

Schools as Training Grounds for Harassment

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INTRODUCTION

The #MeToo movement, which burgeoned in response to allegations of Harvey Weinstein's and others' harassment of women who sought careers in Hollywood and elsewhere, has led to increasing concern about sexual harassment in workplaces and other venues.¹ Significant online movements engage in naming and shaming alleged perpetrators, and workplaces are rewriting their policies in an attempt to prevent and remedy harassment to escape liability for harassers' conduct.² News reports and op-ed articles focus on the prevalence of sexual harassment and harm to women, but, as Professors Vicki Schultz and Brian Soucek explain, media reports are limited to a narrow understanding of one type of harassment: harassment that is sexual (rather than gendered) in nature and suffered predominantly by women at the hands of more powerful men.³ By "sexual" harassment, I use the common term here to refer to unwelcome behavior that is expressed by sexual means: groping, asking for sexual favors, sexual assault, and even rape. The motive may be sexual desire, as the #MeToo movement seems

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¹ Actor Alyssa Milano borrowed the term from an earlier group started by Tarana Burke and posted it online. Emma Brockes, *#MeToo Founder Tarana Burke: "You Have to Use Your Privilege to Serve Other People"*, GUARDIAN (Jan. 15, 2018), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault> [<https://perma.cc/4NXH-6JAA>].

² *Mira Sorvino: Me Too Can't Just Be Naming and Shaming*, USA TODAY (Nov. 13, 2018), <https://www.usatoday.com/story/life/people/2018/11/13/mira-sorvino-me-too-cant-just-naming-and-shaming/1985971002/> [<http://perma.cc/E9WJ-TBG2>]; Nicole Lyn Pesce, *The #MeToo Movement Has Changed Policies Across Industries, But There's Still Work to Be Done*, MARKET WATCH (Oct. 4, 2018), <https://www.marketwatch.com/story/the-metoo-movement-has-changed-policies-across-industries-but-theres-still-work-to-be-done-2018-10-04> [<https://perma.cc/KU9N-X82W>].

³ See Vicki Schultz & Brian Soucek, 2019 U. CHI. LEGAL F. 227, 227–59 (2019).

to emphasize, but it may also be a desire to police gender expectations of individuals in the workplace. Where there is an employment relationship and a covered employer, this type of harassment is prohibited by Title VII of the 1964 Civil Rights Act,⁴ if sufficiently severe or pervasive. It is also prohibited in schools, whether the harassment be perpetrated by other students or teachers, by Title IX of the Education Amendments of 1972.⁵

A less common but more accurate term that I use throughout this paper is “sex- or gender-based harassment.” This term is much broader than “sexual harassment” in that it refers to unwelcome behavior that occurs because of the sex (biological sex) or gender (social stereotypes and expectations that are related to a person of a particular biological sex) of the victim that can be but is not necessarily sexual in nature: derogatory comments or yelling, physically blocking a person’s way, severe or pervasive treatment because of the victim’s failure to conform to gender stereotypes or with an interest in maintaining the gendered order of the workplace. These latter versions of harassment can be either facially sex- or gender-based or can be neutral in their presentation while still occurring because of the sex or gender of the victim.

As Schultz and Soucek explain, “sexual harassment” that the #Me-Too movement generally targets may merely be the tip of the iceberg. Harassment that is gendered but not necessarily sexual in nature, and harassment, whether sexual or gendered, that is perpetrated by groups of men (and sometimes women) on both male and female victims have been virtually ignored by the movement and the media.⁶

Moreover, the link between sex-segregated workplaces, both horizontally and vertically,⁷ and sex- and gender-based harassment is often overlooked.⁸ In fact, much (if not most) of harassing behavior in workplaces occurs because of gender—the patriarchal structure that promotes the superiority of masculine men over women and gender non-conforming men.⁹

And, while there is considerable discussion about sexual violence on college campuses (a form of “sexual harassment”)—how institutions

⁴ 42 U.S.C. § 2000e, *et seq.*

⁵ Pub. L. No. 92-318 tit. IX, 86 Stat. 235, 373–75 (codified as 20 U.S.C. §§ 1681–88).

⁶ See Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 135 (2018).

⁷ Philip Cohen, *The Problem with Mostly Male (and Mostly Female) Workplaces*, THE ATLANTIC (Mar. 20, 2013), <https://www.theatlantic.com/sexes/archive/2013/03/the-problem-with-mostly-male-and-mostly-female-workplaces/274208/> [http://perma.cc/895U-4RNY].

⁸ Schultz & Soucek, *supra* note 3.

⁹ See ANN C. MCGINLEY, MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS 58–82 (2016) (offering a number of scenarios in which harassment occurs and demonstrating that, in most of these scenarios, the motivation is gender—both of the victim and of the perpetrators).

should respond, what their investigations and hearings should look like, and how to protect both the accuser and the accused¹⁰—there is little or no public discussion of sex- and gender-based harassment that occurs in elementary, middle, and high schools.¹¹ The behaviors involved can be sexual, gendered, or neither; the common thread is the motive of the harassers—it is based on the sex or gender of the victim (as well as the harasser).

Even though few discuss the problem of sex-or gender-based harassment in pre-college schools, the reality is that elementary, middle, and high schools serve as training grounds for sex- and gender-based harassment later on in life, and the law is not providing an effective remedy. Title IX of the Education Act Amendments¹² forbids sex- and gender-based harassment at all levels from kindergarten through college, but private causes of action brought under Title IX do little to deter school administrators from tolerating serious peer sex- and gender-based harassment or to compensate victims. This is because the Supreme Court has established extremely difficult proof requirements, and many lower courts have applied these standards strictly.¹³ While investigations by the Office of Civil Rights of the Department of Education (“OCR”) have historically done a better job of punishing schools for permitting peer sex- and gender-based harassment and requiring improved policies and procedures, the OCR may not have the capacity to investigate the vast majority of incidents occurring in schools. Moreover, given the new regulations proposed by the Department of Education under Secretary Betsy DeVos, which adopt the rigid court standards, there is serious concern that useful OCR investigations may not continue.¹⁴

¹⁰ ADVOCATES FOR YOUTH, 9 THINGS TO KNOW ABOUT BETSY DEVOS’ PROPOSED TITLE IX RULE, https://actionnetwork.org/user_files/user_files/000/028/107/original/Two_pager_on_proposed_rule.pdf [<http://perma.cc/79GA-TLHV>]; Victoria Yuen & Osub Ahmed, *4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault*, CENTER FOR AMERICAN PROGRESS (Nov. 16, 2018), <https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/> [<https://perma.cc/SL3T-AX9D>].

¹¹ Throughout this article, I use the term sex- and gender-based harassment in its broadest sense to mean harassment in workplaces or schools that occurs because of the victim’s sex or gender. There is a debate whether we should merely call this “sexual harassment,” or “sex harassment,” but both seem to be under-inclusive so in the interest of being clear that I am talking about illegal harassment that occurs because of sex or gender and may or may not be sexual or gendered in nature, I use the more comprehensive term. This behavior, if sufficiently severe or pervasive, violates Title VII in the workplace and Title IX in schools.

¹² Pub. L. No. 92-318 tit. IX, 86 Stat. 235, 373–75 (codified as 20 U.S.C. §§ 1681–88).

¹³ See Part III *infra*.

¹⁴ See Part III.B. *infra*.

The fact is that peer¹⁵ sex- and gender-based harassment of both boys and girls in schools is rampant, and administrators are either unable or unwilling to curb it. One problem is adults' normalization of sex- and gender-based harassment by preteens and teens. When girls are victims of harassment by boys, school administrators and teachers interpret the behavior as age-appropriate interest in the "opposite sex." When boys are victims of harassment by other boys, administrators and teachers call it normal "horseplay." In both situations, teachers can exacerbate the problem, often blaming the victims for causing trouble by reporting the behavior to authorities, and thereby incurring the wrath of fellow students.¹⁶ Teachers and administrators fail to understand the role toxic masculinity plays in harassment, and they often fan the flames by encouraging sex stereotyping and gender conformity of both boys and girls by both boys and girls. The resulting peer harassment is neither normal courting behavior, nor normal roughhousing.¹⁷

This article deals with the schools' role in permitting and encouraging peer sex- and gender-based harassment of children and the law's role in failing to hold schools accountable for their negligent and intentional behavior in sanctioning it. Part I discusses the evidence of rampant sex- and gender-based harassment in schools. Part II analyzes the problem through the lens of masculinities theory and explains how cultural notions of masculinity create incentives for boys¹⁸ (and some girls) to engage in peer sex- and gender-based harassment.

Part III analyzes court cases and OCR decisions and explains the serious disconnect between the two; it demonstrates the proof difficulties that victims experience when filing suit under Title IX and the resulting lack of incentives for schools to correct the problems. It also shows that, while the OCR has traditionally held schools to more exacting scrutiny than courts, the new Secretary of Education has proposed new regulations that would align its standards with those of the courts. Ironically, if the proposed regulations are promulgated, the result in the era of #MeToo will be to promote even more sex- and gender-based harassment in our schools.

Part IV proposes new legal standards and interpretations of existing standards for the courts that would hold schools more accountable

¹⁵ I limit this article to the discussion of illegal harassment by peers of other peers in the school context—in other words, student-on-student harassment that occurs because of sex or gender.

¹⁶ See, e.g., *Patterson v. Hudson Area Schools*, 551 F.3d 438, 440 (6th Cir. 2009).

¹⁷ I have dubbed this reason for sex harassment as the "masculinity motivation." See McGinley, *The Masculinity Motivation*, *supra* note 6.

¹⁸ I call this the "masculinity mandate." See Ann C. McGinley, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMPLOYEE RIGHTS AND EMPLOYMENT POL'Y J. __ (forthcoming 2019).

for allowing and condoning peer harassment and argues that the courts' standards should be more similar to those applied by those historically applied by the OCR. To accomplish prevention, educators must understand the role that toxic masculinity plays in peer sex- and gender-based harassment while at the same time be aware of the potential unequal application of school rules to children of different races and classes. Finally, this article concludes that the law should create incentives for schools to fulfill their responsibility to educate themselves and their students to prevent and remedy peer sex- and gender-based harassment. When schools ignore their responsibilities in this area, they become important training grounds for future harassers, a role that the #MeToo movement should not tolerate.

I. EMPIRICAL AND QUALITATIVE EVIDENCE OF PEER SEXUAL HARASSMENT IN SCHOOLS

A. Empirical and Qualitative Studies on Peer Sexual Harassment

1. Definitions: legal vs. social science terminology

Social science data are crucial to the understanding of sex- and gender-based harassment in the schools. But there is one caveat. Social science studies can be confusing to lawyers and judges because of the different terms social scientists and lawyers use to describe behaviors. Moreover, social scientists and lawyers at times use the same terms but define them differently. Social scientists' definitions consider *behaviors* while the law considers *not only behaviors but also motive or intent*. For example, under Title IX, behavior that is sexual, non-sexual, gendered, or non-gendered in nature that is *motivated by* the victim's sex or gender and is severe, pervasive, and objectively offensive is illegal harassment.¹⁹ This legal definition may encompass many different behaviors

¹⁹ See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1207-32 (2008) (explaining different scenarios that constitute illegal sex- or gender-based harassment).

identified by social scientists, including bullying,²⁰ harassment, mobbing, sexual harassment, and physical, verbal, and relational aggression.²¹

When scientific surveys ask children whether they have suffered from sexual harassment, they do not focus on the legal requirement that the behavior be severe or pervasive. They merely ask if the child has suffered a particular type of sex- or gender-based behavior over a particular period of time.²² This means that the survey results can be both over-inclusive and under-inclusive by legal standards: over-inclusive because the behavior may not be sufficiently severe or pervasive to qualify as illegal; under-inclusive because behavior that is not sexual or gendered in nature but whose motive is sex or gender will not be included in the results. Thus, legal scholars, lawyers, and the courts must acknowledge these weaknesses in translation between social science and law when they predict the frequency of sex- and gender-based harassment. With this caveat in mind, however, below is a short summary of some of the social science quantitative and qualitative evidence of sex- and gender-based harassment in the schools as well as a description of facts from court and OCR cases to demonstrate the quality of alleged harassment that occurs.

2. Social science and other evidence of sex- and gender-based harassment

Recent surveys by the American Association of University Women (“AAUW”) concerning sexual harassment in schools reveal that nearly half of school children in grades seven through twelve (48%) report having been subject to sexual harassment,²³ and that 87% of those reporting that they suffered harassment also state that they have suffered

²⁰ Traditionally, psychologists defined bullying, harassment, and mobbing as gender-neutral because both victims and perpetrators can be male and female. Given the thin reed supporting the conclusion that these behaviors are sex-neutral, feminists questioned this view and other social scientists followed. Today, social scientists may disagree about the use of the term “bullying,” but many agree that gender is often a cause of or motivation for these bullying behaviors. Moreover, while the original psychologists who studied bullying believed it resulted from individual personality traits that disposed perpetrators toward bullying (and perhaps victims toward victimhood), social scientists, feminists, and sociologists see bullying as resulting from systemic gender and other inequalities. *See id.* at 1169–80.

²¹ “Physical aggression” is physical but not sexual; “verbal aggression” comprises harmful words and statements that are not physical or sexual; “relational aggression” describes behaviors employed by children such as excluding others and passing rumors that are harmful to the child’s relationship with others.

²² *See, e.g.*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, QUICK FACTS: SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN SCHOOLS (January 2017).

²³ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 11 (2011) [hereinafter “CROSSING THE LINE”]. This survey asks questions about whether the respondent suffered sexual (or gender-based) harassment within the past school year

harm as a result.²⁴ While a few students said that it did not bother them, many described emotional, physical, and educational responses—not wanting to go to school, feeling sick to their stomach, having trouble sleeping, altering the path they took to school, behavior problems at school, and quitting activities at school.²⁵ Half of those stating they were harassed to the AAUW said that they had not reported the harassment at the time it occurred.²⁶ And, despite this evidence that harassment and assault occur on school campuses, schools are drastically underreporting the incidences of sexual harassment.²⁷ School information is gleaned from data reported by schools receiving federal financial aid under Title IX (98,000 schools, nearly half of them with students in seventh through twelfth grades), as part of the Civil Rights Data Collection (“CRDC”).²⁸ Of schools with grades seven through twelve, for example, 79% reported that they had zero reports of sexual harassment or bullying based on sex during the 2015–16 school year; 99% reported that they had zero reports of rape during the same time frame; and 94% reported that they had zero reports of sexual assault other than rape in school during the same time period.²⁹

In some schools, sexual harassment is the norm.³⁰ Studies demonstrate, moreover, that much sexual harassment (physical and verbal) occurs in the open, with teachers looking on but doing nothing.³¹ When teachers are not trained about what is sexual harassment and how to

but does not require severity or pervasiveness for the respondent to answer in the affirmative. Neither does it require that the perpetrators be motivated by gender or sex. Nor does it include sex- and gender-based harassment that is not sexual or gendered in nature but that is motivated by sex or gender. Thus, this survey is both over-inclusive and under-inclusive when it comes to the legal definition under Title IX. *See* notes 19–22 *supra* & accompanying text.

²⁴ KEVIN MILLER, SCHOOLS ARE STILL UNDERREPORTING SEXUAL HARASSMENT AND ASSAULT (Nov. 2, 2018), <https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/> [<http://perma.cc/NU93-M5XZ>] [hereinafter “SCHOOLS ARE STILL UNDERREPORTING”].

²⁵ CROSSING THE LINE, *supra* note 23, at 22. Cases document other serious harms resulting from sex- and gender-based harassment in schools. *See infra* note 94. *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 267 (E.D.N.Y. 2009) (reporting harms such as inability to go to school, self-cutting, PTSD, attempted suicide, and, ultimately, in the most severe cases, suicide).

²⁶ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, QUICK FACTS: SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN SCHOOLS (January 2017) [hereinafter “QUICK FACTS”].

²⁷ *Id.*; MILLER, *supra* note 24.

²⁸ QUICK FACTS, *supra* note 26.

²⁹ MILLER, *supra* note 24.

³⁰ *See* J. Forber Pratt et al., *A Qualitative Investigation of Gang Presence and Sexual Harassment in a Middle School*, 27 J. CHILD & FAM. STUD. 1929, 1935–36 (2018) (concluding that while most of the sexual harassment seemed to be initiated by gang members, it was not all related to gang membership; sexual harassment was the norm, and a failure of adults to respond to open sexual harassment reinforced it as normal).

³¹ *Id.* The cases confirm this finding. *See, e.g., S.K. v. North Allegheny Sch. Dist.*, 168 F. Supp. 3d 786, 796–99 (W.D. Pa. 2016).

respond to it, they may validate the behaviors that constitute sexual harassment as normal.³²

Studies demonstrate that although girls and women tend to suffer more adverse effects than boys and men from harassment, boys and men do experience emotional damage, especially when sexual harassment is used as a method of performing hegemonic masculinity, harassing someone for the purpose of reinforcing the masculinity of the harassers, ridiculing the gender performance (either too masculine or too feminine of male and female victims), or drawing acceptable boundaries of how victims should perform their gender.³³ Especially LGBTQ+ students have “poorer mental and physical health, less engagement with school, and higher suicide rates than their heterosexual peers.”³⁴ Straight boys and men also suffer from homophobic slurs, which cause increased anxiety and depression as well as alienation among middle school children, especially boys.³⁵ One study found that there existed ample evidence of verbal harassment of LGBTQ+ students by both students and educators.³⁶ Approximately 90% of study participants had heard a student verbally harass another because of bias against LGBTQ+ individuals, whereas 44% had heard school staff engaging in the same verbal harassment.³⁷

Much harassment occurs in the open with victims and perpetrators who are both boys and girls and with victims of different races. Studies in middle schools confirm, however, that the perpetrators of sex- and gender-based harassment against both girls and boys are most frequently boys.³⁸ One study found that the highest rate of physical sexual assault was of African-American girls, followed by African-American boys.³⁹ And students reporting sexual harassment stated that it occurred most frequently in hallways, followed by classrooms.⁴⁰

³² Forber-Pratt, *supra* note 30, at 1936 (citing L. Charmaraman et al., *Is It Bullying or Is It Sexual Harassment? Knowledge, Attitudes and Professional Development Experiences of Middle School Staff*, 83 J. SCH. HEALTH 438 (2013)).

³³ See James Gruber & Susan Fineran, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 22 VIOLENCE AGAINST WOMEN 112, 117 (2016).

³⁴ *Id.*; see also Tyler Hatchel et al., *Sexual Harassment Victimization, School Belonging, and Depressive Symptoms among LGBTQ Adolescents: Temporal Insights*, 88 AMER. J. ORTHOPSYCH. 422 (2018) (finding that middle and high school LGBTQ+ victims of sexual harassment suffer increased depressive symptoms over a period of time).

³⁵ Gruber & Fineran, *supra* note 33, at 117.

³⁶ Eliza Dragowski et al., *Educators' Reports on Incidence of Harassment and Advocacy Toward LGBTQ Students*, 53 PSYCH. IN THE SCH. 127 (2016).

³⁷ *Id.* at 137.

³⁸ See Dorothy L. Espelage et al., *Understanding Types, Locations, & Perpetrators of Peer-Peer Harassment in U.S. Middle Schools: A Focus on Sex, Racial, and Grade Differences*, 71 CHILDREN & YOUTH SERV. REV. 174, 180 (2016).

³⁹ *Id.*

⁴⁰ *Id.* at 181.

Although social scientists traditionally have seen bullying and sexual harassment as two separate phenomena and have thought of bullying as gender-neutral, recently, social scientists have begun to question the bullying paradigm that is both gender-neutral and based on individual personalities rather than systemic causes.⁴¹ One problem with the bullying literature is that it defines bullying as neutral and not gender-based and thereby underestimates important injuries caused by gender-based harassment.⁴² This is particularly important when it comes to the law for two reasons: 1) anti-bullying efforts often ignore gender-based harms, many of which are intentional, and 2) Title IX forbids sex- or gender-based discrimination and not bullying that does not occur because of sex or gender of the victim. Schools do two contradictory things that allow them to escape responsibility: they engage in anti-bullying campaigns and, at other times, hide behind bullying (which does not occur because of sex and is not illegal) in order to defend Title IX claims. Some newer social science research demonstrates that girls suffer from gender-based harms caused by sex-based peer aggression, and this research argues that bullying scholars should recognize the gendered nature of much bullying.⁴³ In fact, at least one study finds that gender-based sexual harassment that employs stereotypes, both sexist and anti-heterosexist, causes greater harm to victims' school outcomes than gender-neutral bullying does.⁴⁴ Those harms include erosion of victims' school engagement, alienation of victims from teachers, and decreased academic achievement of victims.⁴⁵ It is important to understand that much of what some social scientists may label "bullying" by looking at the behaviors alone is actually illegal harassment under federal civil rights laws that occurs because of the victim's sex or gender nonconformity. Thus, although it is not possible to conclude that all bullying behavior has a sex- or gender-based motive, especially in the school context much of it does. Therefore, these behaviors can constitute both bullying in the traditional social science definition and sex- or gender-based harassment in the legal context.⁴⁶

⁴¹ *Id.*

⁴² For an explanation of the bullying research and whether it is gender-neutral or gender-based, see McGinley, *supra* note 19, at 1191–92 (explaining that many of the behaviors categorized by social scientists as bullying also occur because of the victim's sex, which would make them illegal under Title VII).

⁴³ See generally Rosalyn Shute et al., *High School Girls' Experience of Victimization by Boys: Where Sexual Harassment Meets Aggression*, 25 J. AGGRESSION, MALTREATMENT & TRAUMA 269 (2016); McGinley, *supra* note 19, at 1174–82 (arguing that bullying often does have a gendered aspect to it and collecting feminist literature that agrees with this proposition).

⁴⁴ James Gruber & Susan Fineran, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 22 VIOLENCE AGAINST WOMEN 112 (2016).

⁴⁵ *Id.* at 112–13.

⁴⁶ See generally McGinley, *supra* note 19.

Even social scientists are beginning to understand that their original conclusion that bullying is not related to gender is likely erroneous. Studies demonstrate that for boys and girls there is a positive correlation between being perpetrators of bullying behaviors in middle school, such as homophobic name-calling, and engaging in sexual violence later on.⁴⁷ A recent study found that both boys and girls who reported that they engaged in bullying and homophobic name-calling during middle school were more likely to be perpetrators of sexual violence in high school.⁴⁸ But the correlation between students who are victims of bullying in middle school and their tendency to commit sexual violence in high schools is gender dependent. Boys who are victims of homophobic name-calling react by engaging in more sexual violence against others, whereas girls who are victims of homophobic name-calling in middle school are not more likely to perpetrate sexual violence in high school.⁴⁹

Given that homophobic name-calling in middle schools (which seems to be largely ignored by teachers) seems to increase the perpetration of sexual violence in high school, the authors of the study recommended interventions and education of children that would occur before middle school, in the later elementary school years, that would prevent homophobic name-calling.⁵⁰ Prevention of homophobic name-calling seems to be important not only to reduce the stress of children but also to reduce increased sexual violence in high school. The authors pointed to social emotional learning (“SEL”), a system that enhances communication and empathy of middle school children that has proven successful in reducing homophobic name-calling and sexual violence.⁵¹

⁴⁷ See generally Dorothy L. Espelage, et. al, *Longitudinal Examination of the Bullying-Sexual Violence Pathway across Early to Late Adolescence: Implicating Homophobic Name-Calling*, 47 J. YOUTH & ADOLESCENCE 1880 (2018).

⁴⁸ *Id.* at 1880–81, 1888. According to the authors of the study, bullying is engaging in recurrent aggressive acts that are physical, verbal, or relational; homophobic name-calling is gender-based harassment using derogatory terms that indicate that the object is a member of a sexual minority, but it is often directed at members of sexual majorities as well; sexual violence comprises nonconsensual physical sexual acts as well as verbal harassment. The authors include both sexual harassment in the legal sense and physical and verbal harassment in the definition of sexual violence. Of course, under Title IX, homophobic name calling itself could be a form of gender-based harassment if it is severe, pervasive, and objectively offensive and denies the victim equal access to educational opportunities.

⁴⁹ *Id.* at 1889–90.

⁵⁰ *Id.* at 1889.

⁵¹ *Id.* at 1890.

B. Case Studies of Sex-Based Harassment

Fact patterns alleged in cases and OCR complaints under Title IX provide a qualitative view of the type of sex- and gender-based harassment that occurs in schools.⁵² Court cases reveal allegations of egregious harassment against girls and boys perpetrated by individuals and groups of boys and girls. School officials react by neglecting the behavior and even by hostile actions toward the victim. One case that demonstrates the destructive behavior and the school's failure to protect the victims is *Wells v. Hense*⁵³ where the plaintiffs alleged⁵⁴ that two tenth-grade boys sexually assaulted two tenth-grade girls in a math classroom with the shades drawn and the doors locked while other students looked on.⁵⁵ Afterwards, other students gossiped and harassed the victims verbally. The plaintiffs alleged that the school assured them that they would investigate and take prompt remedial action but that the school did not do either. As a result, the girls were forced to leave school and finish out the school year by studying at home.⁵⁶

Severe sex- and gender-based harassment occurred in *Thomas v. Town of Chelmsford*⁵⁷ where a ninth-grade boy was harassed repeatedly and ultimately raped with a broomstick by fellow players at football camp.⁵⁸ The next day, the coach told the victim, Matthew, "This is part of growing up."⁵⁹ As a result of the school district's failure to take the victim's report seriously, male athletes began to bully and harass Matthew, calling him "Broomstick," making derogatory sexual comments about him in school and social media postings, and threatening violence against him.⁶⁰ Teachers singled Matthew out in front of other children in class, ridiculing him, and accusing him of being an "instigator."⁶¹ One teacher failed to discipline a student who hit Matthew with a shoe in class; another did not comply with Matthew's Individual Education

⁵² Depending on the procedural posture of the cases described in this subsection, the facts in court cases are as alleged or taken in the light most favorable to the plaintiff; the facts in OCR investigation reports have been found by a preponderance of the evidence to support a finding of a school's liability.

⁵³ 235 F. Supp. 3d 1 (D.D.C. 2017).

⁵⁴ *Id.* at 6 (the allegations in this case are taken as true because the court is deciding the defendant's motion to dismiss under Rule 12(b)(6)).

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 8–9. The court properly refused to grant the motion to dismiss because the complaint plausibly alleged deliberate indifference when it alleged that the school did not do an adequate investigation or punish the boys who were allegedly responsible for the sexual assaults, thus making it impossible for the victims to continue in the school.

⁵⁷ 267 F. Supp. 3d 279 (D. Mass. 2017).

⁵⁸ *Id.* at 290.

⁵⁹ *Id.*

⁶⁰ *Id.* at 290–91.

⁶¹ *Id.* at 292–93.

Plan (“IEP”);⁶² another told the class, “[C]hildren who report something are snitches and are the worst type of person.”⁶³ The athletic director swore at Matthew and told Matthew’s parents that the school had found no wrongdoing by the alleged rapists.⁶⁴ The harassment escalated for months, lasting for the entire school year, with mocking and ridicule at lacrosse tryouts, sexually explicit threats by one of the alleged rapists toward Matthew, and a dean’s instruction to Matthew to “man up,” because the behavior was “boys just being boys.”⁶⁵ The captain of the lacrosse team yanked Matthew’s facemask and yelled in his face that he “was going to f . . . ing kill” Matthew if he did not quit the team.⁶⁶ Graffiti appeared on the bathroom walls that stated, “Matt Thomas likes it in the ass.”⁶⁷ Ultimately, Matthew and his family reported twenty-four incidents to the school during the school year.⁶⁸

A female student entering the ninth grade alleged egregious harassment in *S.K. v. North Allegheny School District*.⁶⁹ Even before the school year began, the plaintiff received a text message from a tenth-grade girl stating, “You f . . . ing bitch, I’m going to cut your f . . . ing face.”⁷⁰ After the plaintiff told her sister, the plaintiff received another text message from a second girl stating, “You just dug your grave deeper.”⁷¹ Many harassing posts on the plaintiff’s Facebook page followed. This was just the beginning.

Continuous harassment included texts and oral threats from girls such as “I am going to slit your (and your friend’s) throats, that’s a promise, not a threat;”⁷² daily verbal insults in the school halls that the plaintiff was a “slut” and a “c . . . t;” the altering of a photograph to show the plaintiff with a banana in her mouth;⁷³ football players throwing bananas at her and proclaiming loudly that the plaintiff had herpes; pushing, shoving, and touching by male students; football players pinning the plaintiff against the lockers and groping her sexually; and escalating abuse during lunch period so that the plaintiff ultimately had

⁶² *Id.* at 293 (the Individuals with Disabilities Education Act requires schools to create IEPs for students with disabilities who are covered by the Act. Pub. L. 101-476; 20 U.S.C. 1414).

⁶³ *Id.* at 294.

⁶⁴ *Id.* at 293–94.

⁶⁵ *Id.* at 294.

⁶⁶ *Id.*

⁶⁷ *Id.* at 295.

⁶⁸ *Id.*

⁶⁹ 168 F. Supp. 3d 786, 796 (W.D. Pa. 2016) (describing egregious harassment of a ninth-grade girl by boys and girls at her school).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

to eat lunch alone in a classroom. Things got so bad that the harassment spilled into the plaintiff's employment, and her employer became alarmed and warned the principal.⁷⁴

The plaintiff repeatedly reported these events to the principal. Her parents filed a police report against a female student who had threatened her.⁷⁵ In response, the student escalated the harassment, physically assaulting the plaintiff on many occasions. Despite the relentless harassment that the plaintiff reported, much of which was witnessed by faculty members, male athletes who were perpetrators were never punished. Female harassers and other male harassers were merely talked to, but school authorities did nothing even remotely effective to stop the harassment.⁷⁶ In fact, the plaintiff tried to commit suicide after more than six months of continuous harassment, but even that act led to increased harassment.⁷⁷ The school officials literally gave up; they told the plaintiff that they could not stop the harassment and encouraged her to attend another school. Ultimately, the plaintiff transferred for the rest of the school year, but she returned to the school the following year, and the harassment continued so that the plaintiff was forced to leave a second time.⁷⁸

In *Haines v. Metropolitan Government of Davidson County*,⁷⁹ an eleven-year-old girl was subjected to more than twenty sexual assaults at school by two eleven-year-old boys.⁸⁰ The complaint alleged that the boys threw the girl, Jessica, to the ground, laid on top of her in a sexual manner, fondled her buttocks, breasts, and genitals, and verbally assaulted her. They told her that they were going to have sex with her, and they asked her if she was a virgin and if she had been raped before.⁸¹ When Jessica tried to send a note to her teacher to tell her of the abuse, her teacher tore up the note and told Jessica not to be a "tattle tale."⁸² Jessica also told the principal, and school authorities did virtually nothing to stop the harassment. The boys finally admitted to the harassment, and they were given only one-day in-school suspensions.⁸³

⁷⁴ *Id.* at 797.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 799.

⁷⁸ *Id.* at 798. Fortunately, the court denied the defendant's motion to dismiss the Title IX claim, which was supposedly based on an argument that there were insufficient allegations of facts constituting deliberate indifference. It is difficult to imagine that a court would ever dismiss a case with these facts.

⁷⁹ *Haines v. Metro. Govern. Of Davidson Cty.*, 32 F. Supp. 2d 991 (M.D. Tenn. 1998).

⁸⁰ *Id.* at 995.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 996.

The assaults continued even though Jessica's psychiatrist warned the principal about the serious effect of the assaults.⁸⁴

Besides the cases decided by the courts, OCR case resolutions also document severe harassment that occurs in schools. One OCR case resolution⁸⁵ revealed that the complaining student had received a series of private electronic messages attempting to extort nude photos of her, and the school told her to report it to the police but took no further action.⁸⁶

In the West Contra Costal Unified School District, a spate of harassing and criminal behaviors was documented by the OCR. The resolution described severe sexually harassing behavior that permeated the education environments at school sites.⁸⁷ The OCR found that a female student was raped in a high school classroom by two male students in 2008.⁸⁸ A year later, several men raped another female high school student on school property; some of the perpetrators were current or former students in the district. A male girls' basketball coach in the district was accused the same year of watching female students change clothes and inappropriate touching and sexual comments in the locker room in the presence of the entire team.⁸⁹ The OCR described frequent nonconsensual sexual touching among students between classes and during lunch periods. The behavior included groping, grabbing, forced kisses and hugs, and "grinding."⁹⁰ A health center employee admitted to counseling female students in the West Contra Coastal District every year because they complained about forced oral sex, being grabbed and held against their will, and being groped. While most of this behavior was initiated by male students on female students, sometimes female students initiated the behavior on male students or the behavior occurred between students of the same sex. Female students sometimes submitted to unwanted touching because they feared that if they resisted, the behavior would escalate.⁹¹ Students often called each other

⁸⁴ *Id.*

⁸⁵ The OCR provides access through its website to case resolution letters and agreements that were reached after October 1, 2013. These OCR case resolutions are particularly helpful in furthering our understanding of how the OCR interprets the law and applies it to facts on the ground. See U.S. DEPT OF JUSTICE, <https://www.ed.gov/ocr-search-resolutions-letters-and-agreements> (last visited Feb. 5, 2019) [<https://perma.cc/379J-LDBZ>].

⁸⁶ See Perris Union High Sch. Dist., U.S. DEPT OF EDUC., OCR No. 09-15-1263, 10 (Apr. 21, 2016).

⁸⁷ West Contra Costal Unified Sch. Dist., U.S. DEPT OF EDUC., OCR No. 09-10-5002, 7 (Nov. 6, 2013) (this description gives only some of the facts concerning harassment in this district because harassment was so pervasive).

⁸⁸ *Id.* at 6.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.*

⁹¹ *Id.*

sexually derogatory names, and slang about female anatomy was frequent. Rumors circulated concerning female students' sexual reputations.

Similar behaviors occurred in the middle and elementary schools in the same school district, including a female middle school student who was sexually assaulted by another girl in the restroom.⁹² There was pervasive graffiti throughout the district; male students who appeared feminine were labeled "faggot[s]."⁹³ These student victims were, according to a middle school principal, not necessarily gay but were perceived as such because they did not participate in sports or had mostly female friends.⁹⁴

Many of these behaviors that took place in the West Contra Coastal Unified School District were criminal in nature, and criminal authorities should have investigated and prosecuted where necessary. But because criminal sanctions take place after the fact, it is crucial for school authorities who are often present and aware of much of the behavior to control the behavior before it reaches the criminal level. School administrators and teachers need to be taught how to recognize and deal with these situations so they can prevent physical, emotional, and educational harm to students. Only risk of significant liability or OCR penalties will be sufficient to create the proper incentives to train educators to take action before the behavior gets out of control.

The empirical and qualitative studies and the cases alleging Title IX violations demonstrate that sex- and gender-based harassment is common and that it has severe effects. Children's responses to peer harassment, as is obvious from the cases, include crying, inability to go to school, self-cutting, PTSD, attempted suicide, and ultimately, in the most severe cases, suicide.⁹⁵

Cases and OCR complaints and investigation victims seem to be disproportionately children with disabilities, even if there is no allegation of disability-based discrimination. This finding is consistent with the studies that demonstrate that children with disabilities are more vulnerable to harassment than children who do not have disabilities.⁹⁶

⁹² *Id.* at 10.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See, e.g., T.Z. v. City of New York*, 634 F. Supp. 2d 263, 267 (E.D.N.Y. 2009) (cutting, difficulty sleeping, PTSD).

⁹⁶ *See Jesse Krohn, Sexual Harassment, Sexual Assault, and Students with Special Needs: Crafting an Effective Response for Schools*, 17 U. PENN. J. L. & SOC. CHANGE 29, 31–33 (2014).

Moreover, many complainants in the OCR process allege race or national origin (as well as disability) and sex- or gender-based harassment. Studies show that girls of color are more often victims of sex- or gender-based harassment.⁹⁷ A number of cases also arise in the setting of very young children. Children as young as five years old are telling their parents about sexual harassment and their parents are filing complaints.⁹⁸

One specific concern that arises in the complaints is the possibility of racial motives for the complaints. While most of the cases do not discuss race unless the complainant files a race-based claim, race is often erased from the picture. A proper response to the problem of sex- and gender-based harassment in school should avoid creating additional problems by listening to victims or disciplining perpetrators unequally depending on their racial identities. All schools and OCR officials must be aware: differential treatment of children based not only on their gender but also on their race must be avoided.⁹⁹

II. MASCULINITIES, MEAN GIRLS, AND PEER SEX HARASSMENT

As noted above, most peer sex- and gender-based harassment in schools is perpetrated by boys (often in groups), some of it on boys and some of it on girls. Peer sex- and gender-based harassment stems from a desire for status by performing masculinity in prescribed ways, and it often not only solidifies the perpetrator's place in the group, but also adds to the group's status. This article explains that masculinity is a powerful motivation for sex- and gender-based harassment. While masculinities theory may not completely explain all different types of harassment and bullying that occur in school, many cases, when examined through the lens of masculinities theory, reveal that societal notions of masculinity underlie a very large percentage of the harassment that occurs.

Masculinities theory explains that masculinity is not a biological imperative, but instead is a performance that is socially constructed.

⁹⁷ See Espelage et al., *Understanding*, *supra* note 38.

⁹⁸ See Amy B. Cyphert, *Objectively Offensive: The Problem of Applying Title IX to Very Young Children*, 51 FAM. L. QUART. 325 (2017) (discussing cases of very small children accused of sexual harassment); *Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255 (D. Mass. 2006) (alleging that kindergartner was coerced by a third-grade male student into lifting up her dress, pulling down her underwear, and spreading her legs every time she wore a dress on the school bus).

⁹⁹ At the time I was writing this, a woman who was a high school and middle school principal informed me that in the middle school in which she worked, a school of lower income families, parents of white girls would frequently complain that black boys were harassing the girls. The difficulties associated with these types of reports, given the historical context in the U.S. are obvious, and OCR workers and educators must be trained to handle these types of cases with sensitivity.

Boys are encouraged to perform a particular type of masculinity. Masculinity is defined by what one is not, not by what one is. That is, masculine boys must constantly prove that they are not girls (or effeminate) and not gay.¹⁰⁰ Boys should be tough, not weak. A showing of emotion—especially crying or tenderness—makes a boy weak. Boys are particularly vulnerable to these messages and bullying from a failure to comply with the masculinity code in their pre-teen years. As a result, as they approach puberty, it is not uncommon for boys to engage in masculinity-enhancing performances, including sex- and gender-based harassment and violence against boys and girls in order to prove their masculinity to themselves and to the boys surrounding them.¹⁰¹

Depending on the individual's intersectional identities, there are numerous ways to perform masculinity.¹⁰² Boys of different social classes and races tend to perform masculinity in different ways. Among adults, the most powerful masculinity is that of the hegemonic masculinity—the type of masculinity associated with upper-middle class white men who are wealthy professionals. But, even in the adult world, different groups in society approve of different types of performances,

¹⁰⁰ See NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 36 (2010). There is a strong current among progressive young adults that resists the binary classification of sex as male and female. I recognize and applaud this movement and understand that not all persons fit into the binary that society has established. Clearly, persons are born intersex as well as male and female; moreover, trans and other non-cisgender persons may live on a gender spectrum and perform their genders in different ways depending on their preferences or needs. See, e.g., Amanda Montañez, *Visualizing Sex as a Spectrum*, *SCIENTIFIC AMERICAN* (Aug. 29, 2017), <https://blogs.scientificamerican.com/sa-visual/visualizing-sex-as-a-spectrum/> [<http://perma.cc/46LQ-57QP>]; Ritch C. Savin-Williams, *What Everyone Should Know About Genderqueer and Nonbinary*, *PSYCHOLOGY TODAY* (July 29, 2018), <https://www.psychologytoday.com/us/blog/sex-sexuality-and-romance/201807/what-everyone-should-know-about-genderqueer-and-non-binary> [<https://perma.cc/3YT6-KTUY>]. The gender regime that I describe—an imposition of masculinity on boys—is particularly harmful to those individuals who do not wish to, or who cannot, alter their bodies or genders to perform as society expects. It is difficult to explain gender theory given that much of it—at least the language used—relies in large part on the binary that has previously been accepted, but I hope to avoid essentialism in my analysis. The binary itself is essentialist, and to some extent, so is much of masculinities theory. But this theory is receptive to all persons, whether cisgender or not, and should be supportive if we can find a language that works to describe the reality that is society's pressure on persons who are perceived to be men and boys to perform masculinity in particular ways given their particular identities (racial, age-based, sexual orientation, etc.) in certain contexts. I will leave for another day the effort to create a language that is more inclusive should this essay fail to be so.

¹⁰¹ See McGinley, *supra* note 6; Beth A. Quinn, *Sexual Harassment and Masculinity: The Power and Meaning of "Girl Watching,"* 16 *GENDER & SOC'Y* 386 (2002).

¹⁰² See MCGINLEY, *supra* note 9.

and individuals tend to perform the masculine identities that are favored by the groups to which they belong.¹⁰³ These performances, too, often take a toll on the individual.¹⁰⁴

While different socio-economic groups express preferred masculinity in different ways,¹⁰⁵ common among all socio-economic groups is the use of sex- and gender-based harassment of women and men (girls and boys) as a means of proving their masculinity to themselves and others.¹⁰⁶ The victims are male and female, straight, gay, and trans. Workplaces are key locations for proving masculinity because men's sense of identity often derives from the work they do.¹⁰⁷ But these behaviors appear much sooner in boys' lives. Gender norms are ubiquitous in our culture, and young children are aware of gendered expectations long before they attend school. Once in school, boys from all social and racial backgrounds feel pressure to prove their masculinity. Boys are admonished not to be a "girl," in other words, not to be weak.¹⁰⁸ In schools, sex- and gender-based harassment is rampant, both at the college and university levels and from kindergarten through high school.¹⁰⁹

In schools, boys are encouraged to demonstrate their masculinity and to hide their feminine characteristics. One way of doing this at the middle and high school levels is through sex- and gender-based harassment.¹¹⁰ Groups of boys join to harass both girls and other boys. The goal of harassing boys and girls is to elevate the masculinity of the harassers and to set group gender rules. Harassing both boys and girls establishes the superiority of masculinity over femininity.¹¹¹ Boys who do not conform their gender performances to accepted forms of masculinity

¹⁰³ See Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L. REV. 221, 242–47, 256–59 (2015) (examining the different forms of masculinity performed by male police officers and young black men living in neighborhoods targeted by the police).

¹⁰⁴ See DOWD, *supra* note 100, at 58–60.

¹⁰⁵ See MCGINLEY, *supra* note 9, at 24–25; McGinley, *Policing*, *supra* note 103 (explaining that men are responsible for more than 90% of violence internationally, compared to their female counterparts who commit only about 10% of violent acts; that engaging in crime is a masculine performance; that a large percentage of young men of all classes commit crimes, but the types of crimes men commit vary depending on their class status, and middle and upper class young men tend to "age out" of crime sooner because of the availability of paid work).

¹⁰⁶ See McGinley, *The Masculinity Motivation*, *supra* note 6.

¹⁰⁷ MCGINLEY, *supra* note 9, at 29–32.

¹⁰⁸ See PLAN INTERNATIONAL, *THE STATE OF GENDER EQUALITY FOR U.S. ADOLESCENTS 4–5* (2018) (finding in a 2018 survey of 1,000 children ages 10–19 that 82% of boys surveyed had heard someone tell a boy that he was acting like a girl, which they interpret to mean that the boy is "emotional, crying, sensitive, weak, feminine, and moody/dramatic—and implicitly unbecoming.").

¹⁰⁹ See *supra* Part I, at 4–7. RAINN, *CAMPUS SEXUAL VIOLENCE: STATISTICS* (2019), <https://www.rainn.org/statistics/campus-sexual-violence> [<https://perma.cc/BV9J-9DUK>].

¹¹⁰ See *generally*, McGinley, *supra* note 6.

¹¹¹ *Id.* at 104.

are frequently the victims of this harassment. Moreover, boys, especially in segregated spaces such as sports teams, tend to harass other boys who are new to the program in order to assure understanding of and compliance with the rules of masculinity.¹¹² In schools, some of the cases reveal, coaches either join in or look the other way when this boy-on-boy harassment is occurring.¹¹³

When girls join groups of boys to harass boys, they may do so in large part in order to “fit in” with the most powerful group of boys who perform their masculinity in a socially acceptable manner.¹¹⁴ At the middle school level this type of harassment increases substantially,¹¹⁵ at a time when children are encountering their own gender and sexual identities. The harassment serves to establish and preserve the society’s gender hierarchy. Girls, as well as boys, police the gender performances of boys by, for example, homophobic name-calling.¹¹⁶ This behavior is directed not only at boys who are gay but also at boys who identify as straight.¹¹⁷ Thus, although the language used often refers to the supposed sexual orientations of the victims, the behavior is used not only to punish outsiders because of their sexual orientations but also because their gender identities do not conform to the expected roles. One purpose of the harassment is to assure the power of the binary gender roles that the boys and girls play. The harassment not only confirms the power of the masculine boys and feminine girls but also denigrates the victims for their failure to perform their masculinity in socially acceptable ways.¹¹⁸

We often hear of “mean girls,”¹¹⁹ popular girls who engage in competitive mistreatment of other girls, especially during middle and high

¹¹² *Id.* at 106.

¹¹³ See Perris Union High Sch. Dist., U.S. DEP’T OF EDUC., OCR No. 09-15-1263, 10 (Apr. 21, 2016).

¹¹⁴ There is some emerging research that shows that at least some girls use forms of relational aggressive behavior as well as physical and verbal aggression toward boys as well. See, e.g., Siobhan Dytham, *The Role of Popular Girls in Bullying and Intimidating Boys and Other Popular Girls in Secondary School*, 44 BRIT. EDUC. RES. J. 212 (2018) (describing aggression of popular girls toward other girls and boys in a white working-class school in England).

¹¹⁵ See, e.g., S.K. North Allegheny Sch. Dist., 168 F. Supp. 3d 786 (W.D. Pa. 2016) (sexually, physically and verbally harassing behaviors against a ninth-grade girl).

¹¹⁶ See Espelage, *supra* note 47, at 1880–81.

¹¹⁷ *Id.*

¹¹⁸ See, McGinley, *The Masculinity Motivation*, *supra* note 6.

¹¹⁹ “Mean Girls” was a movie starring Lindsey Lohan produced by Paramount Pictures in 2004. The plot focuses on a clique of popular high school girls, known as “the Plastics” who mistreat other girls in the school. See MEAN GIRLS (Paramount Pictures 2004). “Mean Girls” is also currently a Broadway musical. Both the movie and the play were inspired by *Queen Bees and Wannabes* by Rosalind Wiseman. See ROSALINE WISEMAN, QUEEN BEES AND WANNABES: HELPING YOUR DAUGHTER SURVIVE CLIQUES, GOSSIP, BOYS, AND THE NEW REALITIES OF GIRL WORLD (2002). See Esther Zuckerman, *Revisiting ‘Mean Girls’ with Rosalind Wiseman* (Apr. 28, 2014), <https://www.theatlantic.com/entertainment/archive/2014/04/revisiting-mean-girls-with-rosalind-wiseman/3>

school years.¹²⁰ Many of these behaviors, too, are likely attributable to maintaining gender hierarchies in schools. The “mean girls” are aligned with the popular boys who perform the most powerful form of masculinity, and, generally, the girls’ power comes from their relationship with these boys. Girls may use harassment of other girls to maintain their competitive edge with the most powerful boys—the masculine boys—and to assure that the hierarchy of the masculine over the feminine continues to thrive.¹²¹ The relationships between gender dynamics and bullying and harassment in schools are very complicated, but there is no question that gender is involved.

Gendered behaviors are difficult to recognize because gender is often invisible. That is, because gender is embedded in our society, we interpret learned gender behaviors as biological imperatives, and we see the behavior as normal. But much learned behavior that is destructive of children, both boys and girls, does not result from biology but from societal pressures to conform to certain gender norms. The cases discussed below give a glimpse into the types of behaviors that children are perpetrating on other children and the failure of adults to recognize the seriousness of the behaviors and to respond to them appropriately. The cases demonstrate that some teachers and administrators stand by as sex- and gender-based harassment occurs between peers without disciplining the perpetrators. Even worse, other teachers, coaches, and administrators join in verbal sex- or gender-based harassment of victims, in essence demonstrating by their actions that this behavior is acceptable and even condoned. As a result, schools have become training grounds for sex- and gender-based harassment in the workplace and other locations in society.¹²² But the research shows that it is not only

61283/ [http://perma.cc/R6HT-KPRA].

¹²⁰ For a real-life example, see *North Allegheny Sch. Dist.*, 168 F. Supp. 3d at 796–99 (describing harassment inflicted by groups of girls and boys and by individual boys and girls).

¹²¹ Feminist writers have criticized the “mean girls” trope. See, e.g., Jennifer Bethune and Marnina Gonick, *Schooling the Mean Girl: A Critical Discourse Analysis of Teacher Resource Materials*, 29 GENDER AND EDUCATION 389 (2017). Feminist writers consider the “mean girls” literature to be anti-girl and responsible for creating and maintaining social stereotypes about girls and boys and the gender-binary. *Id.* at 389–91. “Mean girls” texts also focus on individual behavior and choice as a response but ignore systemic inequality of girls in our society while perceiving girls’ aggressive behavior as aberrant, but biological, and boys’ aggressive behaviors as normal. *Id.* at 392. Moreover, critics of the “mean girls” literature point out that it is class-based in that it sees upper middle-class white girls as performing relational aggression and working-class girls who are white or of other races as more physically and verbally aggressive. While a complete analysis of girls and the “mean girls” phenomenon is beyond the scope of this article, it is important not to accept the “mean girls” literature as merely a description of reality and to recognize that it may be a discourse that is responsible for creating gender differences and expectations. *Id.* at 393.

¹²² I am not taking the position that schools are the only training grounds for this type of harassment. Harassment is pervasive both in the family and throughout society as well, but schools have a unique role in their ability to take a stand to influence children’s views about sex and gender, and they participate in the harassment by either standing by or outwardly condoning it.

the schools where children are educated. Gender messages are ubiquitous in our families and other institutions, but a reversal of the damaging effects of gender in schools will only come once administrators and teachers are educated about gender, educate their students and their parents, and refuse to allow sex- and gender-based harassment to continue in the schools. Exposing schools to legal liability and penalties imposed by the OCR should create the proper incentives for administrators and teachers to take this education seriously.

III. THE LAW'S RESPONSE TO PEER SEX- AND GENDER-BASED HARASSMENT IN SCHOOLS

A. The Courts' Extreme Deference to School Authorities

1. The Supreme Court

Title IX of the Education Amendments of 1972 prohibits a student from being excluded from participation in, denied the benefits of, or subjected to discrimination under any educational program or activity that receives federal financial assistance.¹²³ The Act authorizes an administrative enforcement scheme for Title IX; federal agencies with authority to provide financial assistance may promulgate rules, regulations, and orders that enforce Title IX's objectives of assuring equal access to educational opportunities for all students, no matter their sex or gender.¹²⁴ Although the Act does not explicitly grant a private right of action for damages against school boards, the Supreme Court has implied a cause of action for damages where there is teacher-on-student harassment,¹²⁵ or student-on-student harassment.¹²⁶

Although the statute does not state standards for holding a school authority liable for damages, the Supreme Court adopted stringent standards for liability when it implied a cause of action for damages.¹²⁷ These standards have made it extremely difficult for plaintiffs to prevail in cases against school districts. Additionally, although the standards set forth in *Davis v. Monroe County Board of Education*¹²⁸ for peer harassment are very exacting, many lower courts, when applying the Supreme Court standards to the facts before them, have interpreted these standards to be even more difficult to meet than the original Su-

¹²³ 20 U.S.C. § 1681(a).

¹²⁴ 20 U.S.C. § 1682.

¹²⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

¹²⁶ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 635 (1999).

¹²⁷ *Id.*; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

¹²⁸ *Davis*, 526 U.S. 635.

preme Court case appears to require. Thus, very few cases brought under Title IX for sex- or gender-based harassment survive motions to dismiss or for summary judgment.

In *Gebser v. Lago Vista Independent School District*,¹²⁹ which was decided the year before *Davis*, the Court had authorized liability of a school district for a teacher's sexual harassment of a student only if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to the teacher's misconduct."¹³⁰

A year later, in *Davis*, the Court held that a school board may face liability for third-party harassment of its students only where it has "substantial control" over both the harasser and the context in which the harassment occurs.¹³¹ A school board will be liable for peer sex- and gender-based harassment if the plaintiff proves that: 1) the school administration had actual knowledge of the behavior; 2) exhibited deliberate indifference to the harassment; and 3) the harassment was so severe, pervasive, and objectively offensive that it denied the victim equal access to educational opportunities.¹³² A plaintiff need not show physical exclusion from the educational opportunity in order to prove a denial of equal access.¹³³ Rather, a plaintiff must establish that the harassment undermined and detracted from the victim's educational experience so that she or he was effectively denied equal access to the institution's resources and opportunities.¹³⁴ In determining whether the behavior itself is sufficiently severe and pervasive,¹³⁵ *Davis* cited an employment discrimination case brought under Title VII of the 1964 Civil Rights Act, concluding that context matters. The "constellation of surrounding circumstances, expectations and relationships" including, but not limited, to the ages of the harasser and the victim and the number of individuals involved must be considered.¹³⁶

Moreover, the Supreme Court counseled that schools are different from workplaces in that children regularly interact in ways that would

¹²⁹ 524 U.S. 274.

¹³⁰ *Id.* at 277.

¹³¹ *Davis*, 526 U.S. at 645.

¹³² *Id.* at 651–52.

¹³³ *Id.* at 651.

¹³⁴ *Id.* at 651.

¹³⁵ Under Title VII, the plaintiff must show either that the behavior is severe *or* that it is pervasive, which appears to be a lower standard than that applied in Title IX, which requires a showing that the behavior is severe *and* pervasive. By the same token, as mentioned above, the Court cited to a Title VII case, *Oncale v. Sundowner Offshore Service, Inc.*, 523 U.S. 75, 82 (1998) when it analyzed the standard.

¹³⁶ *Davis*, 523 U.S. at 651, citing *Oncale*, 523 U.S. at 82.

be unacceptable for adults.¹³⁷ Thus, school students engage in “insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.”¹³⁸ Damages are not available to victims of “simple acts of teasing and name calling among school children” even if the comments are gendered.¹³⁹ The Court also noted that it is possible but unlikely that a single incident of harassment would deny equal access to educational opportunities, and that damages should be limited to situations where the harassing behavior and the school’s indifference to it have a systemic effect on educational programs or activities.¹⁴⁰ Finally, the Court explained that it should be easier to recover damages against a school board based on teacher-on-student harassment than peer harassment among students.¹⁴¹

Despite these rigid standards, the Court refused to affirm the lower court’s dismissal of the plaintiff’s case. The complaint alleged that LaShonda Davis, a fifth-grade girl, suffered repeated sex-based physical and verbal harassment over a five month period by a boy in her class who ultimately pleaded guilty to sexual battery for his conduct.¹⁴² Both LaShonda and her mother told a number of teachers of the incidents, and one teacher told her mother that the principal had been informed.¹⁴³ The complaint also alleged that a group of girls (along with LaShonda) who were sexually harassed by the same boy attempted to speak to the principal, but a teacher told them that the principal would call them if he wanted to speak to them.¹⁴⁴ No call was made to the girls.¹⁴⁵ La Shonda’s mother, however, finally spoke to the principal who never took disciplinary action against the boy.¹⁴⁶ The complaint also alleged that LaShonda’s grades dropped because she could not concentrate, and, ultimately, she wrote a suicide note.¹⁴⁷ Finally, the complaint alleged that the Board of Education had not established a policy on peer sexual harassment or instructed its personnel on how to respond to student-on-student harassment.¹⁴⁸

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 652.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 653.

¹⁴² *Id.* at 633.

¹⁴³ *Id.* at 633–34.

¹⁴⁴ *Id.* at 635.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 634.

¹⁴⁸ *Id.*

A majority of the Supreme Court concluded that the allegations were sufficient to state a cause of action under Title IX because LaShonda was a victim of repeated verbal and physical acts of sexual harassment over a five-month period, and the alleged behavior was severe, pervasive, and objectively offensive.¹⁴⁹ The allegations suggest that the harassment had a concrete negative effect on LaShonda, and that the Board had actual knowledge and responded with deliberate indifference when it made no effort to investigate or correct the harassment.¹⁵⁰

2. The lower courts' response to *Davis*

Many of the lower courts have interpreted *Gebser* and *Davis* in the strictest fashion, concluding in subsequent cases with egregious facts that the plaintiff did not, *as a matter of law*, meet the Supreme Court's standards. But a few other courts have taken a more measured approach to these standards. The following section analyzes cases with reference to individual requirements of the Supreme Court's standard, and also as a whole.

a. Actual notice

Davis requires that school authorities have actual notice of the harassment before the school has a responsibility to correct the situation. There are a number of questions concerning what this requirement means in the peer harassment cases. First, it is unclear, because of conflicting and insufficient caselaw, whether notice to a supervising teacher is sufficient to give the district actual notice. Second, it has not been resolved whether notice of a perpetrator's prior harassment of the individual in question or of others is sufficient notice to constitute actual knowledge that would trigger the school's responsibility to act to prevent more harassment. Third, where the victims are very vulnerable because of young age or intellectual disabilities, and therefore unable to communicate to school authorities in a sex-specific way, it is unclear what type of communication is sufficient to satisfy the actual knowledge requirement.

i. Sufficiency of notice to supervising teacher

There remains a question as to who should have actual notice in the peer harassment cases. *Gebser* states that actual notice exists only if an official who has the authority to take corrective action has notice

¹⁴⁹ *Id.* at 653–54.

¹⁵⁰ *Id.*

of the harassment in the teacher-on-student cases.¹⁵¹ Given that in teacher-instituted harassment an administrator may be the lowest level person with authority to take corrective action, a number of courts of appeals have held that knowledge of a fellow teacher or guidance counselor of ongoing sexual harassment of a student by a teacher is insufficient to constitute actual notice for purposes of a school district's Title IX liability.¹⁵² *Davis* does not discuss this issue with reference to peer harassment, but there is a non-trivial argument that notice to a teacher who supervises both the perpetrator and the victim would be sufficient to satisfy the actual notice requirement.¹⁵³

Nevertheless, the Eleventh Circuit declined to decide this question, stating that it would be necessary to study how Florida organizes its public schools and grants authority and responsibility by state law to administrators and teachers, the school district's discrimination policies and procedures, and the facts of the particular case.¹⁵⁴ Other courts have not yet decided the issue.

ii. Notice of perpetrator's prior harassment

A second issue is whether school authorities' knowledge of past harassment by the perpetrator is sufficient to fulfill the actual notice requirement of Title IX regarding a new harassing event. The question is whether a victim of a perpetrator's harassment can point to school authorities' knowledge that the perpetrator had harassed this same victim or a different victim in the past sufficient to constitute actual knowledge. If so, the question would arise as to whether school authorities were under a duty to remedy the past harassment and to prevent future harassment.

Courts in a number of circuits conclude that notice of prior sexual harassment in a teacher-on-student harassment Title IX case is sufficient to constitute actual notice in a subsequent case with the same teacher and a finding of deliberate indifference follows if the prior harassment is not distant in time or type from the current harassment.¹⁵⁵

¹⁵¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

¹⁵² *See, e.g., Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, 520 U.S. 1265 (1997).

¹⁵³ The regulations proposed by the Department of Education actually conclude that knowledge of a teacher in elementary and secondary school is sufficient to constitute actual knowledge of the school. This is because the teacher has a duty to report and correct harassing behavior. *See* 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt.106).

¹⁵⁴ *Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1286–87 (11th Cir. 2003).

¹⁵⁵ *See, e.g., J.M. ex rel. Morris v. Hilldale Indep. Sch. Dist.*, No. 1-29, 2010 WL 3516730 (10th Cir. Sept. 10, 2010) (upholding a jury verdict holding school district liable and finding actual knowledge and deliberate indifference toward an inappropriate sexual relationship between a student and teacher where another student reported to the school principal that he saw the student lying on the teacher's bed in a hotel room with the door closed on a band trip); *see also*

These courts state that knowledge of prior acts of harassment is sufficient to constitute actual notice to the school administration that a teacher is a substantial risk to the students.¹⁵⁶ But prior notice of a university administration of a professor's relationships with two older non-traditional students, ten year-old accusations of inappropriate comments, and one touching incident were not sufficiently similar or close in time to the repeated groping and touching alleged in the later case before the court to constitute actual notice that would trigger the university's responsibility to prevent injury to the current plaintiff.¹⁵⁷

A lower court in the Second Circuit has concluded that, "In the context of deliberate indifference, the actual notice standard may be satisfied by knowledge of a 'substantial risk of serious harm' where there have been multiple prior allegations of the same or similar conduct that is at issue."¹⁵⁸ And some courts hold that there is actual knowledge when there is a substantial risk created by a person whom the authorities know has engaged in abuse of other students.¹⁵⁹ This reading of actual knowledge is more consistent with the goals of Title IX to prevent unequal access based on gender or sex than requiring a showing that school authorities had actual knowledge of the abuser's behavior in the particular case. Permitting schools to wait until the harm occurs before they react gives schools near immunity from damages.

iii. Actual notice when vulnerable victim unable to communicate in sex-specific terms

A third related question arises as to the specificity necessary of the student complaint to school authorities, especially when the student victim is particularly vulnerable because of young age or intellectual disability and is unable to communicate in sex-specific terms. In a number of cases, young students and those with intellectual disabilities have reported to school officials in general terms that they were being

Escue v. N. Okla. College, 450 F.3d 1146 (10th Cir. 2006) (holding that even under the more liberal reading of Title IX that would permit a finding of actual knowledge based on prior incidents, two consensual relationships with non-traditional students and a ten-year old report of repeated inappropriate comments and one touching were not sufficiently close-in-time or similar to the type of non-consensual groping alleged by the plaintiff and therefore were insufficient to provide actual notice to the university administration); *Doe A. v. Green*, 298 F. Supp. 2d 1025 (D. Nev. 2004) (holding that reports to a principal that a fourteen year old girl was uncomfortable with attention from a coach, and subsequent partial admission and denials by the girl were sufficient to trigger a more rigorous investigation and to demonstrate actual notice by the school of the inappropriate relationship).

¹⁵⁶ See, e.g., *Green*, 298 F. Supp. 2d at 1033–34.

¹⁵⁷ *Escue*, 450 F.3d at 1153.

¹⁵⁸ *Carabello v. New York City Dept. of Educ.*, 928 F. Supp. 2d 627, 638 (E.D.N.Y. 2013) (quoting *Zamora v. N. Salem Cent. Sch. Dist.*, 414 F. Supp. 2d 418, 424 (S.D.N.Y. 2006)).

¹⁵⁹ *Id.*

bothered or that their perpetrators were acting “nasty.”¹⁶⁰ Courts have generally held that under these circumstances there is no actual notice even if the victims are very young or intellectually disabled.¹⁶¹

For example, in *Rost ex rel. K.C. v. Steamboat Springs Re-2 Sch. Dist.*,¹⁶² a seventh-grade female student who was intellectually disabled was repeatedly coerced into performing sexual acts on a number of boys for a number of years. A few years into the coercive behavior, the victim’s mother asked the school psychologist to find out why the victim did not wish to go to school. The victim testified in her deposition that she told the school counselor that the boys were “bothering” her, but that she did not know the word “assault” at that time.¹⁶³ Her personal therapist testified that the victim told him that she had told the counselor at school about the coerced sexual behavior with the boys.¹⁶⁴ The court concluded, however, that the information given to the counselor was insufficient to give the school actual notice that the child was being harassed and assaulted.¹⁶⁵ And, the knowledge the school did have created no responsibility to investigate further.¹⁶⁶

Similarly, in *Hawkins v. Sarasota County School Board*,¹⁶⁷ three eight-year-old girls (Jane Does I, II, and III) were allegedly harassed repeatedly over several months by an eight-year-old boy in their class in a series of gestures; obscene comments, such as telling them he wanted to “suck” their breasts, he wanted them to “suck the juice from his penis,” and he wanted them to “have sex with him;” and actions such as chasing them and touching them on their breasts and groin, attempting to kiss them, grabbing one of them and looking up her skirt, and rubbing his body on hers.¹⁶⁸ The girls cried frequently, were anxious about going to school, and at least two of them pretended that they were sick on four or five occasions so they would not have to go to school.¹⁶⁹ Both boys and girls in the class had complained to the teacher that this boy was bothering them, was disruptive, and that he had pushed children on the playground.¹⁷⁰ At one point, Jane Doe II and two other girls told the teacher that he was being “disgusting.” The teacher testified,

¹⁶⁰ See *Rost ex rel. K.C. v. Steamboat Springs Re-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008).

¹⁶¹ *Id.* at 1119.

¹⁶² *Id.*

¹⁶³ *Id.* at 1119–20.

¹⁶⁴ *Id.* at 1120.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 322 F.3d 1279 (11th Cir. 2003).

¹⁶⁸ *Id.* at 1281.

¹⁶⁹ *Id.* at 1281–82.

¹⁷⁰ *Id.* at 1282.

however, that it was not until she spoke with Jane Doe III's mother a number of months later that she heard of the explicit things John Doe had said and done.¹⁷¹ The girls testified, however, that they had repeatedly and persistently described his behavior to the teacher, and the teacher had ignored their complaints.¹⁷²

These persistent complaints of three eight-year-old girls to their teacher should be sufficient to create a responsibility on the teacher's part to investigate the issue further. Had she investigated (or even listened to Jane Doe III), she would have found out the explicit facts of the boy's behavior toward the girls. This is particularly troubling in this situation, as in *Rost*, because these victims were vulnerable due to their youth and may have been unable to describe the boy's behavior explicitly without prompting. Clearly, these holdings protect school districts from liability, but they do not encourage schools to act proactively when they have sufficient information that should lead to a duty to investigate more thoroughly general complaints from young or intellectually disabled children who may be incapable of explaining the assaults or harassment.

b. Deliberate indifference

In Title IX cases, the issue of deliberate indifference is linked to actual knowledge.¹⁷³ If there is no knowledge, it is impossible to show deliberate indifference. Assuming that there is actual knowledge, however, the courts have applied the deliberate indifference standard very strictly. Courts require that the school administration's response to known harassment be clearly unreasonable. Given this standard, some courts have found almost any response short of ignoring the harassment sufficient. At least some courts conclude that the school does not have to stop the harassment, nor is it clearly unreasonable if it institutes a remedy but does not meet again to decide whether to continue with the remedy.¹⁷⁴ Other courts hold that if the school authorities learn that their remedy has been ineffective in that the remedy did not stop the harassment, the school can be deliberately indifferent.¹⁷⁵

¹⁷¹ *Id.*

¹⁷² *Id.* (the court ducked the issue of whether notice to the teacher alone would be sufficient under Title IX, concluding that even if there was actual notice and deliberate indifference, the girls had not been denied access to an education opportunity as a matter of law because the behavior was not sufficiently severe, pervasive, and objectively offensive and because the girls' grades in school did not suffer); *see also id.* at 1288.

¹⁷³ *See, e.g.,* Gant ex. rel. Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 141 (2d. Cir. 1999).

¹⁷⁴ *See, e.g.,* Pahssen v. Merrill Community Sch. Dist., 668 F.3d 356 (6th Cir. 2012).

¹⁷⁵ *See, e.g.,* Hunter ex rel. Hunter v. Barnstable Sch. Committee, 456 F. Supp. 2d 255, 265 (D. Mass. 2006) (stating that there is a split in the circuits as to this issue); Wills v. Brown University, 184 F.3d 20, 26 (1st Cir. 1999) (stating that once school authorities find out that their remedy—

A good example of the former is *Pahssen v. Merrill Community School District*.¹⁷⁶ In *Pahssen*, John Doe, a ninth grader, committed three fairly serious acts of sexual harassment against Jane Doe, an eighth-grade girl, and ultimately raped her at school.¹⁷⁷ When notified of the three incidents (before the rape), school officials met to discuss an Individual Education Plan (IEP) for John, who was in special education, to determine what to do about the boy's aggressiveness.¹⁷⁸ The team decided to place John under constant adult supervision for thirty days, but the team never met again to decide whether to lift the supervision; it was automatically lifted at the expiration of thirty days.¹⁷⁹ Less than two months later, the boy raped the girl at school.¹⁸⁰ Although both the Justice Department, which joined as an *amicus*, and the girls' father argued in briefs that the school had shown deliberate indifference when it failed to continue to supervise the boy after thirty days elapsed, the Sixth Circuit upheld the lower court's grant of summary judgment of the Title IX claim, holding that the school did not demonstrate deliberate indifference.¹⁸¹

In this case and others, courts repeatedly emphasize that courts should defer to school administrators, that schools have limited resources, and that children are often cruel to each other in determining that the school did not act in a clearly unreasonable manner and therefore did not display deliberate indifference.¹⁸² The courts require that the harassing behavior against a particular individual reach the level of severe, pervasive, and objectively offensive and that the school know about it before a responsibility to react is triggered.¹⁸³ But as the cases demonstrate, harassing behavior escalates.¹⁸⁴ It starts as bothersome pushing and name calling, but soon it moves to punching and shoving, obscene comments and gestures, demands for oral sex, and sexual assault. A school district should not escape liability for the ultimate severe behavior when it knows in advance that some of these behaviors are occurring and does nothing about it.

in a professor-on-student harassment case—has not worked “it may be required to take further steps to avoid new liability.”)

¹⁷⁶ 668 F.3d 356 (6th Cir. 2012).

¹⁷⁷ *Id.* at 360.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 363.

¹⁸² *Id.* at 363, 365.

¹⁸³ *See, e.g., Pahssen*, 668 F.3d 356.

¹⁸⁴ *See, e.g., Patterson v. Hudson Area Schools*, 551 F.3d at 439–42 (describing homophobic name-calling, pushing, shoving, destruction of property, and ultimately sexual assault).

In *Stiles ex rel. D.S. v. Grainger County*,¹⁸⁵ a boy who weighed less than eighty pounds in the seventh grade was continuously harassed, bullied, and battered; he was punched in the face and in the stomach, thrown to the floor, and kicked while he was on the floor.¹⁸⁶ On at least two occasions, D.S. was pushed, and he fell and hit his head.¹⁸⁷ On another, D.S. had his face slammed into a locker and had gum put in his hair.¹⁸⁸ As he was physically assaulted, D.S. was frequently called “faggot,” “pussy,” “pedophile,” and other insulting slurs regarding his gender, sexual orientation and proclivities.¹⁸⁹ Affidavits by third parties stated that a friend of D.S. witnessed students ramming D.S.’s head into a locker, another student threatened to kill D.S., and a third student told D.S. to kill himself.¹⁹⁰ This behavior occurred continuously for two school years, and D.S. and his mother complained after many of the assaults and batteries occurred.¹⁹¹ Despite that D.S.’s mother complained repeatedly to the principal and the principal met with them a number of times, the situation was never cured. D.S. testified that the disciplinary supervisor for the county schools, Coombs, stated that he could not keep D.S. safe, but Coombs denied making this statement.¹⁹² A number of investigations took place, and the instigators were punished, but to no avail.¹⁹³

The court held that as a matter of law the school district did not show deliberate indifference because it engaged in a number of investigations, gave in-school suspensions to some of the harassers, and changed class scheduling to separate D.S. from his harassers.¹⁹⁴ The Sixth Circuit had held earlier in *Vance v. Spencer County*¹⁹⁵ that there was a jury question of deliberate indifference when school officials had actual knowledge that its efforts to cure the problem did not work and continued to use those same efforts unsuccessfully.¹⁹⁶ However, in *Stiles*, it distinguished *Vance*, stating that the school had made many

¹⁸⁵ 819 F.3d 834 (6th Cir. 2016).

¹⁸⁶ *Id.* at 834–46.

¹⁸⁷ *Id.* at 842.

¹⁸⁸ *Id.* at 846.

¹⁸⁹ *Id.* at 845.

¹⁹⁰ *Id.* at 846 n.7. These statements contained hearsay and therefore the court refused to consider them on the motion for summary judgment. *But see Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (evidence creating issue of fact for nonmoving party need not be in admissible form).

¹⁹¹ *Stiles*, 819 F.3d at 834–46.

¹⁹² *Id.* at 845.

¹⁹³ *Id.* at 850.

¹⁹⁴ *Id.*

¹⁹⁵ 231 F.3d 253 (6th Cir. 2000).

¹⁹⁶ *See Stiles*, 819 F.3d at 849–50, citing *Vance*, 231 F.3d at 261.

efforts and there were almost no repeat offenders in the *Stiles* case, unlike in *Vance*.¹⁹⁷

The court in *Stiles* also distinguished *Patterson v. Hudson Area Schools*¹⁹⁸ largely because school officials had reason to believe in *Stiles* that D.S. was “at least an occasional instigator” of some of the physical confrontations.¹⁹⁹ The court’s adoption of this “defense” to a possible finding of deliberate indifference appears to add an “unwelcomeness” requirement into Title IX’s already stringent standards.²⁰⁰ This is an inappropriate standard to graft onto the situation of a middle school boy who suffers serious physical and verbal harassment, much of which, if reported to the police, would constitute crimes against him. Grafting an unwelcomeness requirement in this situation only serves to reward the true perpetrators and to let the school off the hook for its failures to control the situation.

Clearly, these are very complicated situations, and there was some attempt by school officials in *Stiles* to remedy the situation, but a reasonable jury could conclude that at some point during the two-year period of harassment it became obvious that the school’s efforts to stop the harassment were not working. At that point, a jury could conclude that the school operated with deliberate indifference when it did not report the abusers to the police and did not suspend or expel the abusers or engage in any other disciplinary measure designed to stop the harassment. This case demonstrates the difficulty of meeting the deliberate indifference standard. While this standard was intentionally set by the Supreme Court so as not to permit undue interference with the educational prerogatives of school officials, this case demonstrates that, at least as it was interpreted in this case, it does not serve to protect school children from gender-based discrimination. Even given allegations of grossly dangerous harassment and bullying that rises to the level of encouraging suicide, criminal batteries, and other severe behaviors, the court concluded as a matter of law that the school’s knowing ineffective response was not deliberate indifference.

¹⁹⁷ *Id.* at 850.

¹⁹⁸ 551 F.3d. 438 (6th Cir. 2009).

¹⁹⁹ *Stiles*, 819 F.3d at 851.

²⁰⁰ In Title VII sexual harassment cases, the plaintiff must prove that the harassing behavior was unwelcome. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The original reason for this requirement was related to the question of consent in a sexual harassment case of a supervisor who imposed himself sexually on a subordinate. Although the Court made clear in *Meritor Savings Bank* that the unwelcomeness requirement does not mean that the plaintiff must show that she did not consent to the behavior because of the differential power between a supervisor and subordinate, the plaintiff still had to demonstrate that she did not wish to engage in the behavior. *Id.* at 68.

c. *Severe, pervasive, and objectively offensive sufficient to deny equal access to educational opportunities*

The severe, pervasive, and objectively offensive standard is linked to whether the behavior is serious enough to deny equal access to school opportunities because of the individual's sex or gender. In determining whether illegal harassment occurred, it would make sense, then, to take into account the ages of victims and the victims' subjective reaction to the harassment as well as to its objective severity, but courts do not always do so. In *Hawkins v. Sarasota County School Board*,²⁰¹ for example, the court concluded that the behavior was "not so severe, pervasive, and objectively offensive that it had the systemic effect of denying the [three eight-year-old girl victims] equal access to education."²⁰² The court stated that the effect must be systemic, which means that a single instance of one-on-one peer harassment would be insufficient, and "the effects of the harassment [must] touch the whole or entirety of an educational program or activity."²⁰³ This standard is incorrect. Other courts have held that one single incident, if sufficiently severe, can deprive an individual victim of access to equal educational opportunities.²⁰⁴

Moreover, in *Hawkins*, the victims alleged ongoing, repeated verbal and physical harassment of a sexual nature. But the court noted that the girls did not suffer sufficiently. The court stated:

None of the girls suffered a decline in grades and none of their teachers observed any change in their demeanor in classroom participation. The girls simply testify that they were upset about the harassment, although not enough to tell their parents until months after it began. Two of the girls say they faked being sick four or five times in order not to go to school. This falls short of demonstrating a systemic effect of denying equal access to an educational program or activity.²⁰⁵

How should a victim prove that there has been a systemic effect on the entire educational program? It seems odd that a statute that was intended to protect women and girls from unequal educations would require them to suffer in the extreme in order to get their education. As Justice O'Connor stated for the Court in the Title VII context in *Harris v. Forklift Systems*:²⁰⁶

²⁰¹ 322 F.3d 1279 (11th Cir. 2003).

²⁰² *Id.* at 1288 (emphasis added).

²⁰³ *Id.* at 1289.

²⁰⁴ See, e.g., *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).

²⁰⁵ *Hawkins*, 332 F.3d at 1289.

²⁰⁶ 510 U.S. 17 (1993).

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.²⁰⁷

The behavior in question in *Hawkins* certainly created an unequal educational environment for the girls who were harassed. It would make little sense to assume that denial of equal access depends merely on the subjective emotional strength or weakness of the victim or on the systemic effect of the harassment. As in Title VII coverage, Title IX should protect victims before they have psychological breakdowns.²⁰⁸

A number of other courts have concluded that harassing behavior is not sufficiently severe, pervasive, and objectively offensive as a matter of law. For example, in *Pahssen*, the court concluded that three acts of harassment by a ninth-grade boy—smashing the eighth-grade female victim up against her locker, telling her that if she did not perform oral sex on the perpetrator that he would no longer hang out with her, and making obscene gestures at the victim as she was playing basketball in a public arena at school—were insufficient to create a genuine issue of fact as to severity, pervasiveness, and objective offensiveness sufficient to trigger the school's responsibility to protect the victim who was later raped by the same boy.²⁰⁹

In contrast, *T.Z. v. City of New York*²¹⁰ concluded that one serious episode of sexual harassment was sufficiently severe that it may have had the effect of denying a student's access to equal educational benefits. Even though the language uses the terms "severe and pervasive," the court concluded that the "severe and pervasive and objectively offensive" standard's purpose was to predict whether the plaintiff would

²⁰⁷ *Id.* at 22.

²⁰⁸ Judge Illana Rovner would likely agree. See *Gabrielle M. v. Park Forrest-Chicago Heights, Illinois Sch. Dist.* 163, 315 F.3d 817, 827–28 (7th Cir. 2003) (Rovner, J., concurring) (concluding that a female five year-old kindergartener can suffer even if the perpetrator, also a kindergartener, may not be able to form the intent to harass; it is the *school's* intent and response, not that of the young perpetrator, that matters; Gabrielle's sleepless nights, bed wetting, loss of appetite, and emotional distress were sufficient to find unequal access to educational opportunities).

²⁰⁹ *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356, 365 (6th Cir. 2012).

²¹⁰ 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).

suffer unequal access.²¹¹ Given the serious sexual assaults that the plaintiff suffered in a classroom with the teacher present, and the serious effects on the plaintiff's mental health that included sleeplessness, panic attacks, PTSD, and self-cutting, the court held that this single instance of sexual assault (perpetrated by a number of boys) was sufficient to rise to the level of "pervasiveness;" therefore, there was a question for the jury.²¹² Unlike many of the other cases decided above, I submit, this case was correctly decided.

d. Because of sex

Under Title IX in schools and Title VII in workplaces, sex- or gender-based harassment is illegal only if it occurs because of the victim's sex.²¹³ Many courts deciding Title VII cases have trouble recognizing that harassment occurs because of sex in the same-sex environment.²¹⁴ This problem occurs most frequently under two circumstances. First, although same-sex harassment is illegal under Title VII,²¹⁵ up until very recently all federal courts had held that discrimination based on sexual orientation was not prohibited sex discrimination.²¹⁶ Thus, these courts concluded that as a matter of law, based on language used in the workplace, the discrimination occurred because of the victim's sexual orientation, not his sex, and was therefore not illegal.²¹⁷ Fortunately, the Equal Employment Opportunity Commission and a number of courts of appeals have recently concluded that discrimination based on sexual orientation is discrimination based on sex.²¹⁸ But there is a serious question whether the U.S. Supreme Court, considering its current composition, will agree with these decisions, and a number of cases dealing with this issue are currently before the Supreme Court.²¹⁹

²¹¹ *Id.* at 269.

²¹² *Id.* at 271.

²¹³ Of course, Title VII also forbids discrimination in workplaces that occur because of race, color, national origin, or religion. *See* 42 U.S.C. § 2000e-2.

²¹⁴ *See* MCGINLEY, *supra* note 9, at 46–48.

²¹⁵ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

²¹⁶ *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 713, 714 n.3, 732 (2010).

²¹⁷ This distinction would be very difficult to make. *See id.* at 738–44.

²¹⁸ *See, e.g.*, *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc) (cause of action exists under Title VII for sex discrimination); *Baldwin*, 2012-24738-FAA-03 (2015) (concluding that sexual orientation discrimination prohibited by Title VII); *compare*, *Macy v. Dep't of Justice*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (concluding that transgender status protected under Title VII prohibition of sex discrimination).

²¹⁹ *Bostock v. Clayton Cty, Georgia*, 723 Fed. App'x. 964 (11th Cir. 2018) (sexual orientation is not covered by Title VII); *cert. granted*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (April 22, 2019) (No. 17-1618); *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (en banc) (a cause of action exists under Title VII for sexual orientation discrimination), *cert. granted*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (April 22, 2019) (No. 17-1623). *Compare*, *Equal Employment Opportunity Commission v. R.G.*

The second issue that arises in Title VII cases regarding “because of sex” results from *Price Waterhouse v. Hopkins*’s²²⁰ holding that the statute prohibits discrimination based on an individual’s failure to conform (or hyper-conformity)²²¹ to gender stereotypes. In other words, discrimination “because of sex” also includes discrimination because of gender. Even if the Supreme Court holds that sexual orientation discrimination is not prohibited by Title VII, the sex stereotyping doctrine allows causes of action for harassment that results from an individual’s failure to conform (or hyper-conformity) to gender stereotypes, whether the plaintiff is LGBTQ+ or straight.

Even in cases brought under *Oncale v. Sundowner Offshore Services, Inc.*²²² and the sex stereotyping theory of *Price Waterhouse*, however, some lower courts have had trouble concluding, especially when men harass other men, that the behavior occurred because of sex. They conclude, instead, that the behavior is merely normal “roughhousing” or “hazing.”²²³ This error results from a misreading of *Oncale*. The Court mentions in *Oncale* that there is no Title VII cause of action for roughhousing or hazing that is not sufficiently severe or pervasive. But the *Oncale* court never held that roughhousing behavior that is severe and/or pervasive is not actionable. Lower courts, without focusing closely on *Oncale*, use this statement to hold that the behavior is roughhousing, and, therefore, it did not occur because of sex. These decisions are wrong because they distort *Oncale*’s language and meaning.

Masculinities theory also proves them to be wrong. Masculinities theory explains that severe or pervasive harassment of men by men often occurs because of sex because the harassers are motivated by the victim’s failure to conform to gender stereotypes and/or they harass the victim in order to enhance their own masculinity, to buttress the masculinity of their group, and to police the masculine norms of the workplace.²²⁴

& G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (a cause of action exists under Title VII for discrimination based on transgender status), *pet. cert. filed* (No. 18-107), June 24, 2018. The petitions for certiorari were granted on April 22, 2019 in all three of these cases. See Amy Howe, *Court to Take Up LGBT Rights in the Workplace*, available at <https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/>.

²²⁰ 490 U.S. 228 (1989).

²²¹ By “hyper-conformity,” I refer to discrimination or harassment motivated by the female victim’s extreme performance of femininity or the male victim’s extreme performance of masculinity.

²²² 523 U.S. 75 (1998).

²²³ See, e.g., *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179 (D. Conn. 2016).

²²⁴ See, McGinley, *The Masculinity Motivation*, *supra* note 6.

While less frequently, some courts deciding Title IX same-sex cases also conclude that harassment does not occur because of sex either because the behavior occurred because of the victim's sexual orientation²²⁵ or because the behavior is normal roughhousing or hazing among boys. The mantra "boys will be boys" excuses the behavior as normal and not occurring because of sex.

In *Doe v. Torrington Bd. of Educ.*,²²⁶ for example, the plaintiff, John Doe, attended high school from Fall 2011 until Spring 2013, and was regularly brutalized, bullied, and harassed by his classmates and his teachers, coaches, and a paraprofessional working in the school.²²⁷ His physical and verbal harassment culminated in a number of physical and sexual assaults, including a rape at summer camp; after the rape, students repeatedly harassed him in class, calling him a "faggot" and a "fat ass."²²⁸ Doe's special education teacher characterized the assaults as "everyday banter between boys" and did not take action.²²⁹ Finally, Doe's mother withdrew him from school when a State Trooper informed her that that Doe had been sexually assaulted and that the police would be filing a report on a second incident.²³⁰ The court dismissed the Title IX claim because it did not "sufficiently allege that he was bullied, harassed and assaulted because of his gender" and, because the sexual assault took place in the summer off school grounds, the school would not be liable.²³¹ This case employs a piecemeal approach to analyzing the evidence, refusing to recognize the severely hostile educational environment that was tolerated and created by school officials as well as the

²²⁵ See, e.g., *Tumminello v. Father Ryan High School*, No. 3:15-cv-00684, 2015 WL 13215456 (6th Cir. Dec. 7, 2015) (granting defendant's motion to dismiss where the victim's mother alleged that her freshman son committed suicide after he was targeted with belts used as whips by other students who called him "faggot," and "gay" and told him to "go home and kill himself," holding that the Sixth Circuit had rejected the sex stereotyping theory and the theory that harassment based on sexual harassment occurred because of sex); *Eilenfeldt ex rel. J.M. v. United C.U.S.D. #304 Bd. of Educ.*, 84 F. Supp. 3d 834, 838–42 (C.D. Ill. 2015) (holding that merely using sexual behavior or language does not necessarily show the behavior occurred because of male seventh grade victim's sex, and refusing to recognize at least in this case that the behavior may have occurred for the victim's failure to conform to gender norms even though the complaint alleged that the harassment included inappropriate touching by other boys and students verbally taunting the victim that he was a "rapist," "pedophile," and a child molester, saying he was attracted to young boys, and physically bullying him by kicking, punching, pushing him, and threatening him with a knife).

²²⁶ 179 F. Supp. 3d 179 (D. Conn. 2016).

²²⁷ *Id.* at 184–88.

²²⁸ *Id.*

²²⁹ *Id.* at 186.

²³⁰ *Id.* at 187. The athletes in this school were engaged in other allegedly criminal behavior against girls and boys. Two football players were charged and arrested for rape of minor girls; another football player was charged with felony robbery related to jumping three fourteen-year-old boys. Another football player was later arrested for the second assault of two thirteen-year-old girls. *Id.* at 188.

²³¹ *Id.* at 197–98.

acts of physical, verbal, and sexual assaults directed at the plaintiff, who regularly reported his attacks to school officials. Even the off-campus assault likely had its origins in school-based hostilities.

Another related barrier to liability for damages is the courts' willingness to accept a school's defense that it knew about some behaviors but did not know the behaviors had occurred on the basis of sex.²³² Courts erroneously conceive of behaviors as simple bullying and ignore gender-based motives.²³³ Simple bullying without a gender motive is not illegal under Title IX. But behaviors that courts dismiss as simple "bullying" are often the same as those that meet the definition of "sexual" or "gender-based" harassment under the law.²³⁴ Moreover, if we look closely at the behavior, we can recognize a gender motive in most of these cases.

For example, in *K.S. v. Northwest Independent School District*,²³⁵ classmates ridiculed a sixth-grade boy because he had large breasts, calling him "titty boy" and "Teddy titty baby."²³⁶ Students touched and twisted his breasts in the locker room, hallways, and other parts of the school.²³⁷ According to the court, however, this behavior was insufficient to notify the school of "anything more than middle-school bullying."²³⁸ These "bullying" behaviors, however, should constitute illegal sexual

²³² The next three paragraphs are largely derived from McGinley, *Masculinity Motivation*, *supra* note 6.

²³³ See *N.K. v. St. Mary's Springs Acad. Of Fond Du Lac*, 965 F. Supp. 2d 1025, 1033 (E.D. Wis. 2013) (citing to cases that hold that the harassment occurred because of personal animus rather than sex, gender, or race).

²³⁴ See McGinley, *supra* note 19, at 1191–92 (concluding that the behaviors involved in male-on-male bullying and harassment are the same); Dorothy L. Espelage et al., *Longitudinal Associations Among Bullying, Homophobic Teasing, and Sexual Violence Perpetration Among Middle School Students*, 30 J. INTERPERSONAL VIOLENCE 2541, 2544, 2554 (2015) (concluding that "[b]ullying is in many ways a gendered phenomenon" and finding that male behavior characterized as bullying escalates to sexual harassment later on). Although social scientists distinguish between bullying and sexual harassment, the gendered bullying they describe meets Title VII's and Title IX's definition of behavior occurring "because of sex." Although it may prove too much to consider all bullying to be masculinities-based, a full appreciation of the animating forces behind bullying suggests that most of it results from the Masculinity Motivation and, if properly understood, would be actionable pursuant to Titles VII and IX.

²³⁵ 689 F. App'x 780 (5th Cir. 2017).

²³⁶ *Id.* at 781.

²³⁷ *Id.*

²³⁸ *Id.* at 787 n.8; see also *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179, 185, 197–98 (D. Conn. 2016) (finding taunting and comments such as "faggot," "fat ass," "pussy," "bitch," and "baby," insufficient to conclude that the behavior occurred because of sex); *J.H. v. Sch. Town of Munster*, 160 F. Supp. 3d 1079, 1092–93 (N.D. Ind. 2016) (calling a male high school student names such as "cunt," "pussy," and "bitch" is insufficient evidence to show it occurred because of sex); *Eilenfeldt ex rel. J.M. v. United C.U.S.D. #304 Bd. of Educ.*, 84 F. Supp. 3d 834, 838, 842 (C.D. Ill. 2015) (dismissing complaint where harassers called junior high student "rapist," "pedophile," and "child molester" and concluding that the victim was not harassed for being male or insufficiently masculine and that it was "nothing more nor less than schoolyard cruelty and near-arbitrary animosity").

and gender-based harassment. They are severe, pervasive, and objectively offensive, and they occur because of the plaintiff's failure to comply with expectations and stereotypes of how a boy should look and act. In other words, they occur because of the victim's perceived failed masculinity. "Harassing those who violate prescribed gender norms helps to sustain male privilege and power and serves to preserve the status quo while maintaining the division of labor among the sexes."²³⁹

Masculinities theory posits that perpetrators seek to enhance their own power in school—to make the boys more masculine and, when girls are involved in this type of harassment, to uphold the gender hierarchy of how boys and girls should look, act, and interact. Masculinities studies explain that boys and men symbolically turn other boys and men into girls or women by harassing and assaulting them sexually. By converting male victims into symbolic females, the harassers denigrate the victims and demonstrate their superiority to each other and the victims.²⁴⁰

Finally, some courts hold that using sex- or gender-based language or behavior is insufficient to prove that the behavior occurred because of sex or gender, especially where the student has another reason for ridicule—in this case, a disability.²⁴¹ Most problematic, most of these cases are either dismissed in response to a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment. Failing to understand these intersectional claims and to recognize that a reasonable jury could conclude that the behavior constituted illegal sex discrimination under Title IX, these courts deny children who suffer from serious harassment their days in court.

²³⁹ Brenda L. Russell & Debra Oswald, *When Sexism Cuts Both Ways: Predictors of Tolerance of Sexual Harassment of Men*, 19 *MEN & MASCULINITIES* 524, 528 (2016).

²⁴⁰ See Paula McDonald & Sara Charlesworth, *Workplace Sexual Harassment at the Margins*, 30 *WORK, EMP. & SOC'Y* 118, 129 (2016) (noting that findings of male-on-male sexual harassment supported the view that the purpose of such harassment is to enforce traditional heterosexual male gender roles and that complaints by men in the study included taunts about "apparently unmasculine" conduct and "insinuations" that victims were gay); cf. Kathryn J. Holland et al., *Sexual Harassment Against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context*, 17 *PSYCHOL. MEN & MASCULINITY* 17, 18 (2016) (citing Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 *ACAD. MGMT. REV.* 641 (2007)).

²⁴¹ See, e.g., *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 238–40 (W.D.N.Y. 2012) (holding that victim who had Asperger's Syndrome could not make out a cause of action for gender discrimination even though he was called "gay," "homo," "bitch," and "faggot," and was constantly subjected to vulgar and offensive language such as being asked whether he watched pornography, was gay, or masturbated, and whether he would perform oral sex on another male student, and once a male student asked if he could "put [his] dick in [the victim's] ass" because the plaintiff could not prove it was the victim's gender and not his disability that caused the behavior).

e. How the standard operates as a whole

While each of these parts of the *Davis* standard individually may appear to balance the interests of the potential victims against those of school districts to avoid expensive judgments, the way many courts interpret and apply these standards as a whole creates a nearly impossible barrier to school district liability for damages when cases are brought against them. Plaintiffs walk a virtual gauntlet of barriers to a Title IX victory. This application of the legal standards does little to encourage schools to be aware of the risks presented by particular students and to try to avoid the risks of harm to the other children in the school. In fact, given the discomfort that courts of appeals appear to have with lawsuits against school authorities, it may be that legal interpretation actually serves to discourage school authorities from acting responsibly in the face of known risks. The result: young children in schools (who are required to be there) have much less protection from sex- and gender-based harassment and assault than their adult counterparts in workplaces. In fact, the school authorities whom we must trust to care for and educate our children are held to a much lower standard than employers who permit hostile work environments to occur. The policy behind Title IX makes clear that unequal access to educational opportunities based on sex or gender is illegal. While schools have important and expensive educational programs, those programs cannot be allocated on the basis of sex and school districts should be held to an equal grant of opportunities to its children. Given the little success that Title IX cases have, it appears that this standard does little to assure equal access to school programs.

Under Title VII, employers are liable for their negligence when they have knowledge or constructive knowledge of a sexually harassing environment created by peers and do not respond promptly and adequately to correct the problem.²⁴² Thus, if an adult at work is harassed by a co-worker or a group of coworkers or if there is a sexually harassing environment in the workplace caused by peers, the employer will be liable for money damages caused by the harassment if it acts negligently by failing to investigate the situation and failing to take prompt remedial action. While this standard, given the courts' interpretation, is often not sufficient in the workplace to protect plaintiffs from having their cases dismissed improvidently, the Title IX standard, as interpreted, requires young children to negotiate extremely hostile conditions without holding schools responsible.

²⁴² *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998); *Vance v. Ball State Univ.*, 570 U.S. 421 (2013).

Consider *Pahssen v. Merrill Community School District*—the facts and risks known to the school, the school’s response, and the predictable harm that eventually took place.²⁴³ In *Pahssen*,²⁴⁴ John Doe, the ninth-grade perpetrator of numerous violent acts, including the rape of Jane Doe, an eighth-grade student, had been in trouble regularly for years: suspended for sexual harassment²⁴⁵ and for physically attacking other students, and arrested twice for sexual assault.²⁴⁶

During the first few weeks back after a year’s suspension, John Doe committed three acts of sexual harassment against Jane Doe.²⁴⁷ The victim’s stepfather wrote a letter to the school administration demanding that something be done about this boy whom he correctly believed was a “volcano” ready to erupt.²⁴⁸ At that point, John Doe was placed on thirty days of adult supervision. Less than two months later, John Doe raped Jane Doe on school property.²⁴⁹ The School Board expelled John Doe forty days later upon the recommendation of the Superintendent.

Jane Doe’s mother filed suit against the school, and the federal district judge granted summary judgment in favor of the defendants on all causes of action, including a Title IX count for sex discrimination.²⁵⁰ The Sixth Circuit Court of Appeals affirmed the summary judgment, concluding that three incidents of harassment of Jane Doe that preceded the rape were not severe, pervasive, and objectively offensive as a matter of law; the incidents of sexual harassment against other individuals of which Merrill should have been on notice could not be considered in determining whether John Doe posed a risk to Jane Doe,²⁵¹ and the court could not take into account those other incidents of which the defendant had notice in determining whether the three incidents against Jane Doe were severe, pervasive, and objectively offensive.²⁵²

Second, the court held that even if the three incidents triggered the school’s responsibility to act, it did act by holding the IEP meeting and determining to have constant adult supervision of John Doe for thirty days. The school, therefore, did not act with deliberate indifference at that point.²⁵³

²⁴³ *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356 (6th Cir. 2012).

²⁴⁴ These facts are taken in the light most favorable to the plaintiff as this case was decided on a motion for summary judgment.

²⁴⁵ *Id.* at 361.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 360.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 359.

²⁵¹ *See id.*

²⁵² *Id.* at 363.

²⁵³ *Id.* at 364.

While the court's analysis appears to track the requirements set forth in *Davis*, a closer look at the court's conclusions demonstrates that it interprets *Davis*'s strict standards in a way that makes it impossible for an injured plaintiff to recover in a Title IX case against the school district. First, at the very least, the three sexually harassing incidents suffered by Jane Doe before the rape should be sufficient to go to a jury to determine whether the behavior was severe, pervasive, and objectively offensive. This case deals with a girl in the beginning of eighth grade—likely thirteen years old—whose “boyfriend” commits a physical assault on her, threatens her with a demand of oral sex, and makes obscene gestures toward her in public. Clearly, a reasonable jury could conclude that this behavior was sufficient to deny the victim equal access to educational opportunities. Instead, the court held that as a matter of law the sexually harassing behavior was not sufficiently severe, pervasive, and objectively offensive. And, the court concluded, even if it were, the school authorities reacted sufficiently when they became aware of these behaviors by calling an IEP meeting to discuss John Doe and subjecting him to adult supervision for thirty days. Once again, the court decides a factual question as a matter of law: according to the court, school authorities did not act with deliberate indifference when they discontinued adult supervision of John Doe even though they did not even meet again to assure that the thirty-day adult supervision was adequate.

Moreover, in determining that the school did not act with deliberate indifference as a matter of law, the court refused to permit consideration of the school's prior experience with John Doe and actual knowledge of his misbehavior. The rape confirms the danger that John Doe posed both to Jane Doe and to other children at school, and, fortunately, the school expelled John Doe forty days later. But its inadequate discipline of a child who was clearly about to erupt and failure to protect Jane Doe should be sufficient to send the issue of deliberate indifference of school authorities at Merrill to the jury. There is no question that Jane Doe suffered severe, pervasive, and objectively offensive behavior that denied her access to educational opportunities because of her sex and that the school authorities had actual knowledge of John Doe's criminal behavior toward both Jane Doe and others but made little attempt to protect his most likely target from him. In slavishly applying the deliberate indifference standard, the court not only refused to hold the school accountable, but also refused to permit a jury to do so.

Pahssen is not an outlier among the cases decided under Title IX. In most of the reported cases the courts of appeal hold that there is no liability under Title IX as a matter of law without allowing a jury to determine what seem to be genuine issues of material fact, even in the

face of severe gender- and/or sex-based harassment that the school officials either knew about and ignored or participated in.

As we shall see in the next subsection, this has not been the case with the administrative investigations of complaints by the OCR, but things might soon change to the detriment of claimants.

B. Office of Civil Rights of the Department of Education: Changing Norms

The other important enforcement arm of Title IX is the Office of Civil Rights of the Department of Education (“OCR”). The OCR issues rules, guidance, and interpretations, including “Dear Colleague” letters and “Questions and Answers” that explain and interpret the law. It also investigates complaints by students (and their parents) alleging that their schools have discriminated against them under Title IX based on their sex or gender, under Title VI based on their race, color, or national origin, and under Section 504 of the Rehabilitation Act based on their disability.

Once the OCR determines that a complaint is timely and within its jurisdiction, it decides whether an investigation is necessary.²⁵⁴ Upon opening an investigation, it requests documents from the alleged victim and the accused school district and interviews the claimants (who in the pre-college context are usually the parents of the students who have allegedly been subject to harassment), the student victim, and school officials.²⁵⁵ The OCR determines whether there is sufficient evidence (using the preponderance of the evidence standard) that the alleged victim suffered harassment and, as a result, a denial of access to equal educational opportunities.²⁵⁶ While the investigation proceeds, the OCR considers whether the school district policies, training programs for administrators and teachers, and reporting mechanisms are adequate. Eventually, if the OCR concludes that the recipient has not complied with the law, it attempts to reach a Resolution Agreement with the school district that sets out requirements for compliance.²⁵⁷ If the school district refuses, the OCR has the power to begin the very rare process to cease federal funding of the institution.

After *Gebser* and *Davis* were decided, the Department of Education issued its permanent revised Title IX guidance on sexual harassment

²⁵⁴ See U.S. DEP’T OF EDUC., OFFICE FOR C. R., COMPLAINT PROCESSING PROCEDURES (Nov. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> [<https://perma.cc/W5BV-SLQF>].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See OCR Complaint Processing Procedures, *supra* note 254.

in 2001.²⁵⁸ The 2001 Revised Guidance replaced the 1997 guidance.²⁵⁹ All administrations subsequent to the 2001 Revised Guidance—both Republican and Democratic (including the Trump Administration)—have followed the 2001 Revised Guidance. The 2001 Revised Guidance explained that the Supreme Court limited the actual knowledge and deliberate indifference standards used in *Gebser* and *Davis* to court cases of private parties seeking monetary damages only and did not apply to OCR investigations.²⁶⁰ Nor would the courts' stringent standards apply, the 2001 Revised Guidance opines, to plaintiffs in court cases seeking injunctions and equitable relief and no monetary damages.²⁶¹ Moreover, the Revised Guidance states that the Supreme Court acknowledged the power of the Department of Education to enforce Title IX even in cases where there would not be money damages.²⁶² Because there are no money damages resulting from the OCR's finding of noncompliance, the 2001 Revised Guidance stated that the OCR would continue to use a negligence standard (like that used before *Gebser* and *Davis*, under the 1997 Guidance)—schools' *knowledge or reason to know* about harassment would trigger a responsibility to investigate and promptly remedy the issue.²⁶³ The next subsection analyzes the differences between the courts' and the OCR's standards in deciding Title IX cases.

1. Courts' vs. the OCR's legal interpretations

The 2001 Revised Guidance interpretations vigorously protect the rights of children who are abused in pre-college and college settings,²⁶⁴ and they stand in stark contrast to the meager protections provided by the courts in litigation brought for peer-harassment in schools under Title IX. Many (likely, the majority) of the OCR investigations in pre-college cases result in findings that the school discriminated against the alleged victim and in Resolution Agreements between the OCR and the accused school districts.

In contrast to the courts' legal standards and requirements under Title IX, unlike the courts' requirement of actual knowledge, OCR requires that the school district have knowledge or *reason to know* that

²⁵⁸ See Notice of availability, 66 Fed. Reg. 5512 (Jan. 19, 2001) (hereinafter "2001 Revised Guidance").

²⁵⁹ See Final Policy Guidance, 62 Fed. Reg. 49 (Mar. 13, 1997).

²⁶⁰ See 2001 Revised Guidance, *supra* note 258, Preamble, at ii-iv.

²⁶¹ *Id.* at iv n.2.

²⁶² *Id.*

²⁶³ See 2001 Revised Guidance, *supra* note 258.

²⁶⁴ It also protected the interests of victims of sexual violence in colleges and universities, but I am focusing in this article on harassment occurring in pre-college situations.

the harassing behavior was occurring or had occurred.²⁶⁵ Once school authorities have *reason to know* about harassment, they have a responsibility to investigate and engage in a prompt remedial response if harassment has occurred. If the initial remedy is not effective, schools have an ongoing obligation to assure that the victim does not continue to experience harassment from the harasser(s).²⁶⁶ This obligation contrasts with the courts' requirement that the school with actual knowledge act with deliberate indifference to the harassment in order to be liable under Title IX. As explained above, the deliberate indifference standard, as interpreted by at least some of the courts, requires only minimal action from the school.²⁶⁷ Literally, so long as the schools engage in half-baked efforts to stop the harassing, they are safe in the courts. The courts require a showing that the school's response be "clearly unreasonable" for a finding of deliberate indifference, a far greater showing than the OCR requires in order to find the school district noncompliant.²⁶⁸

There are other important differences between how the OCR investigators have interpreted Title IX when investigating a complaint and how courts interpret Title IX when deciding a case. The OCR investigations and resolutions evidence an approach that is considerably more demanding of schools and, consequently, more protective of students who are harassed by peers. OCR investigations have concluded:

- A police investigation does not relieve schools of continuing obligations to investigate and remedy discrimination under Title IX;²⁶⁹
- Schools must take interim steps to protect the alleged victims before the final outcome of the investigation;²⁷⁰
- Schools should not generally remove the complainant from classes while allowing the alleged perpetrator to remain;²⁷¹
- It is improper to require the complainant to work out the problem directly with the alleged perpetrator;²⁷²

²⁶⁵ See 2001 Revised Guidance, *supra* note 258.

²⁶⁶ *Id.*

²⁶⁷ See, e.g., *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356 (6th Cir. 2012).

²⁶⁸ See, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 635 (1999).

²⁶⁹ See *Perris Union*, *supra* note 86.

²⁷⁰ See *West Contra Costal*, *supra* note 87.

²⁷¹ *Id.*

²⁷² *Id.*

- A recipient of federal funds must process all complaints of sexual violence or assault (even if the allegations indicate that the behavior occurred off campus) to determine whether the conduct occurred in an off-campus education program or if not, had continuing effects on campus.²⁷³
2. Procedural differences between courts' and the OCR's determinations

To make matters worse for victims who sue in court, most of the cases are decided for the defendants on motions to dismiss or for summary judgment.²⁷⁴ The strict application of the substantive legal standard, combined with the federal courts' proclivity to dispose of the cases procedurally, allows for an emotional distance between the decision makers (the judges) and the plaintiffs. When there is no trial, neither judges nor juries must face the victim's pain as he or she relates the story from the witness box. It's more efficient this way, especially in the context of the federal judiciary that considers itself overburdened and works to dispose of cases quickly. Contrast the judges' lack of connection to the victims with the relationship that OCR investigators have with the victims based on interviewing the witnesses—the parents of the victim, and, depending on the victim's age, the victim as well, and the school authorities. The OCR investigator is likely to experience the emotional power of the plaintiff's situation as no federal judge will do so if the case in court is decided on the papers using strict substantive standards. Although some would say that legal decision makers should be emotionally distant from the subjects whose fate they decide, a purely rational approach to the law that shields the decision maker from empathy may not yield the best result.²⁷⁵ The OCR investigator, therefore, because of his or her personal connection to the complainant and school officials, is more likely to understand the dynamics of the situation that happened in the school. This leads us to an analysis of the changes the Obama OCR made in its 2011 and 2014 "Dear Colleague" letter and "Questions and Answers," the Trump Administration's rescission of these interpretations, and the proposed new regulations by the Trump Administration.

²⁷³ See *Greenup Cty. Sch. Dist.*, U.S. DEP'T OF EDUC., OCR No. 03141163, (Mar. 18, 2015).

²⁷⁴ I have read all peer harassment cases decided under Title IX and published or available online through Westlaw since 2012, and the vast majority are decided for the defendants on procedural motions.

²⁷⁵ See Lynne N. Henderson, *Legality and Empathy*, 85 MICH L. REV. 1574, 1576–77 (1987) (explaining that better legal decisions are made when empathy, which includes both emotion and cognition, is present).

3. Obama Administration's OCR: new interpretations

While honoring the 2001 Revised Guidance, the Obama Administration's OCR issued a number of "Dear Colleague" letters and "Questions and Answers" with added interpretations of Title IX. These Obama Administration interpretations (April 4, 2011 "Dear Colleague" letter, and April 29, 2014 "Questions and Answers") required, among other things, that schools' and colleges' grievance processes use the preponderance of the evidence standard to determine whether the accused was responsible; they also banned use of mediation to resolve a conflict between the accuser and the accused when sexual assault is alleged.²⁷⁶ On September 22, 2017, the Trump Administration rescinded the Obama Administration's April 4, 2011 "Dear Colleague" letter and the April 29, 2014 "Questions and Answers"²⁷⁷ and issued a "Dear Colleague" letter and "Questions and Answers" of its own.²⁷⁸ While some provisions in both the Obama and Trump Administrations' documents may apply universally to elementary and secondary schools, both focus on college processes in sexual assault proceedings. The Trump rescission permits colleges to use either the "preponderance of the evidence" or "clear and convincing evidence" standard, permits voluntary mediation, and clarifies that cross examination is permitted.²⁷⁹ The Trump Administration "Dear Colleague" letter also states that it will issue proposed regulations and use the notice and comment process to promulgate new regulations.²⁸⁰

²⁷⁶ See U.S. DEP'T OF EDUC., OFFICE FOR C.R., DEAR COLLEAGUE LETTER ON TITLE IX, SEXUAL VIOLENCE AND HARASSMENT (Apr. 4, 2011); U.S. DEP'T OF EDUC., OFFICE FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2011).

²⁷⁷ Rescinded Obama Administration interpretations include: U.S. Dep't of Educ., U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13, 2016) (granting transgender students the right to use bathrooms and locker rooms that accord with their gender identity); U.S. DEP'T OF EDUC., OFFICE FOR C.R., DEAR COLLEAGUE LETTER ON TITLE IX, SEXUAL VIOLENCE AND HARASSMENT (Apr. 4, 2011) (requiring, among other things, that the school's grievance procedure use a "preponderance of the evidence" standard and forbidding use of mediation in sexual assault cases); U.S. DEP'T OF EDUC., OFFICE FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014); see also U.S. DEP'T OF EDUC., U.S. DEP'T OF JUSTICE., DEAR COLLEAGUE LETTER RESCINDING PREVIOUS GUIDANCE ON TRANSGENDER STUDENTS (Feb. 22, 2017); U.S. DEP'T OF EDUC., OFFICE FOR C.R., DEAR COLLEAGUE LETTER ON TITLE IX, SEXUAL VIOLENCE AND HARASSMENT (Sep. 22, 2017) [hereinafter DEP'T OF EDUC. DEAR COLLEAGUE LETTER (2017)]; U.S. DEP'T OF EDUC., OFFICE FOR C.R., QUESTIONS AND ANSWERS ON CAMPUS SEXUAL MISCONDUCT (2017) [hereinafter Q&A ON CAMPUS SEXUAL MISCONDUCT (2017)]. For a list of Guidances, Dear Colleague letters, etc., in force and rescinded, see CARNEGIE MELLON, OFFICE OF TITLE IX INITIATIVES (Feb. 7, 2019), <https://www.cmu.edu/title-ix/law-and-guidance/index.html> [<https://perma.cc/GV7Z-KRJV>].

²⁷⁸ DEP'T OF EDUC. DEAR COLLEAGUE LETTER (2017), *supra* note 277; Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 277.

²⁷⁹ Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 277, at 4–5.

²⁸⁰ DEP'T OF EDUC. DEAR COLLEAGUE LETTER (2017), *supra* note 277, at 2.

4. Trump Administration's OCR: proposed regulations

On November 29, 2018, the Secretary of Education issued proposed regulations that would govern the OCR decision making process.²⁸¹ The focus of the proposed regulations is post-secondary enforcement of Title IX; the proposed regulations address concerns about colleges' and universities' investigations and grievance proceedings resulting from claims of sexual violence on campus. A discussion of the proposed rules' effects on college campuses, however, is beyond the scope of this article.²⁸²

This article deals with Title IX's effectiveness in eliminating peer sex- and gender-based harassment in elementary, middle, and secondary schools; viewing the proposed regulations through this lens reveals a serious likelihood that sex- and gender-based harassment would increase if the new regulations become law. The proposed regulations *would radically change the law as it applies to elementary, middle, and secondary schools and the procedures that the OCR uses to enforce Title IX in those institutions*. They would not only reverse Obama Administration 2011 guidance, which has already been rescinded, but, more importantly, would also overturn the 2001 Revised Guidance that has been followed by all of the presidential administrations for the past eighteen years. The new law would adopt new stringent standards for finding a school district noncompliant. If these stringent standards become law, they will seriously harm the rights of children to equal access to education based on their sex and gender. Particularly at a time when law and institutions are responding to the #MeToo movement, this change would represent a serious setback that may affect generations to come. In essence, the proposed regulations create disincentives for schools to educate themselves and their students about the causes of illegal sex- and gender-based harassment, the importance of avoiding these behaviors, and of acting promptly when the behaviors occur. Schools will solidify their roles as training grounds for future generations of harassers.

²⁸¹ As I write this article, the notice and comment period has still not elapsed. It is unclear whether the proposed regulations will be adopted, and if so, whether there will be changes made to them. I focus here on the most problematic ones for pre-college students.

²⁸² For analysis of the proposed regulations with reference to colleges and universities, see NATIONAL WOMEN'S LAW CENTER, DEVOS' PROPOSED CHANGES TO TITLE IX EXPLAINED (Feb. 7, 2018), <https://nwlc.org/resources/devos-proposed-changes-to-title-ix-explained/> [<https://perma.cc/6SD3-CQ9H>].

5. Analysis of proposed regulations: back to the courts

The most problematic changes proposed in the new regulations for pre-college institutions deal with definitions and legal standards that the OCR would apply to complaints filed with the Department of Education. Section 106.44 of the proposed regulations requires that the recipient of federal funds have *actual knowledge of sexual harassment* and respond in a manner that is *deliberately indifferent* in order for a violation to occur.²⁸³ Section 106.44(a) defines “deliberately indifferent” as a response that is “clearly unreasonable.”²⁸⁴ Section 106.30 defines “sexual harassment” as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [recipient’s] education program or activity.”²⁸⁵ Actual knowledge includes knowledge of the Title IX Coordinator or of “an official of the recipient who has ‘the authority to institute corrective measures on behalf of the recipient’” or in elementary and secondary schools, a teacher in the context of peer harassment.²⁸⁶

These proposed standards would largely adopt for the OCR the most stringent interpretations of the Supreme Court’s rigid standards for monetary damages in Title IX cases.²⁸⁷ These new OCR standards would require actual knowledge that the conduct described in the complaint already be sufficiently severe, pervasive, and objectively offensive to deny equal access to educational opportunities *in order to trigger a school district’s response* to the behavior. And, once triggered, if that response is not “clearly unreasonable,” the school district would be considered compliant.

As demonstrated above in Part III.A.1, the Supreme Court’s rigid standards in private parties’ damages actions relieve school authorities (even in some of the most egregious cases) of investigating and responding to ongoing sex- and gender-based harassment. Moreover, a number of lower courts have interpreted the “deliberately indifferent” standard very strictly, permitting a school to exonerate itself by responding only once to the harassment, even if the response is not effective.²⁸⁸ These

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ One positive difference from the Supreme Court standards is the recognition that if a teacher has knowledge of peer harassment in the elementary and secondary school context, that knowledge is actual knowledge for purposes of triggering a duty on the school’s part to respond. See NATIONAL WOMEN’S LAW CENTER, § 106.30; *supra* Part III.A.2.a.i (discussing lower courts’ uneven reading of whether a teacher would constitute a person with authority to take corrective measures for purposes of fulfilling the actual knowledge requirement).

²⁸⁸ See *e.g.*, *Pahssen v. Merrill Community Sch. Dist.*, 668 F.3d 356 (6th Cir. 2012) and the discussion, *supra* Part III.A.2.e.

standards as applied by the courts differ drastically from the more reasonable standards used traditionally by OCR of both Democratic and Republican Departments of Education. As explained in Part III.B.1–2 above, the OCR has traditionally used a standard that requires a school to respond when it believes or has reason to believe that the harassment is occurring, and once the response takes place, to monitor it for effectiveness. If the response is not effective, schools must attempt different remedies until they have eliminated the problem.²⁸⁹ Consider again the *Pahssen* case. If this case were investigated by the OCR using the 2001 guidance, there is no question that the OCR would have found the school district was noncompliant when it failed to respond initially to three incidents of sexual harassment by a student who had a history of sexual assault and harassment and when it stopped monitoring John Doe’s behavior after thirty days of surveillance. In contrast, under the proposed rules, the OCR’s ability to find noncompliance by the school would likely be hampered, which would prevent the OCR from entering into a resolution with the school district requiring it to adopt new training, reporting, and investigatory methods. The same would be true if the *Stiles* case, discussed in Part III.A. above, had been investigated by the OCR. Using the 2001 standards, the OCR would certainly have found that the school district was not in compliance with Title IX because the alleged victim in the case, a middle-school boy, was repeatedly harassed verbally and physically over a two-year period and his mother frequently reported the egregious harassment to school authorities. Although the court concluded that the school did not act with deliberate indifference because it had taken some steps to punish the harassers, the OCR would have likely concluded that because school authorities knew about the harassment, it had a responsibility to investigate and engage in a prompt remedial response. If the initial remedy was not effective, the OCR would have held the school to its ongoing obligation to assure that the victim would not continue to experience harassment from the harasser(s). If the proposed OCR amendments becomes law, however, it is very likely that the OCR would follow the courts’ standards and conclude that the school was not deliberately indifferent because it took some minimal steps to punish the harassers.

Besides differing standards, the nature of the courts and the OCR has influenced how Title IX has traditionally been enforced. Historically, the OCR process has permitted a back-and-forth between the OCR and the school district that is under investigation.²⁹⁰ There are no monetary damages, unlike in federal court, and the OCR investigators

²⁸⁹ See 2001 Revised Guidance, *supra* note 258.

²⁹⁰ See generally, The TEXAS BAR ASSOCIATION, OCR BASICS: UNDERSTANDING AND SURVIVING A CIVIL RIGHTS INVESTIGATION (2018) (“OCR BASICS”).

can survey the policies and procedures in place and their implementation. This traditional structure permits the OCR and the recipients to enter into Resolution Agreements that detail how the schools are expected to improve and, by doing so, avoid a loss of funding for the schools. This structure encourages better future enforcement of Title IX.

If the proposed regulations become law, the OCR will likely decline to investigate many valid complaints and will abdicate its role of educating the educators about Title IX law. In essence, the administrative oversight contemplated by the statute will be upended, and the preventive and educative roles of the OCR will be eliminated. It is highly unlikely that the drafters of the progressive legislation of Title IX, given an understanding of changing cultural mores surrounding sex- and gender-based harassment, would agree to interpret legislation to have such a limited effect as that contemplated by the proposed regulations.

Moreover, as the notice of the proposed regulations acknowledges, the *Davis* case does not apply to the Department of Education OCR standards, and the OCR is free to follow its own standards in applying Title VII. The *Davis* standards, the Court makes clear, are applied because the Court *implied* a private right of action in *Davis* for *monetary damages*.²⁹¹ The Court, in essence, was conscious of its responsibility not to overstep Congressional authorization. As noted above, the statute authorizes the Department of Education explicitly to deal with Title IX violations but does not explicitly create a cause of action in the courts. It is clear that the Court concludes that the OCR may apply its own standards, and the OCR has always done so. But the irony is this: despite the possible justification for the strict standards that may exist in lawsuits for damages against the school districts, no such justification exists in an OCR investigation. The original statute²⁹² sets out the Department of Education as the enforcer of the statute, and the OCR does not impose monetary damages. In the case of a recalcitrant school district that refuses to comply or resolve a complaint with the OCR, the OCR has the additional and scarcely-used remedy of denying federal funding to the school district in the future, but this remedy is not applied without notice to the school district and an opportunity to engage in negotiation and to resolve their differences with the OCR through a Resolution Agreement.²⁹³

The drafters of the proposed regulations defend their choice to adopt the Supreme Court standards by arguing that uniformity will

²⁹¹ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 635, 651 (1999).

²⁹² 20 U.S.C. §§ 1681–1688.

²⁹³ See OCR BASICS, *supra* note 290.

make compliance easier and that schools should have flexibility to determine how to further their disciplinary processes. Furthermore, they argue that the misconduct Title IX forbids is that of the educational institution, not the underlying sex- or gender-based conduct. First, it seems that the flexibility arguments may be more directed at colleges and universities than at elementary and secondary schools because institutions of higher education have more developed grievance procedures for all types of wrongdoing than do pre-college institutions. Secondly, while uniformity is one potential goal, my discussion above of the poor results in cases following the Supreme Court standards suggests strongly that if uniformity is such an important goal, the Supreme Court should adopt the OCR standards, and not vice versa.

Finally, there is no reason to believe that use of a negligence standard—the standard applied in Title VII cases of peer harassment—is too harsh on elementary and secondary schools that have control over our children and all of the responsibilities to protect them that accompany that control. The data show that children are suffering in schools from sex- and gender-based harassment of not only their peers, but also from the “loading-on” that teachers and coaches engage in after a child reports harassment. While the Supreme Court standards do not always rectify these situations, traditional OCR standards have worked to eliminate this behavior.

IV. HOLDING SCHOOLS ACCOUNTABLE TO PREVENT SCHOOLS’ ROLE AS TRAINING GROUNDS

Parts I–III raise questions about what the law can do to resolve the many problems I have identified in this article. We must recognize that no matter what the condition of the law is, it is not sufficient to correct all or even most of these problems. Despite the good work of the OCR in previous administrations and Title VII law that forbids sex- and gender-based harassment in workplaces, illegal discriminatory harassment is still pervasive in schools and workplaces. Much of this harassment will not disappear until there is social change, and changes in society do not normally progress constantly on an upward trajectory. Change moves forward; then, there is backlash, and change moves forward again. But the law can play some role in effecting change: it can create incentives and disincentives, and it can tailor remedies to improve behaviors (and perhaps, attitudes) in schools and workplaces. If the law does not move forward to effect positive change, it will become a protector of those who harass and those who tolerate the harassment.

Masculinities theory sees gender as a structure that is constructed upon and actively constructs inequalities. It is not men or women who are the problem. It is the structure that dictates how men, women, boys,

and girls should act and the roles they should play. Until very recently in the U.S., gender has been considered a binary structure that denies the possibility of anything other than man (masculine) and woman (feminine). While there seems to be a marked change in attitudes among young Americans about the inevitability of binary gender identities, there is also a group of young folks that resists such change. Masculinities theory posits that it is the gendered constructions—such as masculinity, especially those forms of masculinity that are forced and exaggerated—that create incentives to harass others. Often, however, because gendered behaviors are considered the norm—in fact, are considered by many to be dictated by biological sex—gender is invisible to many of us. So, in schools, even adults such as administrators, teachers, and coaches reinforce gender norms that, in turn, motivate students to harass others. Without an understanding of this dynamic, schools and teachers will not be able to teach children not to harass, or even to recognize all of the illegal harassment that takes place.

Moreover, multidimensional masculinities theory encourages us all to consider not only gender, but also all of the other co-existing identities of the parties in context of the situation.²⁹⁴ So, besides sex, sexual orientation, and gender identity of the different participants when harassment takes place, we should consider the race, class, national origin, and other identities as well as whether the alleged victims and perpetrators are persons with disabilities. A significant percentage of children who have disabilities are victims of sex-or gender-based harassment, and a significant number of OCR Title IX complaints also allege intersectional claims, including racial, national origin, and disability-based harassment. In formulating solutions, all of these facts must be taken into account. Furthermore, research demonstrates that racial inequalities exist in schools, especially in the ways that discipline is meted out.²⁹⁵ In formulating a solution, it is important that school authorities understand the implicit biases that cause these differential disciplinary measures and that they take actions to counteract them.

To complicate matters, schools are often large, overcrowded, and lacking in resources, and their teachers are underpaid. It may create a huge burden to ask schools to serve as the focal points to change gender norms in society. By the same token, we cannot sacrifice our children

²⁹⁴ See Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* (Frank Rudy Cooper & Ann C. McGinley, eds. 2012) (explaining that it is important to consider not only the gender or sex of the victim but also the victim's other identities in the context of the situation).

²⁹⁵ Moriah Balingt, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST, Apr. 26, 2018, at A.2.

by allowing schools to ignore their responsibility to control the harassing behaviors taking place under their noses. Reforms need to include funding for education of teachers and children about the evils of sex- and gender-based harassment and its causes.

A. Necessary Law Reform

First, it is clear that the regulations proposed by the Department of Education should not become law. As the analysis of the court cases in Part III.A. above demonstrates, the standards employed by the courts permit school districts to escape monetary damages for their failure to control serious harassment in their midst. These standards should not replace the standards successfully used by the OCR for more than eighteen years to resolve complaints and assure ongoing compliance.

Second, when Congress has the political will, it should pass amendments to Title IX to assure better compliance. Those amendments should include an express authorization of private lawsuits for damages against school districts that would overrule *Davis*. Amendments to Title IX should set negligence standards for both the court cases and the complaints investigated and resolved by the OCR, thereby overturning the proposed regulations should they become law.

Third, even in the absence of political power to make these changes, the lower courts can interpret *Gebser* and *Davis* in a way that avoids the harsh results and at the same time faithfully follows the Supreme Court's standards. First, in the context of peer harassment in elementary and secondary schools, a teacher, counselor, or other professional who observes or hears about behavior that is either already severe or appears to be escalating should have the responsibility to report and/or correct the behavior. The professional's knowledge should be sufficient to constitute actual knowledge by school authorities and should trigger a responsibility to investigate and take remedial measures. Where children are very young or the victim has an intellectual disability, the professional's responsibilities to investigate should be triggered sooner if a victim attempts to communicate with the professional but the victim is not capable of communicating the details of the harassment. Second, once there is actual knowledge, the professional, along with other school authorities, must investigate the situation and promptly remedy it. A finding of deliberate indifference can occur if school authorities' remedy is not effective, and the authorities do nothing more to correct the situation. As some courts conclude now, knowledge that the perpetrator has a history of harassment of either the alleged victim or another victim should constitute actual knowledge for the purposes of triggering a duty to take a more cautious approach to the perpetrator, such as more adult

supervision. Finally, lower courts should be more cautious in granting dispositive motions in these cases. Many motions for summary judgment, for example, are granted where there are genuine issues of material facts for the juries to decide. These material facts include who had knowledge, and when, the severity of the behaviors, and whether the victim suffered a denial of access to educational programs as a result, and whether the school's response was deliberately indifferent. The difference between "unreasonable" (which is legal) and "clearly unreasonable" (which is not) is something that a jury of the parties' peers should ordinarily decide based on the facts found at trial.

Fourth, if the proposed regulations become law, OCR investigators should interpret the regulations in a way that comports with the law but simultaneously holds schools responsible for ignoring damaging harassment in the schools. Because of the different posture of the OCR investigations from court cases, the OCR has the ability to continue to use its investigations as a means of educating recipients concerning how to assure compliance and avoid problems in the future. Continued use of voluntary resolution agreements should help. Even if the OCR finds that there is insufficient evidence of noncompliance in the particular case, the OCR should use its investigation to encourage procedural compliance if the recipient, for example, has not appointed a Title IX Coordinator,²⁹⁶ has not notified all students and teachers of its policies and practices, etc. If this type of noncompliance exists, OCR investigators should encourage schools to sign agreements to resolve those issues. The OCR should encourage educational institutions to offer educational and training programs for students and teachers that deal with issues of harassment, and its causes, and how to respond. This training, in accordance with the sophistication of the audience, should include instruction on concepts of gender and masculinity.

B. Schools as Training Grounds for Eliminating Harassment

Finally, no matter what standards the OCR and the courts use, educational institutions should be encouraged to adopt educational programming for administrators and teachers that explains implicit bias, masculinity, gender stereotyping, and other phenomena that can lead

²⁹⁶ A recent study of California and Colorado schools found that many school districts have failed to appoint a Title IX coordinator, contrary to their legal responsibilities. See Elizabeth J. Meyer & Andrea Somoza-Norton, *Addressing Sex Discrimination with Title IX Coordinators in the #MeToo Era*, 100 PHI DELTA KAPPAN 8 (Oct. 2018). Even when they have appointed Title IX coordinators, most of the Title IX coordinators are not very knowledgeable about the law and their responsibilities, have infrequently or never conducted trainings for the faculty and staff in their district, have many other responsibilities that overwhelm those as Title IX coordinator, and are often ignorant of their responsibilities especially with reference to transgender students. *Id.*

to toleration of illegal harassment.²⁹⁷ Without understanding that much of the behavior described is caused by what many think is normal behavior of children, school officials will not be able to curb their own behaviors that encourage harassment or fail to recognize it in the school children. Merely because the behaviors are common does not make them normal in an egalitarian society. Thus, schools need educational reform programs directed at all levels: administrators, teachers, coaches, and students. Of course, the training of children must be age appropriate.²⁹⁸ Only by educating school authorities, teachers, and children can we avoid schools as training grounds for harassment and move toward schools as training grounds for respect, citizenship, and eliminating harassment. In the age of the #MeToo Movement, our society deserves no less.

²⁹⁷ See, e.g., D.K. Whitford, et. al., *Empathy Intervention to Reduce Implicit Bias in Pre-Service Teachers*, 122 PSYCH. REP. 670 (2019) (demonstrating reduced implicit bias in teachers who were given training on empathy); P.G. Devine, et.al., *A Gender Bias Habit-Breaking Intervention Led to Increased Hiring of Female Faculty in STEM Departments*, 73 J. EXPERIMENTAL SOC. PSYCH, 211 (2017) (demonstrating anti-bias training increased hiring of female faculty in STEM); L. A. Rudman, et. al, “*Unlearning*” *Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCH, 856 (2001) (demonstrating that prejudice and bias seminar reduced stereotypes and bias in college students).

²⁹⁸ One concern when engaging in Title IX training and monitoring is what I would call the “hyper-responsive” reports of very young children as sexual harassers. A response to sexual harassment in the schools needs to be aware that very young children often are not capable of sexual harassment and attempting to enforce the “rules” against them can be devastating. See Amy B. Cyphert, *Objectively Offensive: The Problem of Applying Title IX to Very Young Children*, 51 FAM. L. QUART. 325 (2017) (discussing cases of very small children accused of sexual harassment).