreasonable for a private action to lie, the Supreme Court has ensured that these high standards are maintained.[186] An unduly narrow definition of *subjected to* discrimination need not be applied to ensure that educational institutions escape overly burdensome liability standards, and it is inconsistent with the antidiscriminatory purpose of the statute.

Finally, keeping the definition of potential discrimination that a student may be subjected to as broad as possible is also consistent with the true focus of Title IX, which is on educational institutional compliance and ensuring a discrimination-free educational environment, not the exact nature of the harassment perpetuated by the third parties within the institution's control. The crux of liability is whether the educational institution, with actual knowledge of harassment, chooses to remain idle and deliberately indifferent to such harassment.[187] Rather than focusing on the conduct of the institution, the *Kollaritsch* approach centers the inquiry on the third-party student committing the harassment—that student must decide to harass again in order for a school or university to be lia-

183. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019).

184. *See* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 618 (6th Cir. 2019).

185. *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005); *Gebser*, 524 U.S. at 292–93.

186. The Supreme Court has issued several opinions placing boundaries on the reach of Title IX, while notably choosing not to do so in the context of the *subjected to* analysis in *Davis*. For example, in *Gebser*, the Supreme Court rejected the application of vicarious liability to Title IX, finding that institutions are responsible only for their own deliberate indifference. *See Gebser*, 524 U.S. at 288.

187. *See id.* at 290.

ble, even when that institution has already responded with deliberate indifference to an original report of harassment.[188] Such an approach fundamentally undermines the very purpose of Title IX: to protect students from all forms of sex discrimination in institutional settings.[189]

While the plaintiff must show that the school's deliberate indifference caused her to experience some type of damage in the form of impact to educational opportunity, denying liability where that damage takes the form of being made vulnerable to further harassment only discourages broad institutional compliance and encourages universities to unduly scrutinize their students' claims of discrimination.

C. Practice and Ethics

Finally, any court considering the intent of the Supreme Court in defining *subjected* in *Davis* must assume that the Court understood the practical consequences of its interpretive efforts at the time it was evaluating Title IX.[190] If the goal of Title IX is ultimately to ensure an end to discrimination within educational environments, it is most certainly antithetical to that goal to require a student to continue to subject herself to additional harassment in order to be afforded the protections provided by Title IX. Such a requirement has the opposite effect of ending discriminatory experiences at school—it *increases* discrimination by asking a plaintiff to show that she was first subjected to actionable harassment to which a school was deliberately indifferent and then subjected to additional actionable harassment after the initial abuse. As one can easily imagine, after experiencing a rape, assault, or sexual harassment in a school environment, many students chose to leave that environment to escape the psychological impacts of a traumatic event or to ensure that they are not subjected to further abuse.[191] This is itself "discrimination under any education[al] program or activity," as the victim navigates the fear of further harassment within her educational experience or is required to bear the consequences of her lost educational opportunities.[192] The *Farmer* approach recognizes it as such, acknowledging that the fear

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188. *See Kollaritsch*, 944 F.3d at 624–25.

189. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1098 (10th Cir. 2019).

190. *See, e.g.*, Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1107 (1992) (noting that "practical considerations play an important role in the [Supreme] Court's statutory cases").

191. *See* Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. COLL. STUDENT RETENTION: RSCH., THEORY & PRAC. 234, 244 (2015) (finding that students who experience sexual violence were more likely to leave school compared with students who experienced physical or verbal violence); Sharyn Potter, Rebecca Howard, Sharon Murphy & Mary M. Moynihan, *Long-Term Impacts of College Sexual Assaults on Women Survivors' Educational and Career Attainments*, 66 J. AM. COLL. HEALTH 496, 499, 502 (2018) (finding that only 35.8% of study participants who experienced a college sexual assault completed their degree without disruption, and 67% reported a negative impact on academic performance).

192. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a) (2018)).

of further harassment can be almost as damaging as the harassment itself.[193]

By contrast, under the Sixth Circuit's approach, this vulnerability is not enough.[194] Instead, plaintiffs must willingly continue at the same educational institution where the trauma occurred and actively put themselves in harm's way so that they can be subjected to the additional harassment that *Kollaritsch* would require. For example, in a situation where a female student who is raped by a fellow classmate reports the rape, but the school does nothing, the student would be required to continue to go to school with her rapist and deliberately subject herself to retraumatization and further harassment by that rapist to establish a claim for civil damages under Title IX. Even more disturbingly, if a small child is sexually assaulted by a fellow student but the school does nothing to address the assault, the parents would be placed in the unconscionable position to have their young child continue attending school with the assailant if they wanted to seek private action against the school for its obvious failures under Title IX. If they acted, as most parents would, to protect their child from any future harassment by removing their child from the school environment, they would also forgo any right to a Title IX claim, despite the school's clear deliberate indifference.[195]

As multiple courts have noted, this would be a perverse distortion of Title IX.[196] Rather than offering students the protection of the federal government to prevent ongoing discrimination and ensure environments free of harassment, this interpretation of Title IX would require students to actually subject themselves to additional harassment and discrimination to assert their statutory rights. Certainly, this cannot be what legislators intended in enacting the statute, nor the Supreme Court in interpreting it. Preserving the most inherent antidiscriminatory principles of Title IX necessitates following the *Farmer* approach.

CONCLUSION

The passage of Title IX was a historical moment in our nation's collective effort to combat sexual discrimination in educational institutions and ensure that female students have equal access to the educational opportunities that they seek. The purpose of Title IX was broad, and the Supreme Court's interpretations of Title IX have consistently recognized the breadth of the protections that should be afforded to female students.[197] While a circuit split currently exists between *Farmer* and *Kollaritsch* as to whether the *subjected* language of *Davis* permits plaintiffs

193. *Farmer*, 918 F.3d at 1105.
194. Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 624–25 (6th Cir. 2019).
195. *See id.*
196. *See, e.g.*, *Farmer*, 918 F.3d at 1104; Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015).
197. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

to plead vulnerability to harassment, or if additional specific actionable harassment is required, this Article argues that the broad mandate of Title IX should prevail.[198] Whether looking to the plain language meaning in *Davis*, the policies and purposes behind Title IX, or the practical implications of Title IX jurisprudence, the Tenth Circuit's approach to vulnerability in *Farmer* best ensures the protection of women on campus and at school and continues to hold educational institutions accountable when they fail to provide such protection under law.

198. *See supra* Parts VI, VII.

Chapter 21*

Afghan Woman & #MeToo: A Story of Struggle and Strength

Zulaikha Aziz[1] and Nasrina Bargzie[2]

Afghan Path

In 2017, a group of teenage Afghan girls took the robotics world by storm. An all-girls team from Herat, Afghanistan, in the shadow of war, travel difficulties, and family heartbreaks, went toe-to-toe with teams across the world and took first place in a top robotics competition in Europe.[3] Their challenge was to create a robot that could solve a real-world problem.[4] The girls created a robot that uses solar power to assist with fieldwork on farms.[5] Thousands of spectators who attended the event chose the girls' team as the winner.[6] Despite all the challenges, these Afghan girls rose and won. This is the story of Afghanistan and of Afghan women.

Afghanistan has endured nearly forty years of armed conflict, and yet in a 2018 Survey of the Afghan People by the Asia Foundation, 80.8 percent of Afghan female and male respondents reported that they were happy.[7] As Afghan women and the Afghan people face challenge after challenge, both the prevalence of harassment of women exposed by the global phenomena of movements like #MeToo, and the day-to-day challenges of living in a warzone, the resilience and strength of Afghan women amid these realities cannot be understated.

The challenges and harsh realities are many. Violence against women is one of the biggest issues facing not only Afghan women but Afghanistan in general. The severe gender inequality in Afghanistan is directly related to lower health outcomes, lower educational outcome, and lower income inequality overall.[8] We offer a sober assessment of these realities in the pages that

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[3] Christine Hauser, *Afghan Girls' Robotics Team Overcomes Setbacks to Win Contest in Europe*, N.Y. TIMES, Nov. 29, 2017, https://www.nytimes.com/2017/11/29/world/afghanistan-girls-robotics.html.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] THE ASIA FOUNDATION, A SURVEY OF THE AFGHAN PEOPLE: AFGHANISTAN IN 2018, 37 (2018); *Id.* at 37 ("This year, for the first time, women report being generally happy slightly more frequently than men (81.6% vs. 79.9%).").

[8] Afghanistan's Human Development Index value for 2017 is 0.498—which put the country in the low human development category—positioning it at 168 out of 189 countries and territories and a Gender Inequality Index (GII) value of 0.653, ranking it 153 out of 160 countries in the 2017 index. The GII reflects gender-based inequalities in three dimensions—reproductive health, empowerment, and economic activity and can be interpreted as the loss in human development due to inequality between female and male achievements in the three GII dimensions. Please see the 2018 Human Development Report for more information on Afghanistan's statistics with regards to Afghanistan's Human Development statistics and Gender Development Statistics. U.N. Dev. Programme, Human Development Indices and Indicators: 2018 Statistical Update, (2018), http://www.hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf. *See also* U.N. Development Programme, Human Developments Reports: Afghanistan, (2018), http://www.hdr.undp.org/en/countries/profiles/AFG.

follow, but every difficulty is counter-balanced by the sheer will of Afghan women and Afghan people to survive and flourish as independent, free people.

Real Life: Afghanistan

Women across the world are speaking up about their most painful experiences through the #MeToo movement in an effort to further social progress in women's daily lives. Afghan women, too, are part of this movement. Like their sisters across the world, Afghan women have suffered under historic and current-day gender-specific hostilities. Some issues are cross-cutting—abuse of female athletes, street and internet harassment, laws that provide insufficient protection or are not implemented properly. Others are specific to the history and context of Afghanistan—security in war, and patriarchy systems still evolving in the modern context.

Since the removal of the Taliban regime in 2001, women have made substantial legal gains—women's rights were enshrined in the national Constitution of 2004, and successive national governments have vowed to protect women's rights, eliminate violence against women, and support women's economic empowerment and political participation. In fact, one of the cornerstones of the international community's intervention in Afghanistan was the so-called liberation of Afghan women.[9] The military occupation was coupled with billions of dollars in humanitarian and development aid, of which a substantial portion was explicitly conditioned on implementing projects containing a "gender equality" or "women's empowerment" component.[10] Even with all of the rhetoric, reports by the United Nations, local civil society groups, and international human rights organizations have shown that violence against women remains largely unaddressed by the Afghan criminal justice system.[11] After nearly two decades of democratic governance after the fall of the Taliban, which kept Afghan women effectively out of Afghan society,[12] the Taliban legacy continues to loom over legal and social progress made by Afghans.[13] In 2018, according to the Special Inspector General for Afghanistan Reconstruction, 56 percent of the country is under Afghan government (referred to as the National Unity Government (NUG)) control, 30 percent is contested, and 14 percent is under the control of insurgent groups.[14] The latest reports of peace talks between the United States and the Taliban to potentially bring the Taliban into a power-sharing agreement with the current Afghan government have Afghan women in fear of the further erosion of their existing rights.[15]

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[9] Editorial, *Liberating the Women of Afghanistan*, N.Y. TIMES, Nov. 24, 2001, https://www.nytimes.com/2001/11/24/opinion/liberating-the-women-of-afghanistan.html.
[10] *See, e.g.,* Afghanistan: Gender, USAID, (2019), https://www.usaid.gov/afghanistan/gender-participant-training.
[11] *See, e.g.*, U.N. Assistance Mission in Afg., U.N. Office of the High Comm'r for Human Rights, Injustice and Impunity: Mediation of Criminal Offenses of Violence Against Women, (2018), https://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_EVAW_Report2018_InjusticeImpunity29May2018.pdf; Heather Barr, *Afghan Government Ignoring Violence Against Women*, HUMAN RIGHTS WATCH, May 30, 2018, https://www.hrw.org/news/2018/05/30/afghan-government-ignoring-violence-against-women; AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION, SUMMARY OF THE REPORT ON VIOLENCE AGAINST WOMEN (2018), https://www.aihrc.org.af/media/files/Research%20Reports/Summerry%20report-VAW-2017.pdf.
[12] *See* SURVEY, *supra* note 7, at 165 ("Women's participation in the political process has been, on its face, a great success story since the fall of the Taliban, when women had no rights of participation or representation.").
[13] *Id.* at 77.
[14] *Id.* at 128.
[15] Rod Nordland, Fatima Faizi & Fahim Abed, *Afghan Women Fear Peace With Taliban May Mean War on Them*, N.Y. TIMES, Jan. 27, 2019, https://www.nytimes.com/2019/01/27/world/asia/taliban-peace-deal-women-afghanistan.html.

As Afghan women and girls take up the mantle of inclusion in the global community through academics, sports, working outside the home, and leading their families, the same ills that plague other countries also plague Afghanistan. Without a doubt, sexual harassment of women is widespread in Afghanistan. From public places to educational environments to the workplace, studies show that upwards of 90 percent of Afghan women report harassment.[16] Underlying themes that contribute to extreme levels of harassment include the willingness of men to harass, the lack of public intervention when harassment occurs, victim-blaming, and distrust of police and institutions.[17]

Street harassment is a daily experience for Afghan women,[18] including sexual comments and physical attacks, such as groping, pinching, and slapping. Anti-harassment advocates often end up being the subject of harassment themselves.[19] For example, in 2015, an activist walked outside for eight minutes wearing steel armor to protest the groping and leering she endured daily. The activist received so many threats she was forced to leave Afghanistan.[20]

Harassment of women in public institutions is also a problem area. Like the abuse of female gymnasts in the United States,[21] explosive allegations of sexual and physical abuse of players on the Afghan women's national soccer team rocked Afghanistan in late 2018.[22] A former player has alleged that the president of the Afghanistan Football Federation and some trainers "are raping and sexually harassing female players."[23] The response of the NUG was strong and unequivocal. President Ashraf Ghani ordered an investigation and noted that the allegations were "shocking to all Afghans."[24]

The internet has also proven to be a source and space of harassment of Afghan women.[25] Facebook is widely used in Afghanistan and has become a source of harassment where women have received rape threats and extortion threats.[26]

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[16] Patricia Gossman, *#MeToo in Afghanistan: Is Anyone Listening?*, HUMAN RIGHTS WATCH, Dec. 20, 2017, https://www.hrw.org/news/2017/12/20/metoo-afghanistan-anyone-listening ("A 2016 study found 90 percent of the 346 women and girls interviewed said they had experienced sexual harassment in public places, 91 percent in educational environments, and 87 percent at work.").
[17] Danielle Moylan, *When It Comes to Sexual Assault, Afghanistan Is All Talk and No Action*, FOREIGN POLICY, Dec. 21, 2015, https://foreignpolicy.com/2015/12/21/when-it-comes-to-sexual-assault-afghanistan-is-all-talk-and-no-action/.
[18] Sune Engal Rasmussen, *Outrage at Video of Afghan Colonel Sexually Exploiting Woman*, THE GUARDIAN, Nov. 2, 2017, https://www.theguardian.com/world/2017/nov/02/outrage-at-video-of-afghan-colonel-sexually-exploiting-woman.
[19] Moylan, *supra* note 17.
[20] Rasmussen, *supra* note 18.
[21] Christine Hauser & Karen Zraick, *Larry Nassar Sexual Abuse Scandal: Dozens of Officials Have Been Ousted or Charged*, N.Y. TIMES, Oct. 22, 2018, https://www.nytimes.com/2018/10/22/sports/larry-nassar-case-scandal.html.
[22] Fahim Abed & Rod Nordland, *Afghan Women's Soccer Team Accuses Officials of Sexual Abuse*, N.Y. TIMES, Dec. 4, 2018, https://www.nytimes.com/2018/12/04/world/asia/afghanistan-women-soccer-abuse.html; *'There was blood everywhere': the abuse case against the Afghan FA president,"* AFGHAN HERALD, Dec. 27, 2018, https://afghanherald.com/?p=3260.
[23] Abed & Nordland, *supra* note 22.
[24] *Id.*
[25] Gossman, *supra* note 16.
[26] *Id.*

Harassment in the workplace is also rampant, with studies suggesting that up to 90 percent of Afghan women have experienced such harassment. [27] In 2017, a video of an Afghan colonel having sexual intercourse with a woman he pressured after she had asked for a promotion went viral.[28] While the colonel was detained and placed under investigation, no formal charges appear to have been brought yet.[29] Other Afghan women have reported that to get grants from United Nations agencies and various Western embassies, they have been told by Afghan staff that their proposals would be approved in exchange for sexual favors.[30]

Violence against women—including "murders, beatings, mutilation, and acid attacks"—remain prevalent, with the Ministry of Women's Affairs reporting an increase in violence against women in areas under effectively-Taliban control.[31] Afghan women continue to lag behind men in literacy, with literacy of young women being only 57 percent of young men.[32] Further, child marriage continues as a widespread issue limiting the opportunities of women.[33]

The #MeToo movement itself has taken a shape formed by the realities of Afghanistan. While a few Afghan women have spoken out, most Afghan women remain silent in the face of this speak-out movement.[34] One activist who has spoken out noted that "[i]n Afghanistan, women can't say they faced sexual harassment. If a woman shares someone's identity, he will kill her or her family. We can never accuse men, especially high-ranking men, without great risk."[35] Threats come not only from the accused, but also from the victim's families, and society at large.[36]

Afghan activists blame impunity for perpetrators as a key reason that Afghan women do not report harassment or get relief.[37] Activists push back on the argument that misogyny derived from culture and sexual repression is what drives harassment of Afghan women and point out that harassment of women is prevalent in countries with differing cultural backgrounds and that harassment of women is a global problem.[38] That said, because Afghan laws and policies are not appropriately implemented and are rife with politicking, the reality is that Afghan women often remain unprotected in public and private spaces.[39]

The current government is publicly committed to supporting women's empowerment and addressing violence against Afghan women.[40] NUG's adopted National Action Plan includes adoption of UN Security Council Resolution 1325, addressing the effects of war on women.[41] The international donor and development community, which often drives the inclusion of

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[27] Rasmussen, *supra* note 18.
[28] *Id*.
[29] Rod Nordland & Fatima Faizi, *Harassment All Around, Afghan Women Weigh Risks of Speaking Out*, N.Y. TIMES, Dec. 10, 2017, https://www.nytimes.com/2017/12/10/world/asia/afghan-metoo-women-harassment.html.
[30] *Id*.
[31] SURVEY, *supra* note 7, at 32.
[32] *Id*.
[33] *Id*. at 175.
[34] Nordland & Faizi, *supra* note 29.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] SURVEY, *supra* note 7, at 16.
[41] *Id*. at 165.

women's rights issues, is highly involved in attempting to bring NUG's goals into effect and with "two-thirds of the population under the age of 24, Afghanistan's youth culture is thriving in major urban areas, and women are increasingly seen in the arts and media, including bold female street artists, painters and musicians."[42] Strident advocacy of Afghan women's rights leaders has led to the passage of a number of laws directly addressing harassment and violence against women. All these efforts are part of a work very much in progress, and an important part of moving the rights of Afghan women forward.

Women's Rights and the Legal System of Afghanistan

Access to justice remains an enormous problem for Afghan women generally, and more particularly in the context of demanding their right to be free from violence, including harassment.[43] Illustrating the on-the-ground reality for Afghan women and the shortcomings of the Afghan legal system to adequately address violence against women is the excruciatingly tragic story of Farkhunda Malikzada, a 27-year-old woman beaten to death by a mob in the center of Kabul on March 19, 2015.[44]

The murder happened in the center of a city near a religious site, among police checkpoints, embassies, ministries, even in the shadow of the presidential palace.[45] A religious leader falsely accused Farkhunda of burning a Quran.[46] In fact, Farkhunda, a teacher of the Quran herself, had told the man that his business of selling *tawiz*—small scraps of paper with religious verses that are supposed to be powerful spells—was against Islam.[47] After the religious leader began to yell that Farkhunda had desecrated the Quran, a crowd formed and beat her with sticks, stones, and even their feet.[48] They tied her to a car and dragged her through the streets, then threw her body on the riverbank and set it on fire.[49] The brutal murder of Farkhunda shocked Afghans and prompted massive demonstrations urging the authorities to protect women from violence.[50] After initial statements by the police in Kabul and prominent Afghan clerics that her killing was justified, there were mass demonstrations in the streets of Kabul which led to nearly 50 men being tried in connection with the attack, including police officers accused of failing to stop the assailants. [51] Four men were sentenced to death, but those sentences were later commuted, and

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[42] *Id*. at 165.
[43] United Nations Assistance Mission in Afghanistan (UNAMA), *Access to Justice for Afghan Women Victims of Violence "Severely Inadequate,"* May 29, 2018, https://unama.unmissions.org/access-justice-afghan-women-victims-violence-'severely-inadequate'-–-un-envoy.
[44] Frozan Marofi, *Farkhunda Belongs to All the Women of Kabul, of Afghanistan*, THE GUARDIAN, Mar. 28, 2015, https://www.theguardian.com/global-development/2015/mar/28/farkhunda-women-kabul-afghanistan-mob-killing.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] Haroon Siddique, *Farkhunda Murder, Afghan Court Quashes Death Sentences*, THE GUARDIAN, July 2, 2015, https://www.theguardian.com/world/2015/jul/02/farkhunda-murder-afghan-court-cancels-death-sentences.
[51] Hamid Shalizi & Jessica Donati, *Afghan cleric and others defend lynching of woman in Kabul*, REUTERS, Mar. 20, 2015, https://uk.reuters.com/article/uk-afghanistan-woman/afghan-cleric-and-others-defend-lynching-of-woman-in-kabul-idUKKBN0MG1ZA20150320; Pamela Constable, *It was a Brutal Killing that Shocked Afghanistan*, WASH. POST, Mar. 28, 2017, https://www.washingtonpost.com/world/asia_pacific/it-was-a-brutal-killing-that-shocked-afghanistan-now-the-outrage-has-faded/2017/03/27/e3301f5a-109c-11e7-aa57-2ca1b05c41b8_story.html?utm_term=.08ace350b946.

most of the lengthy prison terms given to eight others were reduced.[52] Though the men were prosecuted, the proceedings were criticized for being conducted too hastily with the appeals process happening completely behind closed doors.[53]

The Laws

Afghan women's legal rights are addressed expressly by the Afghan Constitution. Article 22 of the Afghan Constitution (2004) declares: "Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law."[54] Similarly, Articles 83 and 84 of the Constitution emphasize women's participation in the upper and lower houses, including placing a mandate on the President who should ensure that 50 percent of the one-third of appointees of the Mishrano Jirga, the Upper House of Parliament, are women.[55]

The Constitution also requires all laws to be compatible with Sharia. Beyond the Constitution, the Afghan government has made various commitments to women's rights and gender equality in the Afghanistan Compact (AC 2006), the Afghanistan National Development Strategy in support of human development goals (ANDS 2008-2013), and most recently the Afghanistan's National Action Plan for the implementation of the United Nations Security Council Resolution 1325 (NAP 1325), which came into effect in June 2015. ANDS provided an analysis of the priority problems that affect Afghan men and women and set out policies, programs, and benchmarks to measure progress. As a result of such developments, the Afghan government drafted the National Action Plan for the Women of Afghanistan (NAPWA, 2008-2018) with the aim of improving women's lives in Afghanistan through a multi-sectorial plan in the areas of education, health, economic security, and political participation.

In addition to the Constitution and guiding policy documents, there are three sets of official laws that exist in Afghanistan regulating acts of violence against women, namely: the Law on the Elimination of Violence Against Women (EVAW), the Anti-Harassment of Women and Children Law (AHWC), and the revised Afghan Penal Code (PC).

In addition to the Constitution and the three sets of official laws that touch on women's rights, there is also an extensive informal justice system that many Afghans turn to for a variety of reasons including access, familiarity, tradition, convenience, and societal pressure. These informal mechanisms are based on cultural and traditional practices as well as interpretations of Sharia but are often in a tense relationship with both official laws and Sharia.

Overall, however, the official laws are hampered by poor enforcement, and as between EVAW, AHWC, and the PC, there is still unresolved confusion as to which law applies and controls in various contexts.

(1) Elimination of Violence Against Women Law

In an attempt to address the high incidence of violence against women through the law, women's rights advocates, civil society organizations, and their allies backed the drafting of EVAW. The

[52] *Id.*
[53] Siddique, *supra* note 50.
[54] CONSTITUTION OF AFGHANISTAN, Jan. 26, 2004, art. 22, available at http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf .
[55] *Id.* at arts. 38, 84.

first law in Afghanistan specifically addressing violence against women, EVAW was adopted in August 2009 in a Presidential Decree.[56] Formulated in 44 Articles, Article 2 states its overall purpose is to: provide legal and Sharia-based protection to women; promote family integrity and fight against misogynist traditions and customs that are un-Islamic; provide support to women who have been harmed; prevent violence against women; raise awareness about violence against women and women's legal protection; and prosecute perpetrators of violence against women. In the face of great opposition, EVAW was passed by presidential decree while Parliament was in recess but has not been approved by Parliament since.[57] EVAW identifies five serious offenses set out in Articles 17 to 21 that the state must act on, irrespective of whether a complaint is filed or subsequently withdrawn.[58] These offenses include sexual assault, forced prostitution, publicizing rape victims' identity, setting fire to or attacking with a chemical substance, and forced self-immolation or forced suicide.[59]

In addition to the five enumerated "serious crimes," EVAW covers a wide range of issues affecting women, from physical and verbal violence against women to legal, medical, and social protection, to provision of reparations to the harmed party, and protective and supportive measures. EVAW criminalizes twenty-two acts of violence against women such as forced and child marriage, beating, harassment, verbal abuse, and withholding of inheritance, among other offenses.[60] The law also specifies punishments for perpetrators and criminalizes the customs, traditions, and practices that lead to violence against women and that are against Sharia including *baad*,[61] the customary practice of giving a woman or girl from the family of a man accused of a crime in compensation to the family of a victim of a crime.[62]

The institutional responsibility for EVAW is with the Afghan Ministry of Women's Affairs (MoWA) and Afghanistan's judicial system including the Ministry of Justice (MoJ), which is

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[56] Under Article 79 of the Constitution, a bill can be approved by Presidential decree if circumstances require the processing of a legislative document during the recess of the Wolesi Jirga, the lower house of Parliament, with the exception of legislation dealing with matters related to budget and financial affairs. A Presidential decree acquires the full force of law but must be presented to the National Assembly within thirty days of the convening of its first session after the decree has been endorsed. It is up to the National Assembly whether to act on the decree. If the decree is rejected by the National Assembly, it becomes void. If the decree is not rejected by the National Assembly or the National Assembly chooses not to act on the decree, it continues to be enforceable law and must be amended or voided by the same process as a law that has been approved by Parliament. *See* USAID, ISLAMIC REPUBLIC OF AFGHANISTAN LEGISLATIVE PROCESS MANUAL, http://www.cid.suny.edu/publications1/arab/Legislative_Process_Manual.pdf.

[57] See Fawzia Koofi, *It's Time to Act for Afghan Women: Pass EVAW*, FOREIGN POLICY, Jan. 13, 2015, https://foreignpolicy.com/2015/01/13/its-time-to-act-for-afghan-women-pass-the-evaw/ for a more completed discussion of the attempted process to get EVAW passed in Parliament.

[58] Article 39 states that for all crimes listed in Articles 22-39, "the victim may withdraw her case at any stage of prosecution (detection, investigation, trial or conviction) which results in the stoppage of proceeding and imposition of punishment," but a similar allowance is not stated for crimes listed in Articles 17-21, the "5 serious offenses." See Elimination of Violence Against Women (EVAW) Law, art. 39 (Afg.), https://www.refworld.org/pdfid/5486d1a34.pdf.

[59] *Id*. at arts. 17-21.

[60] *Id*. at ch. 3, arts. 17-38.

[61] *Baad* is a pre-Islamic practice of settlement and compensation whereby a woman or girl from the family of one who has committed an offence is given to the victim's family as a servant or a bride. *Afghanistan: Stop Women Being Given as Compensation*, HUMAN RIGHTS WATCH, Mar. 8, 2011, https://www.hrw.org/news/2011/03/08/afghanistan-stop-women-being-given-compensation.

[62] EVAW, *supra* note 58, at art. 25.

responsible for prosecuting crimes, and Afghan courts. They are tasked with providing support to women who bring claims under EVAW, prioritizing cases of violence against women, and taking active preventive measures.[63]

Looking specifically at the issue of harassment, harassment of women is defined in Article 3(7) of EVAW as "using words or committing acts by any means, which cause damage to the personality, body, and psyche of a woman." But these "acts" and "words" remain undefined.[64] According to Article 30, a person convicted of this offense can be sentenced from three to twelve months in prison. In cases where the person who committed the harassment misused his authority, the sentence cannot be less than six months.[65] According to Article 7 of EVAW, the victims or their relatives can register complaints with the police, the Huquq (civil departments within the MoJ), at courts, or in other relevant offices. These institutions must pursue the complaints and inform MoWA.[66] Based on the same Article and Article 16, the High Commission on the Elimination of Violence (HCEV), chaired by MoWA and with participants from all relevant government institutions, is in charge of coordination between the different institutional actors and for developing policies and regulations for the implementation of EVAW.

Besides criminalizing acts of violence against women, EVAW includes provisions designed to ensure that government institutions work to address social and cultural patterns of harassment. For example, according to Article 11, the Ministry of Information and Culture is required to broadcast programs on television channels and radio stations and publish articles to raise public awareness about women's rights, the root causes of violence against women, and to create awareness about crimes committed against women.

EVAW is the most robust law in Afghanistan combatting violence against women. The infrastructure built in order to implement EVAW—including the EVAW prosecuting offices—continues to be active and certain cases are still brought under EVAW. EVAW, however, is hampered by a number of realities. First, it was an extremely controversial law in its development and implementation and buy-in from the judicial system still appears to be an issue. Second, as explained further below, parts of EVAW are incorporated in the other two official laws addressing women's rights, namely the AHWC and the revised PC. This has resulted in confusion as to which laws to use in addressing claims of assault and harassment, as well as the proper procedural mechanisms by which to bring those claims.

(2) Anti-Harassment of Women and Children Law

Despite the availability of EVAW, in 2016, Parliament passed a second law, the Anti-Harassment of Women and Children Law (AHWC) to specifically address harassment. This overlap has created conflict and confusion as to what law should govern and what law would be best for women. Though AHWC contains provisions negating and superseding the articles of the EVAW law that address harassment, it continues to be unclear for legal practitioners under which law to bring claims.

AHWC defines harassment as "body contact, illegitimate demand, verbal or non-verbal abuse and or any action resulting in psychological or physical harm and humiliating the human dignity

[63] *Id*. at art. 8.
[64] *Id*. at art. 3.
[65] *Id*. at art. 30.
[66] *Id*. at art. 7.

of woman and child."[67] The Ministry of Interior (MoI) was tasked with providing a special contact number so that women can report violations, and the Ministry of Labor, Social Affairs, Martyrs and Disabled was made responsible for combatting violations of the law by setting up a High Commission for the Prohibition of Harassment Against Women and Children.[68] All government institutions are "obliged to establish a Committee on Combating Harassment Against Women and Children in their respective [institutions] within three months after the enforcement of this law."[69] All complaints of harassment in government institutions are to be reported to the Anti-Harassment Committee of the relevant institution.[70] The Anti-Harassment Committees are then responsible for investigating the complaints, determining which ones are credible, and forwarding those to "relevant attorney[s]" for prosecution.[71] It is not clear whether these "relevant attorney[s]" are government prosecutors from the MoJ or whether they are legal aid attorneys or private attorneys. The MoI is responsible for ensuring that police officers prevent harassment of women and children in public spaces.[72] But as one Afghan woman subject to harassment stated to the Institute of War and Peace Reporting, "what would really be a big help is if the policemen themselves didn't harass me."[73]

In addition to the overlap with EVAW and the resulting confusion as to which law applies, another major problem with AHWC is the relatively lenient penalty for violations. Penalties for those convicted of harassment in public places or vehicles include fines in Afghanis equivalent to between $80 to $150 (U.S.), while similar behavior in the workplace or educational or healthcare centers can be punished with fines equivalent of between $150 to $300 (U.S.). Aggravated circumstances can lead to imprisonment for up to six months.[74] And even with these lax penalties, implementation under AHWC continues to be ad hoc.

Still other concerns relating to AHWC include that the law classifies women with children,[75] and harassment is narrowly defined as an offense that can be committed against women and children. It does not allow for the prosecution of cases in which men are sexually harassed verbally or physically. Not only does grouping women and children together and excluding men ignore victims of harassment that may be men, it further reinforces the idea that harassment is only a women's issue, as well as stereotypical notions of women being weak and vulnerable and needing to be protected, like children, as opposed to recognizing that the act of harassment is wrong regardless of who is the target.

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[67] Anti-Harassment of Women and Children Law, art 3(1).
[68] *Id* at arts. 5, 10.
[69] *Id*. at art. 7.
[70] *Id*.
[71] *Id*. at art. 8.
[72] *Id*. at art. 10.
[73] Mina Habib, *New Afghan Law Targets Sexual Harassment*, INSTITUTE OF WAR AND PEACE REPORTING, Mar. 8, 2017. https://iwpr.net/global-voices/new-afghan-law-targets-sexual-harassment.
[74] AHWC Law, *supra* note 67, at arts. 25-27; Medica Afghanistan, Petition Not to Ratify the Anti-Sexual Harassment Law Dated 19 Akrab 1395 / 9 November 2016 Pursuant to The Afghanistan Constitution, (2016), http://www.medicaafghanistan.org/medica/index.php/en/petition-not-to-ratify-the-anti-sexual-harassment-law-dated-19-akrab-1395-9-november-2016-pursuant-to-the-afghanistan-constitution/.
[75] When speaking about this law with a number of Afghan women's rights leaders and students, a point that was consistently made was that harassment is not just a problem impacting women. Many men face harassment both from other men as well as from some women; institutionalizing it as just a problem impacting women and children not only infantilizes women but fails to offer adequate protection for men. American University of Afghanistan (AUAF) discussions with Zulaikha Aziz, Nov. 28, 2018.

(3) Penal Code

The PC also addresses violence against women. Led by the MoJ in 2012, the Afghan government began revising the 1976 PC. Apart from incorporating new laws and provisions such as crimes against humanity and war crimes, the revised PC also incorporated all criminal laws and decrees of Afghanistan into one PC. The revision process was deemed necessary for meeting three key objectives: (1) codify all crimes and punishments in one document, (2) modernize the "Code-modern" definitions and concepts, and (3) ensure Afghanistan's compliance with international commitments.[76] The PC was revised and presented in the Official Gazette in an extraordinary issue on May 15, 2017 by Presidential Decree No. 256, coming into force on February 14, 2018.

Though the original draft of the revised PC included a specific chapter on the elimination of violence against women, incorporating provisions to criminalize the majority of the twenty-two acts set out in EVAW, there was great opposition to the incorporation of EVAW into the PC. That draft of the PC also included new provisions prohibiting both the detention of women on charges of running away and the practice of *baad*. However, the final adopted version did not include any reference to criminal offences of violence against women, with the exception of rape. Ultimately, the opponents of incorporation were successful though a later amendment on March 3, 2018 incorporated the five "serious crimes" specified under EVAW Articles 17 to 21.[77]

Proponents of incorporation argued that including a chapter on crimes related to violence against women in the PC would codify these crimes in Afghanistan's official criminal code and strengthen compliance and implementation, since the PC is the definitive authority on Afghan criminal law. Opponents of incorporation argued that the PC would not incorporate all of the provisions of EVAW and that a stand-alone law is needed to highlight the particularly egregious nature of crimes of violence against women, and to ensure the current implementing structures of EVAW prosecutors and the MoWA Committee tasked with implementing EVAW would remain in effect. A further argument was that the EVAW provisions, if incorporated in the PC, would not have passed Parliament and would have been removed in order to ensure passage of the PC. In fact, the PC was never reviewed by Parliament, and it is impossible to say whether it would have been had it included the EVAW provisions.

Ultimately the opponents of incorporation were successful in their lobbying efforts, which resulted in EVAW remaining a stand-alone law and the majority of criminal acts of violence against women remaining out of the PC. Discussions with advisors in MoJ responsible for drafting the PC reveal that the original draft did in fact include all of the criminal offenses enumerated under EVAW.[78] Had the EVAW provisions been designated as violations of Afghanistan's criminal code, they would have carried the same weight as all other criminal offenses in the PC rather than being bogged down by the politically complex history of bringing EVAW into effect.[79] Additionally, current efforts to draft a comprehensive commentary on the implementation of the PC would have included commentary on the crimes related to violence

[76] MINISTRY OF JUSTICE, OFFICIAL GAZETTE 1260 (2007), https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=105003&p_count=12&p_classification=01.
[77] AFGHANISTAN PUBLIC POLICY RESEARCH ORGANIZATION, NEW PENAL CODE AND EVAW LAW: TO INCORPORATE OR NOT TO INCORPORATE? 12 (2018).
[78] Unnamed MoJ Advisor in discussion with authors, Jan. 21, 2019.
[79] The unnamed MoJ Advisor also confirmed that there were no threats to oppose passage of the Penal Code with the EVAW crimes incorporated and all indications pointed to passage.

against women, serving as an important opportunity for all legal practitioners, including judges, to understand the implementation of the law with respect to such crimes.[80]

(4) Use of Informal Justice System

Most cases involving violence against women, including the five "serious" offenses in EVAW—rape, forced prostitution, publicizing the identity of a victim, burning or using chemical substances against a woman, and forced self-immolation or suicide—are not even prosecuted by or adjudicated in courts but are instead referred to traditional councils called shuras and jirgas, which have a long history of resolving disputes through the many provinces of Afghanistan.[81] The Afghan Constitution, EVAW, AHWC, and the PC are the official legal mechanisms that should be used to address abuses of Afghan women. However, it is estimated that over 80 percent of all disputes in Afghanistan are resolved through these informal mechanisms.[82]

Shuras and jirgas, the terminology differs depending on the region and structure of the councils, are based on local custom, tradition, and religious practices and have existed in Afghanistan for centuries. These informal institutions do not enforce the civil or criminal laws of Afghanistan, but rather the councils' interpretation of Sharia, customary law, or the collective wisdom of elders. These mechanisms are not state-actors and are not legally mandated to resolve criminal cases. They largely operate in an unofficial and unregulated capacity, their decisions in criminal cases are unlawful, and as such, are not subjected to any government oversight or scrutiny. The reasons these informal systems are used to such a high degree are complex and varied. However, one reason may be the confusion around which official law prevails.

Afghan authorities can often exacerbate the situation for victims by turning to informal justice mechanisms to mediate serious offenses instead of carrying out their duty to investigate or prosecute offenses through the formal justice system.[83] Often, even EVAW institutions and legal aid organizations refer cases to shuras and jirgas instead of to prosecutors for investigation and initiation of criminal proceedings.[84] Referring such serious criminal cases, let alone lesser offenses of harassment, undermines efforts to promote women's rights, erodes the rule of law, contributes to an expectation of impunity, discourages the reporting of these cases, and increases citizens' perception of a corrupt and unreliable justice system. Further, the referral to informal dispute resolution mechanisms exposes the government's abrogation of its primary responsibility as duty bearer under international law to ensure the effective prevention and protection of women from such crimes and to provide an effective response where they occur.[85]

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[80] The Asia Foundation facilitated the drafting of a comprehensive legal commentary on the revised Penal Code, completed in 2019. The Commentary includes substantial discussion on the provisions related to crimes involving violence against women which will be helpful in informing the application of those provisions in the Penal Code.
[81] UNAMA, *supra* note 11, at 19.
[82] The Center for Policy and Human Development (CPHD) at Kabul University estimated in 2017 that 80 percent of all disputes were being resolved in the informal sector. See CENTER FOR POLICY AND HUMAN DEVELOPMENT, AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007: BRIDGING MODERNITY AND TRADITION—THE RULE OF LAW AND THE SEARCH FOR JUSTICE 9 (2017).
[83] UNAMA, *supra*, note 11, at 6.
[84] *Id*. "In many cases, EVAW Law institutions either coordinated or participated in the traditional mediation process."
[85] Afghanistan is a state party to the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women (signed in 1980 and ratified in

The two different types of mediation carried out by traditional dispute resolution mechanisms related to violence against women—the mediation of criminal offences of violence against women and the mediation of wider disputes leading to decisions that result in violence against women—are both unlawful and constitute human rights abuses.[86] Traditional mediation mechanisms are prohibited legal tools in cases of violence against women in an increasing number of countries as they do not have an official mandate or agreement to abide by laws protecting women from violence and are therefore insufficient to prosecute serious offenses of violence against women. Mainly composed of men, their rulings are often extremely unjust and largely punitive towards women. [87] Still, in the absence of a legal system that is easily accessible to all Afghans, many women and men have no choice but to submit their complaints to shuras and jirgas if they seek resolution of a dispute. In fact, in many matters the shuras and jirgas are often more capable and more efficient in mediation and dispute resolution but in issues related to violence against women, there is a high risk of more damage to victims.

A Path Forward

Though the stories and statistics may seem bleak, much development has occurred in the past two decades and the resilience of Afghan women cannot be understated. They will carry their society forward to a new day of equal rights and protections for women and men, not just on paper but also in practice. To that end, there are a number of key areas where the Afghan government, civil society organizations, academia, and international allies can focus on to work with Afghan women on advancing their rights. Some recommendations are as follows:

A. Continued Commitment to Democratic Governance.

Democratic governance is a key component of advancing Afghan women's rights and must be upheld in Afghanistan. In the face of war and conflict, uncertainty and threats to their lives, the Afghan people have consistently taken the risk and showed up at the polling stations. They have bet on democracy and recognize it as the way forward. Talks of imposing an interim government comprised of the Taliban and acquiescing politicians runs in direct opposition to the notions of democracy for which Afghans have risked their lives. In addition to negotiations with the current official government of Afghanistan and a potential referendum of the people, the Taliban must explicitly recognize the rights of Afghan women and assert that they will uphold the rights of women to be free from violence as enshrined in the official laws of Afghanistan.

B. Overlapping Laws Should Be Clarified.

2003); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. The Committee on the Elimination of Discrimination against Women, General recommendation No. 35 states that the prohibition of gender-based violence against women has evolved into a norm of customary law and General Recommendation No. 33 on Access to Justice, CEDAW/C/GC/33, 23 July 2015 para. 58 (c), designed to: "Ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedures." Accessed respectively at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf; https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf.

[86] UNAMA, *supra*, note 11, at 10.

[87] There are very few cases of shuras and/or jirgas containing women. There have been incidents of all women shuras and/or jirgas in certain areas of the country but those are not regular and are not generally responsible for resolving disputes involving men and women including cases of violence against women.

The overlap between various laws addressing violence against Afghan women should be clarified and corrected through the Afghan legal process. Ideally, EVAW should be elevated entirely into the PC, and any overlapping pieces with the AHWC should be corrected in favor of EVAW. The AHWC and sections of PC should be updated to reflect harassment of men as well.

C. Public Awareness and Education.

An Afghan-led and culturally appropriate awareness and education campaign[88] around women's rights should be formulated and implemented. The basis to do so can be found in the EVAW law that instructs the Ministry of Information and Culture to broadcast programs on television channels and radio stations and publish articles to raise public awareness about women's rights, the root causes of violence against women, and to create awareness about crimes committed against women. Afghans working with Afghans to define and debate harassment is a key component of the legal system's ability to then implement those norms. [89]

D. Afghan Women Leadership.

Afghan women must be given space to further their own agenda without the pressure of outside forces. Confusion and conflict occur due to competing donor aims and funding opportunities with different donors backing different strategies. Afghan women's rights advocates are left in the middle, attempting to access resources needed to further their work and siding with donors based on funding opportunities rather than shared vision. Any funding that is advanced should be in line with goals set by Afghan women, not by donors. Afghan women cannot be represented by only a handful of prominent leaders who have secured access to donors and high-level leaders. The work must be more transparent and in line with the needs of diverse Afghan women. To that end, there should be a focus on including women from rural and remote areas in the development of a comprehensive Afghan women's rights agenda. The voices of women from remote and rural areas, where the majority of informal dispute mechanisms operate, are often drowned out by those of women in cities and in the capital of Kabul.

E. Untangle the Confusion Between Religious and Cultural Issues.

Often cultural perceptions of women's rights are thought to be derived from Islam when the religion says the opposite.[90] There needs to be a greater focus on addressing religious and cultural perceptions that exist with laws related to ending violence against women. For instance, a woman or man who thinks EVAW conflicts with Islam may not attempt to access that law or may not attempt to use that law to advocate for his or her client or may not decide a case in accordance with that law. Actual implementation of the law requires belief in its purpose and legitimacy. This will require a multi-step approach from reforming legal education curriculum, particularly that of the law and Sharia faculties to include more information on women's rights in

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[88] Danielle Moylan, *When It Comes to Sexual Assault, Afghanistan Is All Talk and No Action*, FOREIGN POLICY, Dec. 21, 2015, https://foreignpolicy.com/2015/12/21/when-it-comes-to-sexual-assault-afghanistan-is-all-talk-and-no-action/.

[89] *Id.*

[90] One legal aid attorney relayed the case of a man who was being sued for not giving land that his cousin inherited to her, because she was a woman. His case was being heard by a panel of three female judges. When asked why he was not giving his cousin her land, he responded that "it wasn't in his religion" for women to own land. The judges informed him that in fact, both under Sharia and Afghan law, his cousin was entitled to the land. Ahmad Zia in discussion with Zulaikha Aziz, Dec. 10, 2018.

Islam and the importance of promoting human rights in general. Specific interventions can include:

(1) Legal education campaigns at every level, working with Imams in masjids and local shuras and jirgas—training shura and jirga members in women's rights from an Islamic context but reflective of the official laws of Afghanistan. This must be done with local religious leaders who are seen as legitimate and authoritative, not external/international experts. Great care must be paid to how the information is conveyed and who conveys the information.

(2) More comparative work should be done on how other Muslim countries, which have lower incidence of violence against women, have addressed the issue. Best practices should be developed based on Muslim countries' experiences rather than overreliance on Western models.

(3) Teaching women's legal rights in law and Sharia faculties as part of the curriculum so all legal practitioners have a basic understanding when it comes to implementation and advocacy around relevant rights. Focusing on legal education not only imparts important knowledge on women's legal rights to all legal practitioners, but it does so in the early stages of their legal development so that they inherently understand the importance of promoting women's right to be free from violence as a foundational legal concept and implement that knowledge in their work as judges, prosecutors, and defense attorneys.

Challenges in the Disciplinary System: Sexual Offences on Campus.

BCCE 2021

PROCEDURAL GUIDELINES

- Training is mandated by DHET GBV Policy
  - Trained assessors of staff and students are needed please volunteer (anne.isaac@uct.ac.za)
- Evidence
  - Previously processes mirrored what happened in a criminal court and we argued for an administrative process
  - In the administrative process – the case uses a lower test of a balance of probability (50% vs 51%) instead of the test of reasonable doubt
  - Fair and follows natural justice
  - Manner of questions will not mirror cross examination in criminal court – to prevent harassment of the survivor.
  - Face to face or *in camera*
- Protective Measures
  - No contact order (student) pending outcome or interim measure
  - Suspension (staff) pending outcome as an interim measure (as per existing HR policy- managed by ED: HR)
  - Joint appointments (Split Sanctions on staff contract and student contract) – dual consideration
- Appeals
  - Staff matters still to CCMA once internal processes are exhausted
  - Students – DC process is followed

PROCEDURAL GUIDELINES

- One streamlined process for staff and students
- Staff governed by Labour Law legislation
- Students governed by UCT administrative rules
- Process
  - Reporting online to initiate UCT internal processes
  - Importance of reporting – the system tracks, assists in expediency between departments; offence hotspots and M&E
  - Line manager can certainly support survivor but OIC must be informed immediately to provide correct and empathic support
  - HR/Residence Warden is alerted to provide additional support to the living, work and learning environment.
- When case goes to the formal process
  - Evidence leader takes over from OIC and investigates
  - Reviews statements and further evidence that is necessary
  - Assesses whether matter goes to hearing
  - If it goes to hearing – then charges are drafted (GBV)
  - Charge sheet informs the respondent and the respondent receives the evidence file
  - Pre hearing with respondent is held to meet with them to raise issues in dispute and how they wish to go forward
  - Formal hearing date is set
  - Complainant is also met by the Evidence Leader
  - Tribunal preparation with the Complainant for the hearing
  - During the hearing – Staff (HR representative); Students (SRC rep); all proctors, students, staff must be trained or have expertise in GBV

South African context

- Sexual offences on campus is widespread.
- Sexual violence at universities has been an ongoing problem for decades.
- Historically patriarchal spaces for staff and students.
- Advocacy and public outcry has initiated policy revisions over the years.
- Recent violent crimes against women have incentivised institutions to escalate survivor centred policies.
- The reporting and support aspects of the process appear, on my reading, to have drawn most attention from scholars and activists

SA Universities

- As a result of a sexual harassment scandal the University of the Witwatersrand (Wits) engaged a commission of inquiry to evaluate their sexual harassment and other policies.
- the 2015 student protests at Rhodes University, which highlighted student outrage at the university's failure to adequately deal with disciplinary cases.
- In August 2019 a UCT female student, Uyinene Mrwetyana, was raped and murdered at a local post office.
- Her death inspired the #AmINext movement against gender-based violence. South Africa together with national universities were motivated to accelerate campaigns against gender-based violence.

Cont…

- The literature on sexual violence on campuses shows how advocacy has consistently called for changes to policies and practices over time.
- University policies have been revised to address reporting and support services to the complainant, but there has been a lack of progressive changes to the disciplinary procedures that are necessary to meet the objectives of the policies
- The South African Department of Higher Education and Training (DHET) has developed a Policy and Strategy Framework that addresses GBV which could assist universities in tackling institutional GBV.

- During 2005 and 2006 the African Gender Institute (AGI) conducted research in three Southern African universities in order to assess the success of university sexual harassment policies.
- One was the University of the Western Cape (UWC) that had launched a sexual harassment policy in the 1990's.
- The other two universities, both of which had new policies, were the University of Botswana and Stellenbosch University.
- The AGI argued that there was little indication to show that these policies had been incorporated into university discussions around democracy and gender equality but were rather located in the realm of feminist activism.

- Based on the AGI report, HEI's were operating under two types of positions on the administration of justice.
- One was to deal with disciplinary cases in a more "criminal" way which led to expulsions and other disciplinary sanctions and the other was a more "restorative" approach that led to forgiveness and healing minus any punitive action against the perpetrator.
- Anyone with insight into gender-based violence will identify problems with both types of processes.
- Treating the harm as if it were a criminal offence does reinforce the seriousness of sexual harassment and sexual violence.

- However, a criminal type of disciplinary process also contributes to trauma to a complainant as the perpetrator's focus is inevitably on the credibility of the survivor.
- The research showed that complainants did not want to endure the traumatic effects of such a process
- It may be concluded that a process that is in the best interests of the health and wellbeing of a survivor, together with humanising the perpetrator, is more useful to policy making than one which is criminalised

Current Gaps in our System - SGBV

- Different procedures for staff and students
- Different procedures for PASS and academic staff
- Lack of a gender sensitive approach
- Lack of unique/specialised experience:
- Proctors/Chairs
- Prosecutors/Initiators
- Assessors
- The length of time to finalise cases

Disciplinary procedures

- Currently most institutions deal with all types of misconduct in one disciplinary system for staff and one for students.
- Panel members and Chairs may include academics with no knowledge or skill to deal with sexual harassment and sexual offences.
- The process mirrors a criminal process.
- External legal representation leads to cross-examination of the survivor.

A leap forward

- Sexual offences and discrimination to be heard at a separate, specialised hearing tribunal.
- Chair must be legally qualified with a background in GBV knowledge.
- Panel members must have or be trained in understanding GBV-especially around how trauma affects the evidence of a survivor.
- Training on definitions and consent.
- Legal representation only for complex cases.
- Questions to be directed to the panel. No cross-examination.
- Reasonable, fair, natural justice.

Standard of proof…

- Criminal- beyond reasonable doubt
- Administrative- balance of probabilities.
- "*In Miller v Minister of Pensions* [1947] 2 All ER 372 (King's Bench) it was said at 373H by Denning J: Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice.''

Disciplinary Procedural Rules for Sexual Misconduct

- **Separate/Independent disciplinary process.**
- **Specialised Tribunal.**
- **Disciplinary panel members appropriately qualified and trained.**
- **Inquisitorial enquiry (deviation from the previous adversarial process).**
- **Survivor centred- includes legal representation and survivor support throughout the process.**
- **Alternate means of leading evidence.**

The purpose of a separate disciplinary procedure for Sexual Misconduct: Sexual Offences and Sexual Harassment is to distinguish the process from the academic infringement cases in the student disciplinary system and the general misconduct cases in the Human Resources department. A separate procedure and Special Tribunal, dealing specifically with Sexual Misconduct, is consistent with the university's undertaking to effectively address gender-based violence and shows an intentional movement in meeting such objectives. This procedure supports the revised Sexual Misconduct: Sexual Harassment and Sexual Offences Policy which encourages and supports reporting and dealing with all sexual misconduct. This ensures a fair disciplinary enquiry to the respondent as well.

Objectives:

The objectives of the Special Tribunal are to:

- **Provide a disciplinary focus on GBV/Sexual misconduct.**
- **Ensure presiding officers and assessors are skilled and qualified to hear GBV/Sexual misconduct cases.**
- **Reduce/fast-track old and new reported cases on the system.**
- **Reduce the time taken to initiate contact with the survivor.**
- **Expedite preparation of witnesses for trial.**
- **Develop alternative methods of leading evidence: reduce secondary victimisation.**
- **Provide specialised legal skills for best prosecution outcomes.**
- **Build capacity and resources in respect of Tribunal members.**
- **Ensure that the procedural process is compliant with internal policies, external legislation and policy obligations in synergy with the rights of the accused and most importantly responding to the survivor's needs as envisioned with a survivor centred approach.**

Online tribunal performance surveys for survivors and other complainants.

LEGISLATION AND DIRECTIVES

Compliant with **DHET Policy Framework to address Gender Based Violence in the Post-School Education and Training System 2020**
The **Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (General Notice 1357**), Employment Equity Act 55 of 1998
Labour Relations Act 66 of 1995
Higher Education Act 101 of 1997.
Promotion of Administrative Justice Act 3 of 2000.
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. National directives.

INTERNATIONAL LEGISLATION

Employers to ensure that their policies are in line with the recently adopted International Labour Organization (**ILO)** Convention on Violence and Harassment.
"Convention recognizes that violence and harassment in the world of work constitutes a human rights violation and a threat to equal opportunities; and is unacceptable and incompatible with decent work".
department's Employment Equity Director, Ntsoaki Mamashela, called on employers to "conduct risk assessment at your workplace and have your policies in line with the Convention and make sure that such policies protect employees against violence and harassment including third parties, that is, those who are not part of the incident but are affected."
(https://www.golegal.co.za/violence-harassment-ilo/)

South Arica is a signatory to this Convention- obligation to ensure that policies and processes in dealing with violence and sexual harassment in the workplace are compliant with the requirements of the convention.

The Draft Code of Good Practice on the Elimination of Violence and Harassment in the World of Work was published in August 2020. Both the DHET Policy Framework together with the Code of Good of Good Practice encourages the revision and enactment of employer policies and processes that enable a work environment free of violence and harassment.

The formalising of the Special Tribunal is welcomed at a fortuitous time under the aegis of the various national and international guidelines and obligations in our collective response to gender-based violence.

EXPERT EVIDENCE: IMPERFECT EVIDENCE IS PERFECT

- Social workers
- Talk therapists
- Current trauma therapy practices
- GBV Expertise
- Explaining evidence from a trauma survivor-the impact on litigation and justice for the survivor.

JURISDICTION:OFF CAMPUS/WORKPLACE

- DUTY OF CARE
- REPUTATIONAL DAMAGE
- NEXUS BETWEEN OFFENCE AND WORK/INSTITUTION
- INTERNAL/EMPLOYER PROCESS

COURAGE TO ACT

Addressing & Preventing Gender-Based Violence at Post-Secondary Institutions in Canada

Deborah Eerkes, University of Alberta
BCCE Conference, 29 October 2021

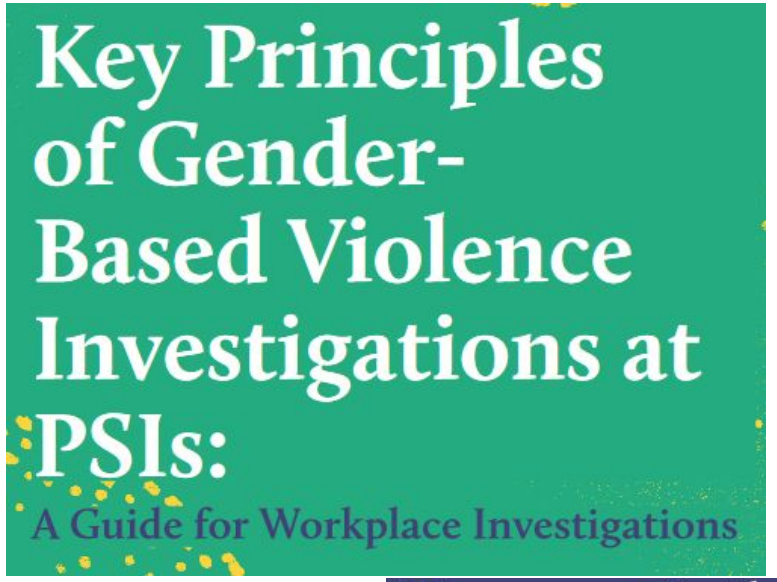
POSSIBILITY SEEDS | COURAGETOACT.CA
#IHaveTheCourageToAct

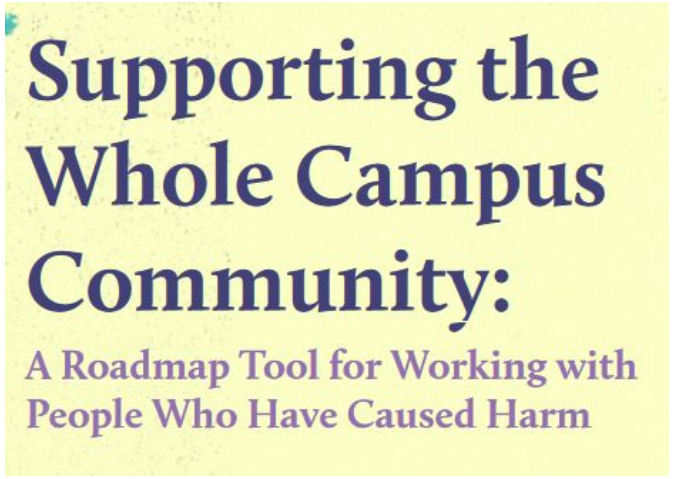
Courage to Act

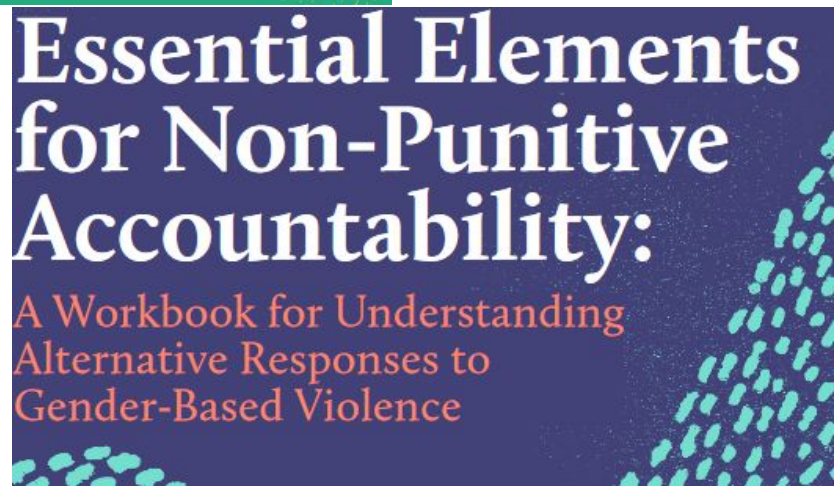
- National Framework
- 3 Working Groups
- 10 Communities of Practice
- 25 Tools (and counting!)
- National skillshare
- Webinar Series
- Knowledge Centre
- Innovation Hub

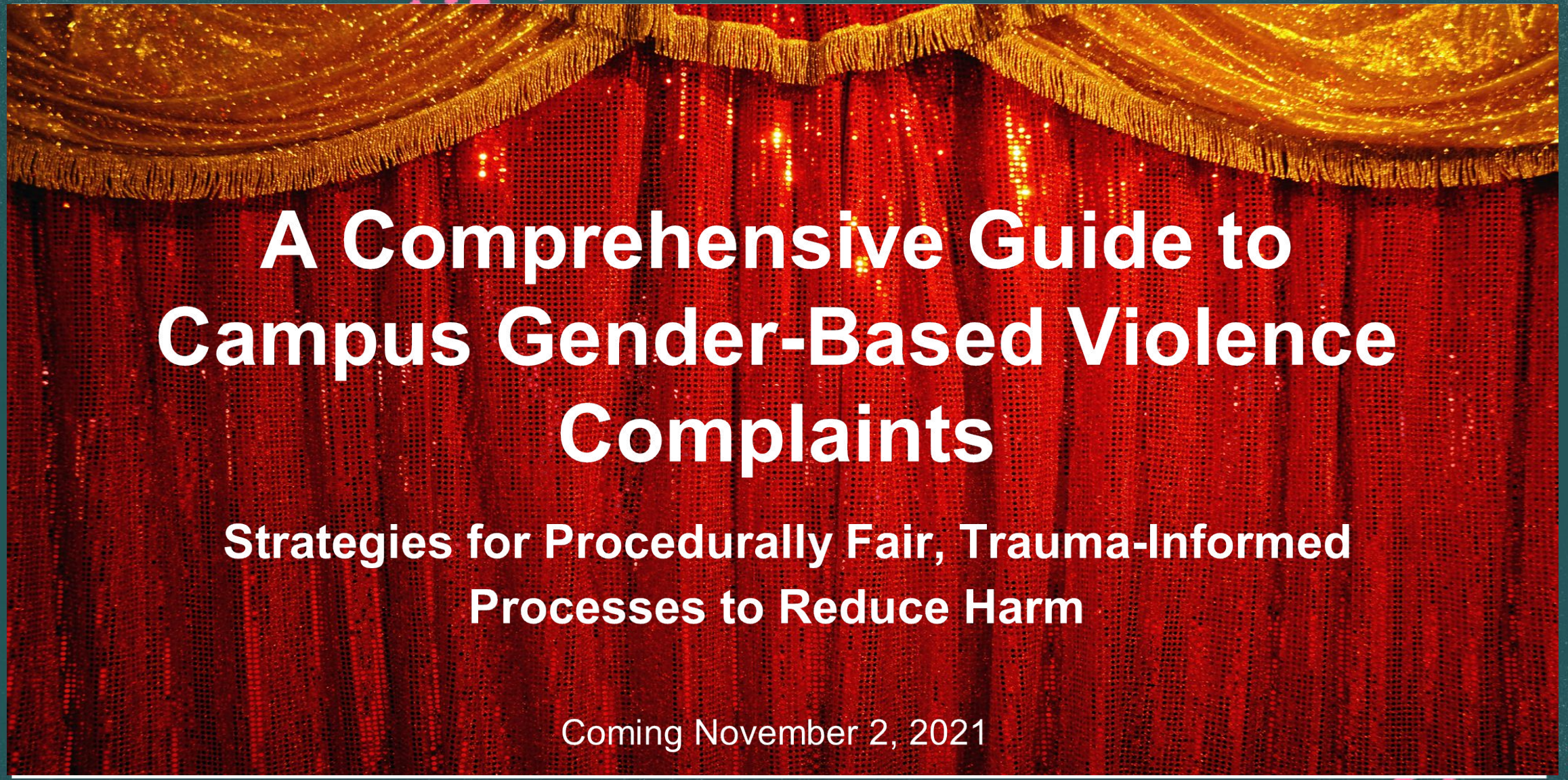
A Truly National project

C2A toolkits







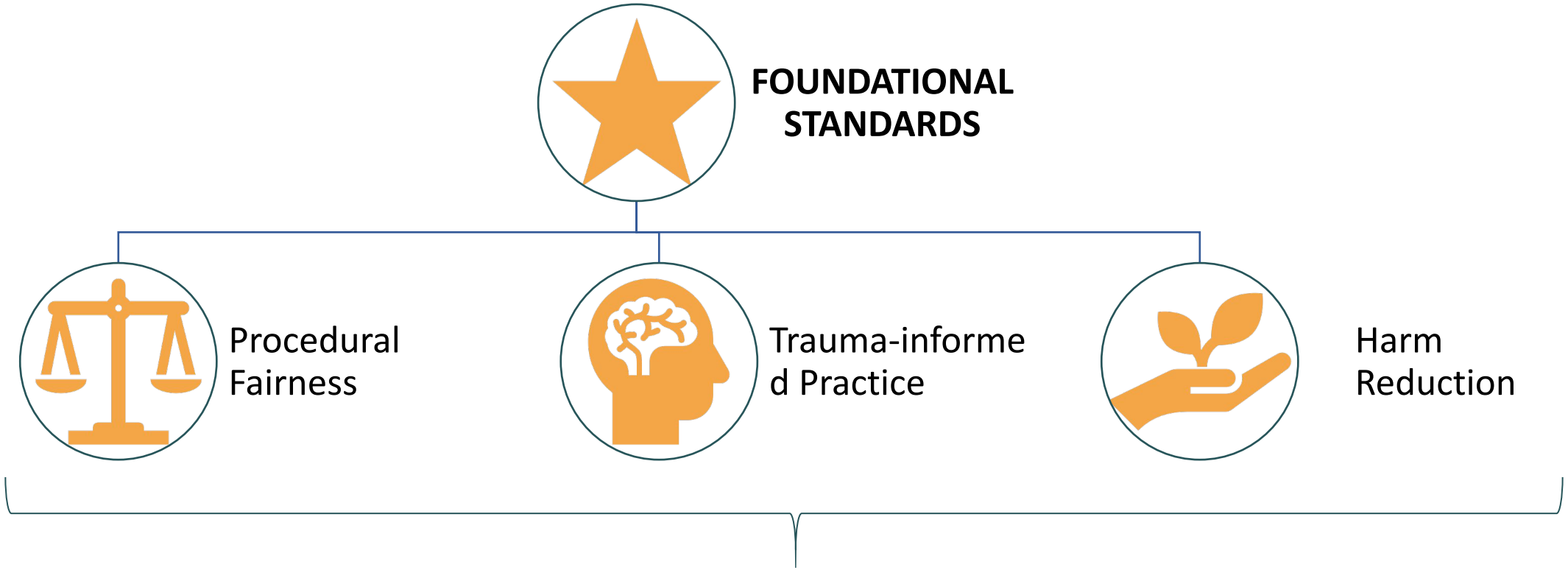


A Comprehensive Guide to Campus Gender-Based Violence Complaints

Strategies for Procedurally Fair, Trauma-Informed Processes to Reduce Harm

Coming November 2, 2021

POSSIBILITY SEEDS | COURAGETOACT.CA
#IHaveTheCourageToAct


FOUNDATIONAL STANDARDS
Procedural Fairness
Trauma-informed Practice
Harm Reduction
Human Rights \ Equity

Comprehensive Guide

PART 1: Foundational Standards

- Procedural Fairness
- Trauma-informed care
- Harm reduction

Part 2: Process, Policy & People

- Framework
- Policy
- Personnel

Part 3: Strategies for Practice

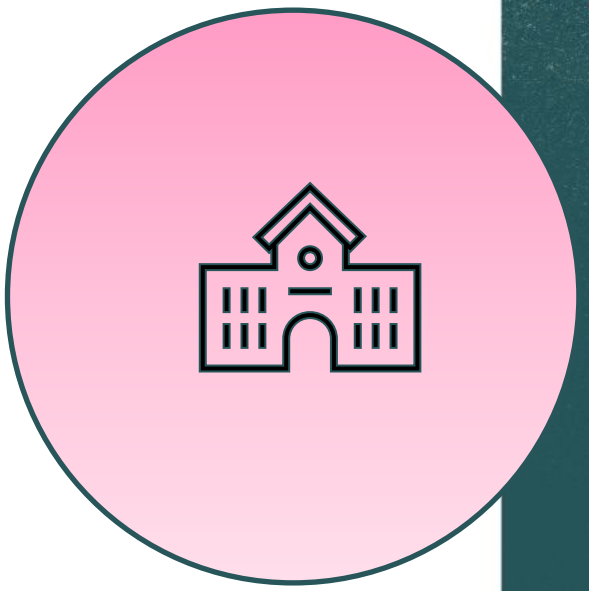
- Receiving complaints
- Interim measures
- Investigation
- Adjudication
- Non-adjudicative Options

Part 4: Unsettled Questions

- Privacy & disclosure
- Criminal matters
- Historical complaints
- Future work

Starting point

1. PSIs are not the penal system
2. The regulatory environment is complex and sometimes contradictory
3. No matter how careful we are, the complaints process causes harm
4. We can never lose sight of the human experience
5. Procedural fairness + trauma-informed practice = risk mitigation



Key Messages

1. Investigation and adjudication should not be our default response
2. Need to recognize and mitigate harm inherent in complaints processes
3. Procedural fairness and trauma-informed practice do not exist in opposition to one another
4. Procedural fairness applies to both the complainant and the respondent
5. Trauma-informed practice applies to everyone involved in the process

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