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Gabrielle Maginn
University of Minnesota Law School

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Beyond Deliberate Indifference: Rethinking Institutional Responsibility and Title IX Liability in K-12 Education

Gabrielle Maginn†

“Every choice those adults made was devastating to her. There was nothing we could do, nothing we could show that would make them have compassion for her.”

Danielle Bostick, about the response of school officials to her 15-year-old daughter’s sexual assault by a classmate.¹

“School is supposed to be a resourceful place, somewhere you can trust. That wasn’t what it turned out to be. It turned out to be somewhere where they just turned their backs against you.”

Jane Doe, a 14-year-old who was suspended after reporting a sexual assault.²

“[Title IX] is . . . an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they

†. J.D. Candidate 2022, University of Minnesota Law School; B.A., 2017, Women’s & Gender Studies and Political Science, Wheaton College (Mass.). The author would like to thank Professor June Carbone, Brigid Kelly, Laura Gustafson, Bailey Martin, Eleanor Khirallah, Lottie James, Sharon Beck, Kendra Saathoff, Braxton Haake, Anne Bolgert, Heather Chang, and the entire *Minnesota Journal of Law & Inequality* for their thoughtful contributions and guidance. Without the patience, enthusiasm, and boundless support of my friends, family, and my incomparable girlfriend, neither I nor this Note would be here—thank you all. Finally, thank you to the residents of Emerson House at Wheaton College—you all shaped me, my understanding of Title IX advocacy, and my capacity for long discussions about complex issues in a profound way that I am grateful for every day.

1. Erica L. Green, *It’s Like the Wild West’: Sexual Assault Victims Struggle in K-12 Schools*, N.Y. TIMES (May 11, 2019), <https://www.nytimes.com/2019/05/11/us/politics/sexual-assault-school.html> [https://perma.cc/F3BZ-XPJ9].

2. Tyler Kingkade, *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, 74 MILLION (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/> [https://perma.cc/4XG2-KGH7].

will have a fair chance to secure the jobs of their choice with equal pay for equal work.”

Senator Birch Bayh.³

Introduction

Since the mid-2000s, stories about sexual assault and harassment⁴ at colleges and universities across the United States have grabbed headlines.⁵ Students, mostly but not exclusively young women,⁶ have come forward with accounts of sexual misconduct at the hands of professors and peers.⁷ These young

3. 118 CONG. REC. 5808 (1972).

4. I use the terms sexual assault and harassment to describe a range of behaviors from rape (through both physical force and coercion), to intimate partner violence, to unwanted kissing or touching, to stalking, to persistent and repeated comments, “jokes,” or threats that are sex- or gender-based. See ELLIE L. YOUNG, BETTY Y. ASHBAKER & BRIAN K. YOUNG, NAT’L ASS’N OF SCH. PSYCHS., *SEXUAL HARASSMENT: A GUIDE FOR SCHOOL PERSONNEL* (2010), for a more detailed explanation of what, exactly, constitutes sexual harassment in schools.

5. See, e.g., Amanda Arnold, *Surviving the ‘Predators’ Club*, CUT (Nov. 19, 2018), https://www.thecut.com/2018/11/dartmouth-professors-sexually-assaulted-students-lawsuit.html#_ga=2.250025294.911091880.16055578781141837767.1603730767 [https://perma.cc/P55S-QDW2]; Eliza Gray, *Colleges Are Breaking the Law on Sex Crimes, Report Says*, TIME (July 9, 2014), <https://time.com/2969580/claime-mccaskill-campus-sexual-assault-rape/> [https://perma.cc/L2JG-JUPB]; Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), <https://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html> [https://perma.cc/235N-C3U4].

6. While 13% of all college students report experiencing rape or sexual assault through physical force, violence, or incapacitation, 25.9% of women students report experiencing sexual assault or rape as compared to 6.8% of men. Transgender, genderqueer, and gender nonconforming students report rates of sexual assault similar to the rates for women (22.8%). Undergraduate women report experiencing other forms of sexual harassment at a rate of 59.2%. DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, SHAUNA HARPS, REANNE TOWNSEND, GAIL THOMAS, HYUNSHIK LEE, VANESSA KRANZ, RANDY HERBISON & KRISTIN MADDEN, AM. ASS’N OF UNIVS., *REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT VII–VIII* (rev. 2020) [hereinafter AAU CAMPUS CLIMATE SURVEY].

7. See Katie J.M. Baker, *Here’s the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra> [https://perma.cc/CDZ8-EKLZ] (discussing the letter read in court by Chanel Miller, who was raped by Stanford student Brock Turner); Carole Bass, *Alexandra Brodsky ‘12, ‘16JD: ‘My School Betrayed Me’*, YALE ALUMNI MAG. (July 18, 2013), https://yalealumnimagazine.com/blog_posts/1517-alexandra-brodsky-12-16jd-br-my-school-betrayed-me [https://perma.cc/4FRW-MNBT] (profiling Alexandra Brodsky, a sexual assault survivor at Yale who went on to establish the advocacy group Know Your IX); Emily Bazelon, *Have We Learned Anything From the Columbia Rape Case?*, N.Y. TIMES MAG. (May 29, 2015), <https://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the>

people have engaged in activism and legal fights intended to hold their institutions accountable for failure to adequately respond to their assaults.⁸ At the same time, thousands of words in op-ed columns have been expended by hand-wringing commentators worried about everything from due process for the accused to the end of free speech on campus as a result of the increased focus on sexual harassment at universities.⁹ Meanwhile, a similar explosion in complaints about sexual assault and harassment has swept the nation's K-12 institutions.¹⁰ In 2019, the Department of Education's Office for Civil Rights (OCR) reported a fifteen fold increase in sexual harassment complaints at K-12 schools over the previous ten years.¹¹ However, primary and secondary schools are far behind

-columbia-rape-case.html [https://perma.cc/4MLE-NNTK] (discussing Emma Sulkowicz's rape case against a peer at Columbia and her "Carry That Weight" protest); Sarah Brown, *This is a Fight We Can Win*, CHRON. HIGHER EDUC. (Jan. 22, 2017), <https://www.chronicle.com/article/this-is-a-fight-we-can-win/> [https://perma.cc/LPP2-TCZU] (detailing Brodsky's activism during and after college); Doreen St. Félix, *The Irrepressibly Political Survivorship of Chanel Miller*, NEW YORKER (Oct. 11, 2019), <https://www.newyorker.com/culture/culture-desk/the-irrepressibly-political-survivorship-of-chanel-miller> [https://perma.cc/SG89-CZY2] (discussing the release of Miller's book).

8. See sources cited *supra* note 7.

9. See Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [https://perma.cc/MF4D-4SP5] (arguing that colleges punish students for relatively minor infractions out of a sense of "political correctness"); Michael Powell, *Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/us/college-sex-assault-rules.html> [https://perma.cc/R87N-X49N] (detailing how some feminist scholars support new Title IX policies because of concern for due process rights of the accused); Bari Weiss, *The Limits of 'Believe All Women'*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html?searchResultPosition=71> [https://perma.cc/G348-5DA3] (criticizing the broader "#MeToo" movement for being too willing to believe sexual assault allegations); Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [https://perma.cc/5FPR-YFQ2] (describing problems with what some see as overly-punitive sexual assault policies on campus). See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016), for a legal perspective arguing that increased government involvement has criminalized normal sexual behavior on campus.

10. *Stats Revealed by AP Investigation of Student Sexual Assaults*, ASSOCIATED PRESS (Apr. 30, 2017), <https://apnews.com/article/b8ac6e2eb19b4aa090f272afeb57fb25> [https://perma.cc/LE9B-J958] ("More than 2,800 cases of sexual assault, involving more than 3,300 victims, were reported at elementary and secondary schools during 2013 and 2014.").

11. U.S. DEPT OF EDUC., OFF. OF CIV. RTS., 2017–2018 CIVIL RIGHTS DATA COLLECTION: SEXUAL VIOLENCE IN K-12 SCHOOLS 3 (2020). It should be noted that an increase in *reported* instances of sexual harassment may not correspond with an

higher education when it comes to investigating and dealing with these incidents.¹² Both K-12 schools and universities are subject to Title IX of the Education Amendments of 1972, which declares that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹³ However, K-12 institutions have failed to comply with Title IX, leaving victims with significant hurdles to obtain justice from the legal system.¹⁴

A cursory overview of K-12 Title IX cases reveals a litany of horrors: a 5-year-old girl in Massachusetts who was forced to pull down her dress and spread her legs by an older student on the school bus nearly every day for months,¹⁵ a 14-year-old boy in Arkansas who committed suicide after enduring months of homophobic bullying,¹⁶ a 12-year-old boy in Texas who was severely bullied and then raped by a classmate in the bathroom,¹⁷ a 14-year-old girl in Alabama who was raped after being used as “bait” by her

actual increase in *cases* of sexual harassment. It is possible that the increase in reports is an indication that students and their parents have more knowledge of reporting procedures now than they did in the past. Brendan L. Smith, *What It Really Takes to Stop Sexual Harassment*, MONITOR ON PSYCH, Feb. 2018, at 36 [<https://perma.cc/CP4D-V7TE>] (noting that successful training programs on sexual harassment in the workplace may result in an elevated number of reports). *But see An Underreported Problem: Campus Sexual Misconduct*, AAUW, <https://www.aauw.org/resources/article/underreported-sexual-misconduct/> [<https://perma.cc/P4P7-3X6Q>] (arguing that the fact that 79% of schools with grades 7–12 reported zero instances of sexual harassment in 2015–2016 indicates a lack of reporting).

12. See Emma Brown, *Sexual Violence Isn't Just a College Problem. It Happens in K-12 Schools, Too*, WASH. POST (Jan. 17, 2016), https://www.washingtonpost.com/local/education/sexual-violence-isnt-just-a-college-problem-it-happens-in-k-12-schools-too/2016/01/17/a4a91074-ba2c-11e5-99f3-184bc379b12d_story.html [<https://perma.cc/MFX8-MQ5K>]; Green, *supra* note 1; Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/> [<https://perma.cc/Z69F-TU2T>].

13. 20 U.S.C. § 1681.

14. See Emily Suski, *The School Civil Rights Vacuum*, 66 UCLA L. REV. 720, 755 (2019) (arguing that primary and secondary schools are failing in their Title IX responsibilities to students); Michelle R. Smith, *Students Sexually Abused at School Face Lengthy Legal Fights*, ASSOCIATED PRESS (May 22, 2017), <https://apnews.com/article/2de61582c2274b0f9c2e393365b15baf> [<https://perma.cc/KW9W-ST5R>] (detailing parents' efforts to hold schools accountable for Title IX violations in court).

15. *Hunter v. Barnstable Sch. Comm.*, 456 F. Supp. 2d 255, 259 (D. Mass. 2006).

16. *Est. of Barnwell v. Watson*, 44 F. Supp. 3d 859, 861 (E.D. Ark. 2014).

17. *Wilson v. Beaumont Indep. Sch. Dist.*, 144 F. Supp. 2d 690, 691 (E.D. Tex. 2001).

school to catch another student in the act of sexual harassment.¹⁸ These experiences are not only horrifying to confront, but also have long-lasting implications for students' mental health and future educational attainment.¹⁹

While the sexual abuse is not perpetrated by the school itself,²⁰ schools can be held liable when they both have knowledge of sexual harassment or assault and fail to respond reasonably.²¹ Yet, the current state of Title IX enforcement in the K-12 setting is confusing and inconsistent. This leaves public school districts across the country, already strapped for resources even before the COVID-19 crisis,²² vulnerable to liability. More importantly, it fails schoolchildren and denies many of them the full promise of Title IX:

18. *Hill v. Cundiff*, 797 F.3d 948, 962–63 (11th Cir. 2015).

19. See *Adult Survivors of Child Sexual Abuse*, RAINN, <https://www.rainn.org/articles/adult-survivors-child-sexual-abuse> [<https://perma.cc/MBF9-K7M6>] (citing guilt, shame, blame, flashbacks, and low self-esteem as experiences adult survivors of child sexual abuse have); COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION NO. 498, ADULT MANIFESTATIONS OF CHILDHOOD SEXUAL ABUSE 2 (2011) (detailing how childhood sexual abuse can result in eating disorders, substance abuse, anxiety, depression, PTSD, and increased risk of sexual abuse later in life); NAT'L WOMEN'S L. CTR., HOW TO PROTECT STUDENTS FROM SEXUAL HARASSMENT: A PRIMER FOR SCHOOLS 1 (2007) (discussing increased risk of dropping out stemming from sexual harassment at school and "talking less in class, not wanting to go to school, and finding it hard to pay attention in school").

20. While cases in which a teacher or other staff member perpetrated the sexual abuse will be discussed, the focus of this Note is peer-on-peer sexual harassment and assault. Not only is this the most common form of sexual misconduct experienced by students at school, but it is also the most difficult to pursue legally in terms of Title IX liability. Cindy Long, *The Secret of Sexual Assault in Schools*, NAT'L EDUC. ASS'N NEWS (Dec. 4, 2017), <https://www.nea.org/advocating-for-change/new-from-nea/secret-sexual-assault-schools> [<https://perma.cc/27TR-2SDL>] ("For every adult-on-child sexual assault, there were seven such assaults by students . . ."); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2082–83 (2016) (finding that the strongest responses from courts tend to come from cases where teacher-student harassment is involved).

21. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) ("[D]amages may not be recovered . . . unless 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."); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999) ("If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment.").

22. See MICHAEL LEACHMAN, KATHLEEN MASTERSON & ERIC FIGUEROA, CTR. ON BUDGET & POL'Y PRIORITIES, A PUNISHING DECADE FOR SCHOOL FUNDING (2017) (describing how public school budgets are still feeling the effects of the Great Recession); Cory Turner, *America's School Funding Crisis: Budget Cuts, Rising Costs, and No Help in Sight*, NPR (Oct. 23, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/23/926815076/americas-school-funding-crisis-budget-cuts-rising-costs-and-no-help-in-sight> [<https://perma.cc/TZV6-8P2D>] (detailing COVID-19's impact on school funding).

the right to an education free from discrimination on the basis of sex. Further complicating the issue is that overly punitive consequences for sexual assault and harassment can have negative effects on young perpetrators who are often victims themselves, especially at the primary school level.²³

Recent decisions from the Ninth and Tenth Circuits regarding Title IX liability at the university level offer a pathway for a more sensible and effective Title IX jurisprudence in K-12 schools. *Karasek v. Regents of the University of California*²⁴ built on and expanded the precedent established in *Simpson v. University of Colorado Boulder*,²⁵ recognizing that a claim for actions (or inaction) prior to a sexual assault could serve as a cognizable theory of Title IX liability against not only an individual university program²⁶ but an entire institution.²⁷ This Note argues that applying *Karasek* and *Simpson* at the K-12 level as a means of Title IX enforcement will shift the focus to institutional responsibility as opposed to individual wrongdoing on the part of a student, and could function as a better avenue to protect students than the system as it currently stands. The proactive nature of these kinds of claims are the most effective way of combatting sexual assault and harassment, and the legal standard should reflect that fact to incentivize schools to take proper action before sexual assault and harassment interfere with students' education. Part I provides an overview of Title IX, the current status of Title IX enforcement at the K-12 level, and a review of the *Karasek* and *Simpson* decisions. Part II argues that applying the "pre-assault" form of liability established in *Simpson* and expanded upon in *Karasek* at the K-12 level provides an especially useful avenue for ensuring Title IX compliance. Finally, Part III discusses the limits of Title IX as it

23. DAVID FINKELHOR, RICHARD ORMROD & MARK CHAFFIN, U.S. DEPT' OF JUST., JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS 3 (2009) ("A number have experienced a high accumulated burden of adversity, including maltreatment or exposure to violence; others have not. In some cases, a history of childhood sexual abuse appears to contribute to later juvenile sex offending."); Jeanette Der Bedrosian, *When the Abuser Is a Child, Too*, JOHNS HOPKINS MAG. (Spring 2018), <https://hub.jhu.edu/magazine/2018/spring/children-who-are-child-sexual-abusers/> [<https://perma.cc/Z3PA-ET87>] (arguing that sexual abuse by children should be viewed as a "preventable public health issue" instead of a criminal matter).

24. *Karasek v. Regents of Univ. of Cal.*, 948 F.3d 1150, 1170 (9th Cir. 2020).

25. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178–79 (10th Cir. 2007) (explaining this standard in the context of an official supervisory policy implemented by the institution).

26. *Id.* at 1178.

27. *Karasek*, 948 F.3d at 1170.

currently stands and possible ways forward that would ensure all students receive equal access to education, as is promised to them.

I. Title IX: From *Alexander* to *Karasek*

Part I provides a brief overview of Title IX jurisprudence as it relates to institutional liability for sexual assault and harassment. First, this Part explains the current status of Title IX enforcement in K-12 schools and how it differs from the university level. Next, it outlines the largest challenges in holding institutions accountable for Title IX failures given the current standards. Finally, this Part summarizes the pre-assault theory of liability as explained by the Tenth and Ninth Circuits in *Simpson* and *Karasek*, respectively.

A. History and Purpose of Title IX

Title IX was signed into law by President Richard Nixon in 1972.²⁸ The law was intended to fill the gap left by Title VI of the Civil Rights Act of 1964, which applied to any program that received Federal funding and prohibited discrimination based on race, color, and national origin, but omitted sex as a protected class.²⁹ Although the popular understanding of Title IX has largely centered on its impact on women's sports,³⁰ the Second Circuit in *Alexander v. Yale* held that sexual harassment of women students qualified as discrimination "on the basis of sex" and was thus prohibited under the statute.³¹ The *Alexander* decision, along with Title VII

28. Presidential Statement on Signing the Education Amendments of 1972, 1972 PUB. PAPERS 701 (June 23, 1972). Nixon's signing statement did not even mention the sex discrimination element of the bill, focusing instead on busing.

29. 42 U.S.C. § 2000d; Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 467–69 (2007).

30. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325 (2012) (giving an overview of the most impactful Title IX cases as related to athletics); Jeré Longman, *For Those Keeping Score, American Women Dominated in Rio*, N.Y. TIMES (Aug. 22, 2016), https://www.nytimes.com/2016/08/23/sports/olympics/for-those-keeping-score-american-women-dominated-in-rio.html?_r=0 [<https://perma.cc/T85Z-N3K4>] (crediting the protections of Title IX with the success of women athletes representing the U.S. at the 2016 Olympic Games). See *Benefits—Why Sports Participation for Girls and Women*, WOMEN'S SPORTS FOUND. (Aug. 30, 2016), <https://www.womenssportsfoundation.org/advocacy/benefits-sports-participation-girls-women/> [<https://perma.cc/5F7F-RDTK>], for a description of the importance of equal access to athletics for girls and women.

31. *Alexander v. Yale Univ.*, 631 F.2d 178, 184 (2d Cir. 1980). While the court found that none of the defendants in *Alexander* had standing to bring a suit as they had all graduated, the recognition of sexual harassment as sex discrimination that could theoretically deny one the full benefits of an educational program would

workplace sexual harassment decisions in the late 1980s,³² paved the way for students across the country to sue their institutions for inadequate responses to sexual harassment and assault. Title IX's scope includes virtually every educational institution in the United States, as the Supreme Court in *Grove City College v. Bell* ruled that the statute applied not solely to public universities and primary and secondary schools, but also to any institution receiving any form of federal funding.³³

B. *The Current Status of Title IX Enforcement in K-12 Schools*

In the forty years since *Alexander* was decided and sexual harassment and assault were recognized as cognizable harms that are eligible for relief under Title IX, courts have refined the liability standards for schools. While the courts have clarified the circumstances in which schools can be held liable for the failure to respond to sexual assault and harassment, they have never identified proactive procedures that establish best practices or whose absence constitutes prima facie evidence of negligence.

1. The *Gebser/Davis* standard

Gebser v. Lago Vista Independent School District, decided in 1998, established the standard of institutional liability in Title IX cases.³⁴ Prior to the *Gebser* decision, lower courts were free to adopt their own standards when evaluating Title IX lawsuits.³⁵ Predictably, this abundance of differing legal standards led to confusion and inconsistency among state and circuit courts.³⁶ While

revolutionize Title IX liability. Additionally, the suit succeeded in scaring Yale into setting up grievance procedures for dealing with sexual harassment and assault complaints, and universities across the country quickly followed suit. Ann Olivarius, *Title IX: Taking Yale to Court*, NEW J. (Apr. 18, 2011), <http://www.thenewjournalat Yale.com/2011/04/title-ix-taking-yale-to-court/> [<https://perma.cc/8WVZ-SAHE>].

32. Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 824 (2002).

33. *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984). A handful of religious colleges do not accept any federal funding to avoid Title IX compliance requirements. This is extremely rare because federal funding includes Pell Grants and other financial aid. Ibbey Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/> [<https://perma.cc/XE8H-WYWF>].

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

35. Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 106 (2010) ("One commentator counted seven different standards in play during the pre-*Gebser* period . . .").

36. *Id.* at 104.

Gebser brought clarity by imposing a uniform approach, it also established what has been described as “an unmistakably high standard,”³⁷ which “largely destroyed” the incentive for proactivity in preventing sexual assault and harassment on campuses.³⁸ Post-*Gebser*, “damages may not be recovered [under Title IX] unless 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.”³⁹ The practical effect of the *Gebser* ruling was to hold that school officials who made no effort to discover whether sexual harassment was occurring in their institutions had no liability due to their lack of knowledge.⁴⁰

One year later, the Supreme Court decided *Davis v. Monroe County Board of Education*. *Davis* clarified that the *Gebser* rule applied to peer-on-peer sexual harassment⁴¹ and added another hurdle for plaintiffs by defining deliberate indifference as actions that are “clearly unreasonable”⁴² and “at a minimum, cause[] students to undergo harassment or make[] them liable or vulnerable to it.”⁴³ The deliberate indifference standard has proved to be particularly difficult for plaintiffs to argue successfully.⁴⁴ Courts have found that schools were not deliberately indifferent to harassment when they responded with essentially the bare minimum to reports of sexual misconduct.⁴⁵ Some have gone so far

37. *Id.* at 106.

38. MacKinnon, *supra* note 20, at 2063–64.

39. *Gebser*, 524 U.S. at 277. The perpetrator in *Gebser* was a teacher, and, at the time of the decision, it was unclear whether the ruling extended to peer-on-peer sexual harassment. Justin F. Paget, *Did Gebser Cause the Metastasis of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX 10 Years Later*, 42 U. RICH. L. REV. 1257, 1257 (2008).

40. *Gebser*, 524 U.S. at 292.

41. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999).

42. *Id.* at 648.

43. *Id.* at 644–45 (internal quotes omitted).

44. MacKinnon, *supra* note 20, at 2069 (“[A] close reading . . . shows a vast disproportion between the number of cases that have lost on deliberate indifference and those that have won.”).

45. See *Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007) (“[A] claim that the school system could or should have done more is insufficient to establish deliberate indifference . . .”); *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610 (8th Cir. 1999) (finding that a school district was not indifferent because they did not “turn a blind eye and do nothing”); *Doe v. D’Agostino*, 367 F. Supp. 2d 157 (D. Mass. 2005) (finding that meeting with a student’s parents and visiting the classroom of a teacher accused of sexually harassing students does not amount to deliberate indifference).

as to hold that a school's "negligent or careless conduct" still does not rise to the level of deliberate indifference.⁴⁶

2. Differences in Title IX enforcement at the K-12 and university levels

In the decades since the decision in *Alexander* alerted colleges and universities to the fact that they could be held liable for their failure to respond adequately to reports of sexual assault or harassment, institutions of higher education have developed systems for dealing with sexual misconduct complaints.⁴⁷ Additionally, there has been an explosion of student activism since the early 2010s regarding sexual assault and harassment on campuses—students across the country have spoken out about their experiences and attempted to hold their schools accountable, either in the media or through the legal system.⁴⁸ As a result, the vast majority of universities have a publicized grievance procedure in place for reports of sexual harassment and assault, sexual harassment training for students and staff, and a dedicated Title IX coordinator.⁴⁹ Information about these procedures has reached the majority of college students: sixty-six percent have reported at least some knowledge of how to make a report of sexual harassment or assault on their campuses.⁵⁰ Under Title IX, schools may resolve complaints through informal procedures, but they cannot require students to utilize informal processes if the reporting student would prefer to pursue a formal process.⁵¹ When colleges resolve sexual assault and harassment complaints through formal processes, this

46. *T.L. v. Sherwood Charter Sch.*, 68 F. Supp. 3d 1295, 1309 (D. Or. 2014). ("Negligent or careless conduct is not deliberate indifference.")

47. MacKinnon, *supra* note 20, at 2063.

48. See sources cited *supra* note 7.

49. 34 C.F.R. § 306.8 (2020).

50. AAU CAMPUS CLIMATE SURVEY, *supra* note 6, at 67 (finding that 34% of students felt "somewhat" knowledgeable, 23% felt "very" knowledgeable, and 9% felt "extremely" knowledgeable about where to make a report of sexual assault or harassment at their school).

51. Schools sometimes use informal processes to avoid reporting statistics through the Clery Act, which requires universities to disclose campus crime statistics. See 20 U.S.C. § 1092(f). The subject of one element of the complaint in *Karasek*, discussed in detail later in this Note, was the University of California Berkeley pushing students who reported sexual assault or harassment to resolve their complaints through informal processes. *Karasek v. Regents of the Univ. of Cal.*, 948 F.3d 1150, 1171 (9th Cir. 2020). *But see* Brian A. Pappas, *Sexual Misconduct on Campus*, DISP. RESOL. MAG. (Winter 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/sexual-misconduct-on-campus/ [<https://perma.cc/Z6AY-5B2J>] (arguing that both formal and informal systems are needed in order to properly address sexual assault and harassment in colleges).

formal process must involve a live hearing wherein the accused and the survivor⁵² both have the opportunity to offer evidence, cross-examine the opposing party, and be represented by counsel.⁵³ A neutral party must preside over the hearing and determine the consequences for the accused, if any.⁵⁴

K-12 institutions, on the other hand, are “light years” behind their higher education counterparts when it comes to having policies in place to address sexual assault and harassment complaints.⁵⁵ Guidance from the Department of Education (DOE) that went into effect in August 2020 states that primary and secondary schools may provide a live hearing but must allow a decision-maker to “ask [each] party and any witnesses [any] relevant questions and follow-up questions, including those challenging credibility . . . that a party wants asked of any party or

52. Instead of the term “victim” or “complainant,” I use the term “survivor” to refer to individuals who have been sexually assaulted. See NATASHA ALEXENKO, JORDAN SATINSKY & MARYA SIMMONS, RAINN, SEXUAL ASSAULT KIT INITIATIVE, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION.

53. 34 C.F.R. § 106.45 (2020). These new regulations went into effect in August 2020 and contradict earlier guidance from the Department of Education under the Obama administration. A 2011 “Dear Colleague” letter, which has since been rescinded, “strongly discourage[d]” schools from allowing the parties to cross-examine each other, citing the potentially “traumatic” effects on the survivor. Russlynn Ali, Assistant Sec’y for Civ. Rts., Off. for Civ. Rts., U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 12 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/9YL4-2SVC>].

54. Examples of consequences imposed by schools on perpetrators can include altered academic schedules, restricted participation in extracurricular activities, altered living arrangements, or a no-contact order. *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> [<https://perma.cc/YQ2N-QVDC>]. The August 2020 regulations now allow colleges to use either a “clear and convincing evidence” standard or a “preponderance of the evidence” standard. 34 C.F.R. § 106.45(b)(1)(vii) (2020). Colleges are free to decide some of the administrative particulars of the hearings, with varying results. Anecdotally, my undergraduate institution, Wheaton College (Mass.), until 2011 held sexual harassment hearings in front of the College Hearing Board, which was comprised of faculty and other students and was the same body that doled out consequences for offenses like plagiarism and underage drinking. Wheaton has since established a separate Sexual and Gender-based Misconduct Hearing Board to hear sexual assault and harassment cases so students would not be forced to have sensitive cases heard by their classmates. See *How to Report Sexual Assault Information*, WHEATON COLLEGE MASS., <https://wheatoncollege.edu/campus-life/campus-safety/sexual-and-gender-based-misconduct-response-and-resources/how-to-report/> [<https://perma.cc/H858-YTLY>]; Erica Coray, *Victim Protection or Revictimization?: Should College Disciplinary Boards Handle Sexual Assault Claims?*, 36 B.C. J. L. & SOC. JUST. 59 (2016) (providing a more nuanced discussion of the limitations of college disciplinary boards when it comes to adjudicating sexual assault cases).

55. Green, *supra* note 1, at 1.

witness.”⁵⁶ K-12 institutions are subject to the same requirements for a publicized grievance procedure and a dedicated Title IX coordinator as colleges are, but compliance with these requirements appears to be far lower at the primary and secondary level than at the university level.⁵⁷ Most school districts have just one Title IX coordinator for the entire district, sometimes comprising tens of thousands of students.⁵⁸ Additionally, many Title IX coordinators do “double-duty,” also serving as HR staff or counselors, and have little to no special training regarding handling sexual assault and harassment cases.⁵⁹ One attorney described talking to school employees identified by their institutions as Title IX coordinators and discovering that they did not know that they had such responsibilities.⁶⁰

The absence of any kind of clear reporting structure at most K-12 schools means parents must do the heavy lifting to advocate for their children. In practice, this reliance upon parental advocacy means parents who do not have knowledge of the legal system, access to attorneys, strong English language skills, or the ability to get time off work are unable to navigate this confusing and unintuitive system.⁶¹ School districts are leaving these families, who are more likely to be low-income and families of color, to fend for themselves, and children are left to deal with the consequences.⁶² An effective, robust Title IX framework would

56. 34 C.F.R. § 106.45 (2020).

57. Tyler Kingkade, *K-12 Schools Keep Mishandling Sexual Assault Complaints*, NBC NEWS (May 25, 2020), <https://www.nbcnews.com/news/us-news/k-12-schools-keep-mishandling-sexual-assault-complaints-will-new-n1212156> [https://perma.cc/JW24-FPG7] (describing shortcomings of K-12 sexual assault complaint procedures). See 34 C.F.R. § 306.8 (2020), for a discussion of K-12 grievance procedure and designated staff member requirements.

58. Elizabeth J. Meyer, Andrea Somoza-Norton, Natalie Lovgren, Andrea Rubin & Mary Quantz, *Title IX Coordinators as Street-Level Bureaucrats in U.S. Schools: Challenges Addressing Sex Discrimination in the #MeToo Era*, 26 EDUC. POLY ANALYSIS ARCHIVES 1, 15 (2018) (concluding that “demand for [Title IX coordinators] services exceeds supply”).

59. Kingkade, *supra* note 57. The school budget crisis has drastically impacted school support staff, even without considering the added responsibilities of serving as Title IX coordinator. In Minnesota, for example, the drastic reductions in the number of school counselors in high schools have been linked to the state’s abysmal graduation rates for students of color. Laura Yuen & Brandt Williams, *Without Support, Minnesota Students Left Behind at Graduation*, MPR NEWS (Mar. 7, 2016), <https://www.mprnews.org/story/2016/03/07/graduation-gap-minnesota> [https://perma.cc/68R2-8S5F].

60. Kingkade, *supra* note 57.

61. Suski, *supra* note 14, at 760–63 (discussing the burden shifting from schools to families and the disproportionate impact on low-income students, who now comprise the majority of public school attendees in the U.S.).

62. *Id.*

ensure that students and parents know how and where to report instances of sexual misconduct and create proactive educational interventions for students on the subject of sexual assault and harassment.

C. Karasek, Simpson, and the “Pre-Assault” Theory of Liability

1. *Simpson* recognizes a university program can violate Title IX for its actions before an assault takes place

Lisa Simpson and Anne Gilmore, students at the University of Colorado Boulder (CU), sued CU for violating Title IX after they were sexually assaulted by CU football players and high school football recruits during a recruiting event at the college.⁶³ In an effort to entice top high school football players to choose CU, the football program hosted recruits on its campus and “promised an opportunity to have sex” with “female ‘Ambassadors’” the University paired them with.⁶⁴ While CU football coaches themselves were not the ones who promised recruits sex on their visits, the coaches paired recruits with players who “knew how to ‘party’” and communicated to these host players that the point of the recruitment program was to “show recruits a good time.”⁶⁵

Simpson’s and Gilmore’s reported sexual assaults were not the first to happen in the CU football program, nor were they the first to happen during the recruiting program itself.⁶⁶ In fact, the Boulder District Attorney’s (DA) office had specifically warned CU officials about the prevalence of sexual assault within the football recruitment program.⁶⁷ At a meeting in February 1998, Assistant

63. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007).

64. *Id.*

65. *Id.* at 1180.

66. There were numerous allegations of sexual assault by CU players in the late 1980s and 1990s, including those by Miles Kusayanagi, who was accused of being the “Duct Tape Rapist,” responsible for eight separate sexual assaults in Boulder in 1986. Tim Murphy, *40 Years of College Football’s Sexual Assault Problem*, MOTHER JONES (Dec. 5, 2013), <https://www.motherjones.com/politics/2013/12/college-football-sexual-assault-jameis-winston/> [<https://perma.cc/9TA6-9F7M>]; Rick Reilly, *What Price Glory?*, SPORTS ILLUSTRATED (Feb. 27, 1989), <https://vault.si.com/vault/1989/02/27/what-price-glory-under-coach-bill-mccartney-colorado-football-has-taken-off-but-so-has-ugly-criminal-behavior-among-the-buffalo-players> [<https://perma.cc/98LE-EG8U>]. Additionally, in 1997 a high school-aged girl alleged that she was sexually assaulted at an off-campus party hosted by CU football players for visiting recruits. *Simpson*, 500 F.3d at 1181.

67. *Simpson*, 500 F.3d at 1182.

DA Mary Keenan told CU officials that she was worried that “women [were] being made available to recruits for sex” and that the reported 1997 sexual assault of a high school student during a party for CU football recruits was not an isolated incident but part of a concerning pattern.⁶⁸

Deciding on an appeal against a motion for summary judgment, the Tenth Circuit found that a violation of Title IX could occur “when . . . caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient.”⁶⁹ The court distinguished *Gebser* and *Davis* because, in those cases, there was “no element of encouragement of the misconduct by the school district.”⁷⁰ The court reasoned that both general information about the risk of sexual assault on college campuses, especially assault perpetrated by athletes, and the specific actions of the CU football program, which included several past incidents of sexual assault, could be seen as official “encouragement of the misconduct.”⁷¹ The Tenth Circuit reversed summary judgment and remanded the case.⁷² CU later settled with Simpson and Gilmore for \$2.8 million.⁷³

2. *Karasek* establishes that an entire institution can be liable for its failures prior to a sexual assault

Over a decade after *Simpson*, Sofie Karasek, Aryle Butler, and Nicoletta Commins sued University of California, Berkeley (UC Berkeley) for violating Title IX in its response to each of their assaults, which occurred in three separate school-sponsored

68. *Id.* at 1182.

69. *Id.* at 1178.

70. *Id.* at 1177.

71. *Id.* at 1177, 1181–84. The specific incidents cited by the court as evidence of the CU football program’s misconduct included: a 1989 *Sports Illustrated* article about the culture of CU football players and sexual assault; the Boulder District Attorney holding a meeting with the football program and warning them to clean up the high school recruiting program after previous incidents that occurred during the program, including the 1997 sexual assault of a high school student at an off-campus party hosted by a CU football player for recruits; the sexual harassment of Katharine Hnida, a CU football player, in 1999, which was so severe it led to her leaving the university; the 2001 rape of a woman student trainer by a CU football player; and the hiring of an assistant coach in 2001 who had previously been accused of sexual assault and banned from the CU campus.

72. *Id.* at 1184–85.

73. Howard Pankratz, *\$2.8 Million Deal in CU Rape Case*, DENVER POST (Dec. 5, 2007), <https://www.denverpost.com/2007/12/05/2-8-million-deal-in-cu-rape-case/> [<https://perma.cc/T97X-93GE>].

programs.⁷⁴ The *Karasek* plaintiffs claimed that the university had not only violated Title IX when it responded to their individual assaults but also by “maintaining a general policy of deliberate indifference to reports of sexual misconduct,” which resulted in a “heightened [] risk” of sexual assault for plaintiffs.⁷⁵

The Ninth Circuit dismissed each of the plaintiffs’ individual claims but vacated the district court’s dismissal of the aforementioned “pre-assault” claims, which hold the institution or program responsible for the environment created prior to the plaintiff’s sexual assault.⁷⁶ The court disagreed with UC Berkeley’s characterization of the *Simpson* holding as limited to “a ‘specific problem in a specific program’” and instead held that such a pre-assault claim can apply to an entire school’s official policy.⁷⁷ The court set forth a four-part test for determining whether a pre-assault claim could survive a motion to dismiss: “(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment (3) in a context subject to the school’s control, and (4) the plaintiff was harassed as a result.”⁷⁸

Like the Tenth Circuit in *Simpson*, the Ninth Circuit avoided the *Gebser/Davis* standard by arguing that a plaintiff need not prove deliberate indifference or adequate notice to a specific incident of harassment or assault if the incident stems from a school’s official policy.⁷⁹ In the instant case, the evidence the court cited to support a pre-assault claim included “a 2014 report prepared by the California State Auditor detailing several deficiencies in UC [Berkeley]’s handling of sexual-harassment cases between 2009 and 2013,” “an administrative Title IX claim filed in 2014 by thirty-one women, alleging that UC [Berkeley] has not adequately responded to complaints of sexual assault since 1979,” and the incongruity between what university officials said publicly about sexual assault and how they handled complaints in reality.⁸⁰

74. *Karasek v. Regents of the Univ. of Cal.*, 948 F.3d 1150, 1156 (9th Cir. 2020).

75. *Id.*

76. *Id.* at 1171.

77. *Id.* at 1170. Indeed, the Tenth Circuit in *Simpson* does emphasize the amount of control that the head football coach had over the football program, comparing it to the control that a police chief has over the force. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184 (10th Cir. 2007).

78. *Karasek*, 948 F.3d at 1169.

79. *Id.*

80. *Id.* at 1160, 1170–71. Seventy-six percent of Title IX complaints at UC Berkeley were resolved via early resolution (informal) processes, possibly to avoid having to report additional sexual assaults as required by the Clery Act.

While expanding the ability of students to file these pre-assault claims against entire institutions can be viewed as a win for advocates, the Ninth Circuit's ruling is not a cure-all. The court ruled that there must be a "causal link" between the school's action or indifference and an assault but did not specify what, exactly, that link would have to look like for a pre-assault claim to succeed.⁸¹ On remand, the district court found that, out of the three plaintiffs, only Sofie Karasek's pre-assault claim adequately alleged that UC Berkeley created and maintained a policy that evinced "deliberate indifference" to reports of sexual misconduct within the organization Karasek was a member of at the time of her assault.⁸² While the claim that the district court allowed to advance was, like the football program in *Simpson*, related only to a specific campus organization, not a whole university, the Ninth Circuit was unequivocal in its holding that it is possible to bring a pre-assault claim like Karasek's against an entire institution.⁸³

II. *Karasek* and *Simpson* in Primary and Secondary Schools

Part II examines both the positive and negative ramifications of applying the *Karasek* and *Simpson* pre-assault theory of liability at the K-12 level. While there are potential stumbling blocks when it comes to employing this strategy, this Part argues that the pre-assault theory of liability is the most effective tool to address Title IX violations in primary and secondary schools because of the proactive nature of these types of claims. Finally, this Part addresses more specifically the aforementioned challenges, including the limiting effect of the *Davis/Gebser* standard and the other potential options for pursuing Title IX liability.

A. *Applying Pre-Assault Claims at the K-12 Level*

As of April 2021, there are no examples of a successful pre-assault claim brought at the K-12 level. In fact, there are very few examples of any pre-assault claims in cases involving primary or secondary school students at all.⁸⁴ While the precedent of *Karasek*

81. *Id.* at 1171.

82. *Karasek v. Regents of the Univ. of Cal.*, No. 3:15-cv-03717-WHO, 2020 U.S. Dist. LEXIS 212770, at *45 (N.D. Cal. Nov. 12, 2020).

83. *Karasek*, 948 F.3d at 1170.

84. *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 2020 U.S. Dist. LEXIS 217596 (S.D. Tex. Nov. 20, 2020) (holding that a high school student's violent sexual assault on school property by her boyfriend did not meet the four-part test articulated in

is new, *Simpson* was decided in 2007, and there have been a few other relatively high-profile cases where plaintiff college students invoked a pre-assault claim with some success.⁸⁵ Similar to the \$2.8 million settlement in *Simpson*, some of these cases have resulted in large awards—including an undisclosed six-figure settlement in *Williams v. Board of Regents of the University System of Georgia*.⁸⁶ Significantly, settlements for pre-assault cases can also include non-monetary terms, such as when Arizona State University (ASU) settled a complaint for both \$850,000 and an agreement to review and change its sexual harassment policies.⁸⁷ These types of non-monetary settlements can carry great significance for survivors who often feel deeply betrayed by their institutions.⁸⁸

Indeed, the student who brought the case against ASU stated that she agreed to settle in part because “she believed the non-monetary terms of the settlement [would] make a significant contribution to making Arizona’s campuses safer and reducing the risk of sexual harassment and assault for all students.”⁸⁹ It is difficult to know how these settlements compare to other post-assault Title IX awards at the collegiate level, as there is no national database tracking this information. Public Justice, a nonprofit legal advocacy organization, does track settlements and

Karasek for pre-assault claims); *Torres v. Sugar-Salem Sch. Dist.* #322, 2020 U.S. Dist. LEXIS 177052 (D. Idaho Sept. 24, 2020) (rejecting a motion for summary judgment brought by defendant school district that argued that *Karasek* changed Title IX law such that plaintiff’s claims were brought under the wrong theory of liability).

85. See Walker, *supra* note 35, at 114 (discussing pre-assault cases that follow the precedent of *Simpson*).

86. *Id.* at 124.

87. *Id.* at 126.

88. See, e.g., Carly Smith & Jennifer Freyd, *Dangerous Safe Havens: Institutional Behavior Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 120 (2013) (explaining that the effects of sexual assault that occurs in a context where the survivor’s safety is dependent on an institution can be more severe); Katie J.M. Baker, *Rape Victims Don’t Trust the Fixers Colleges Hire To Help Them*, BUZZFEED NEWS (Apr. 25, 2014), <https://www.buzzfeednews.com/article/katiejmbaker/rape-victims-dont-trust-the-fixers-colleges-hire-to-help-the> [<https://perma.cc/TB5X-ZXWW>] (detailing survivor activists’ resistance to universities hiring attorneys they see as solely serving the institution at the expense of students); Jennifer Steinhauer, *Behind Focus on Sexual Assaults, a Steady Drumbeat by Students*, N.Y. TIMES (Apr. 29, 2014), https://www.nytimes.com/2014/04/30/us/sexual-assault-on-university-campuses.html?_r=0 [<https://perma.cc/Q594-UY6R>] (quoting a student as comparing sexual assault in college and the military because both are institutions where one expects to be protected but is in reality treated “poorly”).

89. Walker, *supra* note 35, at 126 (internal quotation marks omitted).

awards at the K-12 level, which can range from four to nine figures.⁹⁰

Although lack of data prevents any meaningful comparisons between pre- and post-assault claims at the university level, it is clear that pre-assault claims can result in not only monetary awards, but potential policy and culture change on campus.⁹¹ Unique to pre-assault claims is the emphasis on the institution's failures *prior* to the assault or harassment, which necessarily encourages a more holistic view of the institution's general sexual assault and harassment policies, not only its Title IX grievance procedure (which is implicated in post-assault cases). In primary and secondary schools, which overall have much less robust Title IX procedures and less clear instructions for how and where to report instances of sexual assault or harassment,⁹² pre-assault claims could be very effective. While pre-assault cases in universities necessitate looking at whether the institution followed its own policies and procedures, bringing pre-assault cases in K-12 settings—where policies and procedures are unclear or not communicated to students, parents, or even staff—seems more likely to result in a win for plaintiffs and a restructuring of how schools approach handling assault and harassment.

1. Institutional control in the K-12 setting

Another difference between K-12 schools and institutions of higher education is the degree to which they are able to “control” their students. On remand in *Karasek*, Judge William H. Orrick discussed the importance of determining the level of control a school exercises over the situation in which the harassment or abuse

90. PUB. JUST., JURY VERDICTS AND SETTLEMENTS IN K-12 HARASSMENT & BULLYING CASES (2020). Note that the awards on the very high end of the range (eight to nine figures) are almost always a result of a case where a teacher or other school employee abused multiple children over many years. There are smaller awards listed, some as low as \$75, but these come from cases of bullying, not sexual abuse. Additionally, the terms of some settlements are undisclosed or confidential, making it difficult to form a complete picture of the K-12 Title IX landscape. *See also* Michelle R. Smith, *A Look at Student-on-Student Sex Abuse Verdicts, Settlements*, ASSOCIATED PRESS (May 22, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/a-look-at-student-on-student-sex-abuse-verdicts-settlements.html> [<https://perma.cc/2FZ2-8KAW>] (highlighting select peer-on-peer sexual abuse verdicts and settlements).

91. The ASU settlement established a system-wide student safety coordinator who was responsible for hiring staff on each of the system's three campuses to listen to and address reports of student sexual assaults. *See* Lester Munson, *Landmark Settlement in ASU Rape Case*, ESPN (Jan. 30, 2009), <https://www.espn.com/espn/otl/news/story?id=3871666> [<https://perma.cc/YJT9-2GXM>].

92. *See supra* Part I.B.2.

occurs at length, eventually dismissing one of the plaintiff's complaints for failing to satisfy this necessary element of a pre-assault claim.⁹³ Judge Orrick did not articulate a standard for pre-assault control or clarify whether such a standard might differ from the post-assault *Davis* standard, which requires an institution to exercise control over both the harasser and the context in which the harassment occurs.⁹⁴ While this standard might remain unclear, it is evident that primary and secondary schools have more control over their minor students than universities do over adult students, a contrast acknowledged by the Court in *Davis*.⁹⁵ This control, while not absolute, is substantial enough to grant schools the ability to infringe on the constitutional rights of students in order to protect them, a right not granted to other actors.⁹⁶ While courts have historically shied away from fully recognizing the level of control schools have over children out of deference to the authority of parents,⁹⁷ laws such as mandated reporter statutes for child abuse and Title IX accept the reality that parents are incapable of being in control of and protecting their children while they are at school.⁹⁸

Courts have acknowledged that K-12 schools have more control over their students than colleges do,⁹⁹ and this control necessarily comes with the greater level of responsibility primary and secondary schools have in terms of shaping future citizens. Public primary and secondary schools have long been recognized as transmitting not only educational knowledge to young people, but social and cultural values as well.¹⁰⁰ Scholarship suggests that

93. *Karasek v. Regents of the Univ. of Cal.*, No. 3:15-cv-03717-WHO, 2020 U.S. Dist. LEXIS 212770, at *33–37 (N.D. Cal. Nov. 12, 2020); see *supra* note 78 and accompanying text (explaining the four-part pre-assault test articulated in *Karasek*).

94. *Id.* at *33–34 (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999)).

95. *Davis*, 526 U.S. at 649 (“[A] university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy . . .”).

96. See *Suski*, *supra* note 14, at 743–44.

97. *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992) (arguing that the physical custody of students at school was not sufficient to establish a custodial relationship of the type that would trigger a 14th Amendment responsibility). See *Deshaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 198–99 (1989), for more discussion of what relationships have been recognized by the Court as imposing this duty.

98. See *Suski*, *supra* note 14, at 741–44, for an examination of the conflicting messages with regards to control, responsibility, and authority that are communicated to schools.

99. See *supra* note 95.

100. The Court in *Bethel* justified limiting the free speech of public school students by reasoning:

institutions themselves can tolerate and even encourage sexual assault and harassment through both the actions of authorities and the institution's own unique cultural values.¹⁰¹ The OCR has recognized this fact, finding that a California district was in violation of Title IX based on its response to complaints, and that "sexually harassing behavior permeates the educational environment at the school sites."¹⁰²

Children spend the majority of their days at school, and the influence of teachers, administrators, coaches, and other adults can have a significant impact on their worldview. When these adults do not take sexual assault seriously, turn a blind eye, or dismiss sexual harassment as "harmless," children internalize these messages.¹⁰³ While colleges must contend with older students who come to campus with opinions and attitudes towards sexual harassment that are more fully-formed and must meet students where they are to an extent, K-12 institutions have more influence over forming these attitudes. This control, combined with schools' duty under Title IX to ensure equal access to educational opportunities,¹⁰⁴ should set a lower bar for plaintiffs attempting to prove "deliberate indifference"¹⁰⁵ in K-12 schools than in colleges and universities. It also lends credence to the importance of developing an effective sexual harassment policy in schools, the existence of which can

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. *The inculcation of these values is truly the "work of the schools."*

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (emphasis added) (citation omitted).

101. See MacKinnon, *supra* note 20, at 2056 (discussing how college campuses can be "rape-prone"); Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981) (examining why some institutions are more tolerant or encouraging of sexual assault than others).

102. Letter from Arthur Zeidman, Dir., Off. for Civ. Rts., Region IX California, U.S. Dep't. of Educ., to Bruce Harter, Superintendent, West Contra Costa Unified Sch. Dist. (Nov. 6, 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09095001-a.html> [<https://perma.cc/BG5X-974Y>].

103. Ann C. McGinley, *Schools as Training Grounds for Harassment*, 2019 U. CHI. LEGAL F. 171, 222 (2019).

104. 20 U.S.C. § 1681.

105. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (explaining that a school's "response [to alleged sexual harassment] must amount to deliberate indifference" in Title IX cases).

serve as an important indicator for students and teachers alike of what their school community values.¹⁰⁶

2. Establishing appropriate pre-assault standards

The standard established by the Supreme Court in *Gebser* and expanded upon in *Davis* states that an appropriate school official must have actual notice of the harassment and that the school must be deliberately indifferent to said harassment in order for a plaintiff to prevail on a Title IX claim.¹⁰⁷ The *Gebser/Davis* standard has been troubling since its inception due to the high burden it imposes on those who have experienced sexual harassment or assault and the resultant reduced chances for any kind of real change in the handling of sexual misconduct cases.¹⁰⁸ These bureaucratic burdens can be particularly high for elementary and secondary school students. Studies of child and adolescent brain development have established that young people have far more difficulty making decisions and planning than adults do.¹⁰⁹ These kinds of differences between child and adult brains make the calculations required to

106. Long, *supra* note 20 (“[C]reating a respectful school culture is more effective than classroom lessons alone in creating sustainable, positive changes in student attitudes and behavior . . .”).

107. *Gebser*, 524 U.S. at 277; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–45 (1999).

108. *See, e.g.*, MacKinnon, *supra* note 20, at 2069 (discussing the high bar of the deliberate indifference standard); Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J. L. & GENDER 407, 408 (2008) (“The requirements of ‘actual notice’ and ‘deliberate indifference’ set forth in the *Gebser/Davis* line of cases have created a heavy burden on plaintiffs and made the protections of Title IX inaccessible to many.”) (footnote omitted); Suski, *supra* note 14, at 744 (advocating for a turn towards the Title VII constructive notice standard in Title IX cases because of the difficulty of proving deliberate indifference); Walker, *supra* note 35, at 128 (describing surviving a motion to dismiss for Title IX cases as a “daunting challenge” which continues to grant schools “a certain degree of practical immunity from Title IX liability”).

109. *See* Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1187 (2012) (explaining the importance of emotion in decision-making for adolescents); Dana G. Smith, Lin Xiao & Antoine Bechara, *Decision Making in Children and Adolescents: Impaired Iowa Gambling Task Performance in Early Adolescence*, 48 DEVELOPMENTAL PSYCH. 1180, 1186 (2012) (finding less efficient and effective responses to cognitive demands among children and adolescents); Stacie L. Warren, Yuan Zhang, Katherine Duberg, Percy Mistry, Weidong Cai, Shaozheng Qin, Sarah-Nicole Bostan, Aarthi Padmanabhan, Victor G. Carrion & Vinod Menon, *Anxiety and Stress Alter Decision-Making Dynamics and Causal Amygdala-Dorsolateral Prefrontal Cortex Circuits During Emotion Regulation in Children*, 88 BIOLOGICAL PSYCHIATRY 576, 582 (2020) (finding that anxiety and stress can result in less confident decision-making in children).

decide to make a potentially risky or frightening disclosure of sexual abuse much more difficult for children.¹¹⁰

Additionally, the *Gebser/Davis* standard requires very specific disclosure of sexual harassment or abuse in order for said disclosure to qualify as “actual notice.”¹¹¹ Requiring this kind of specificity from young children who may be unable to articulate what exactly is happening to them is misguided at best.¹¹² While some school employees simply misunderstand students’ attempted disclosures, others ignore, dismiss, or even willfully cover up said disclosures, foreclosing the possibility of meaningful action by the school.¹¹³ Since teachers, the main adult point of contact for children at school, do not qualify under *Gebser* as an appropriate school official for purposes of reporting,¹¹⁴ students are required to find a higher

110. Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147, 1181 (2020).

111. *Gebser*, 524 U.S. at 290 (holding that, in order for the actual notice requirement to be satisfied, “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf” must be informed and fail to respond). The list of cases in which courts failed to find actual notice is long. *See, e.g.*, *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008) (failing to find actual notice where a disabled child was unable to articulate what kind of harassment she was experiencing); *Gabrielle M. v. Park Forest-Chicago Heights*, 315 F.3d 817, 819 (7th Cir. 2003) (failing to find actual notice where a kindergarten student was only able to tell teachers her classmate was “bothering her” and doing “nasty stuff”); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001) (finding that the school did not have actual notice of sexual abuse by a teacher, despite reports that the teacher in question had molested students in the past).

112. Many victims of childhood sexual abuse either fail to report the abuse altogether or significantly delay reporting for months or even years. Kamala London, Maggie Bruck, Daniel B. Wright & Stephen J. Ceci, *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers*, 16 MEMORY 29, 31 (2008). Some studies have found that the more severe the abuse is, the less likely a child is to report it. *See* Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 CLINICAL PSYCH. REV. 271, 273 (2002).

113. Linda Charmaraman, Ashleigh E. Jones, Nan D. Stein & Dorothy L. Espelage, *Is It Bullying or Sexual Harassment? Knowledge, Attitudes, and Professional Development Experiences of Middle School Staff*, 83 J. SCH. HEALTH 438, 442 (2013) (finding that middle school teachers had difficulty identifying sexual harassment between students); BILLIE-JO GRANT, STEPHANIE B. WILKERSON, DEKOVEN PELTON, ANNE COSBY & MOLLY HENSCHER, U.S. DEPT OF JUST., A CASE STUDY OF K-12 SCHOOL EMPLOYEE SEXUAL MISCONDUCT: LESSONS LEARNED FROM TITLE IX POLICY IMPLEMENTATION 55–56 (2017) (reporting that schools not only fail to train staff so they lack knowledge about sexual harassment, but teacher-perpetrators are often transferred between schools rather than disciplined); Jenn Abelson, Bella English, Jonathan Saltzman & Todd Wallack, *Private Schools, Painful Secrets*, BOS. GLOBE (May 6, 2016), <https://www.bostonglobe.com/metro/2016/05/06/private-schools-painful-secrets/OaRI9PFpRnCTJxCzko5hkN/story.html> [<https://perma.cc/85QH-RG8X>] (finding over two hundred victims at sixty-seven elite New England private schools whose cases were dismissed or covered up by administrators).

114. *Gebser*, 524 U.S. at 290.

authority to appeal to if their initial report goes unheard. Expecting children to fulfill this duty after their initial report was ignored or dismissed is unrealistic. Students who have been sexually harassed or abused at school report feeling nervous or afraid of not being believed—adding additional hurdles only makes disclosure even less likely.¹¹⁵ In a setting where already half of students who experience sexual harassment never report it,¹¹⁶ requiring students to report their harassment or abuse within the overly rigid *Gebser/Davis* framework suppresses reporting and hampers Title IX claims.

In the stifling context of *Gebser/Davis*, pre-assault claims offer a way to clarify the legal standard to provide greater emphasis on the pre-assault procedures a school district needs to have in place in order to avoid liability. Both the Tenth Circuit in *Simpson* and the Ninth Circuit in *Karasek* established that a plaintiff need not prove either deliberate indifference or actual notice of a specific incident in order for a pre-assault claim to proceed.¹¹⁷ Since a pre-assault claim deals with a school's *official policy* violating Title IX, reporting students do not need to have made school officials aware of a specific incident of harassment or abuse in the particular way required by *Gebser* and *Davis*.¹¹⁸ This relaxed reporting standard could make a large difference at the K-12 level, where children struggle with both recognizing sexual harassment and assault as well as reporting it in the legally required ways.¹¹⁹

115. Suski, *supra* note 110, at 1181.

116. CATHERINE HILL & HOLLY KEARL, AAUW, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2-3* (2011) (outlining that one-half of students who reported being sexually harassed said that they told “no one” while only nine percent reported the incident to an adult at school).

117. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007); *Karasek v. Regents of the Univ. of Cal.*, 948 F.3d 1150, 1169 (9th Cir. 2020).

118. *Karasek*, 948 F.3d at 1159.

119. This is not to downplay the challenges faced by college students or even adults who struggle with the decision to report their sexual harassment or assault. Barriers to reporting exist at every age. See Marjorie R. Sable, Fran Danis, Denise L. Mauzy & Sarah K. Gallagher, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157 (2006) (finding that college students cite shame, guilt, and embarrassment as reasons for not reporting); Shalia Dewan, *Why Women Can Take Years to Come Forward With Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html> [https://perma.cc/65TZ-556V] (discussing the way that the trauma of sexual assault can affect memory and recall); Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers/> [https://perma.cc/C7B4-YDTF] (awarding Time's “Person of the Year” to women who came forward with sexual harassment and assault allegations against some of the most powerful men in Hollywood after the abuse had been going on for years).

B. Potential Issues and Complications

1. Risk of an increased burden on schools.

One of the main concerns with possibly opening schools up to more liability by enabling pre-assault claims at the K-12 level is the risk of stretching budgets that are already thin, especially in the nation's public schools.¹²⁰ Indeed, K-12 schools already spend millions to settle Title IX cases.¹²¹ The budget crisis in schools should not be taken lightly, especially when the economic burden falls disproportionately on students of color and students who live in poverty, and the effects of underfunded schools can follow children well into adulthood.¹²² However, the answer to the school budget crisis is not to reduce services for children. Title IX does not contain an exception that dictates that students are entitled to equal educational opportunities only when their institutions can afford them. The answer to the budget crisis certainly does not lie in allowing for little to no real legal recourse to children who have been sexually harassed or abused at school.¹²³ Student safety is non-negotiable, and in recent years schools have been increasingly willing to pay large amounts of money on fixes like metal detectors, social-media monitoring software, and other measures intended to protect students in the event of a shooting.¹²⁴ While the

120. See sources cited *supra* note 22.

121. See sources cited *supra* note 90; Erica L. Green, *Proposed Rules Would Reduce Sexual Misconduct Inquiries*, *Education Dept. Estimates*, N.Y. TIMES (Sept. 10, 2018), <https://www.nytimes.com/2018/09/10/us/politics/campus-sexual-misconduct-rules.html> [https://perma.cc/FHA4-N53K] (discussing the Trump administration's proposed Department of Education regulations on Title IX that would reduce investigations and thus liability, saving schools money).

122. See, e.g., Dennis J. Condrón & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District*, 76 SOC. EDUC. 18, 32 (2003) (finding that higher spending results in increased achievement); Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban Migrant School Children*, 2015 BYU EDUC. & L.J. 271, 283 (2015) ("The effect of the current system of determining funding has resulted in the concentration of economically disadvantaged urban and migrant racial minorities into these low performing schools who receive minimal funds."); Michelle Chen, *How Unequal School Funding Punishes Poor Kids*, NATION (May 11, 2018), <https://www.thenation.com/article/archive/how-unequal-school-funding-punishes-poor-kids/> [https://perma.cc/9VSH-RDLW] (finding that poor districts have fewer teachers per child and are more likely to cut school services and programs than wealthier districts).

123. See Suski, *supra* note 110, at 1201, for a more detailed examination of the challenges of balancing strapped school budgets with the rights of students under Title IX.

124. John Woodrow Cox & Steven Rich, *Armored School Doors, Bulletproof Whiteboards and Secret Snipers*, WASH. POST (Nov. 13, 2018),

effectiveness of these expensive improvements is debatable, it is clear that schools and communities value the safety of students while they are at school. This same willingness to spend additional money should extend to Title IX measures and training. Lastly, schools themselves have liability insurance specifically intended to pay out Title IX claims, so some of the concern about impacts on school budgets may be over-exaggerated.¹²⁵

Pre-assault claims, because of their more holistic focus on Title IX policy overall, have the added bonus of being more preventative than post-assault claims.¹²⁶ After a settlement or judgment for a pre-assault claim, a school that improves its Title IX procedures as well as its school culture surrounding sexual harassment will be much less likely to face additional Title IX lawsuits in the future.

2. Other potentially fruitful avenues of pursuing liability and accountability exist

a. *Civil liability for school officials individually*

There is no right of action against individuals under Title IX—only institutions can be sued under the statute.¹²⁷ Some commentators have suggested either (1) expanding Title IX case law to include an ability to bring suit against individuals or (2) relying more heavily on either other federal statutes or state tort law in cases that would traditionally fall under Title IX.¹²⁸ One avenue for these kinds of suits is § 1983 of the Civil Rights Act of 1871, which provides that any person acting under color of law who deprives another person of “any rights, privileges, or immunities secured by

<https://www.washingtonpost.com/graphics/2018/local/school-shootings-and-campus-safety-industry/> [<https://perma.cc/V5V7-S33N>] (discussing the emerging “school safety” industry); Jon Schuppe, *Schools Are Spending Billions on High-Tech Security. But Are Students Any Safer?*, NBC NEWS (May 20, 2018), <https://www.nbcnews.com/news/us-news/schools-are-spending-billions-high-tech-security-are-students-any-n875611> [<https://perma.cc/KJK4-SS6M>] (examining use of military security technology in public schools).

125. See Suski, *supra* note 110, at 1201.

126. See discussion *supra* Part II.A.1.

127. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999) (“The Government’s enforcement power may only be exercised against the funding recipient . . . and we have not extended damages liability under Title IX to parties outside the scope of this power.”).

128. See Christine Tamer, *Bullied LGBTQ Students Are Afraid but Their Schools Aren’t (and That’s the Problem): Why It’s Time to Move On from Broken Title IX to State Tort Law as a Solution*, 25 TEX. J. C.L. & C.R. 153 (2020); Jennifer Kirby Tanney, *A Backdoor to Individual Title IX Liability? The Implications of Fitzgerald v. Barnstable School Committee on the Liability of Teachers and Administrators for Peer-to-Peer Harassment*, 26 WIS. J. L. GENDER & SOC’Y 23 (2011).

the Constitution and laws” is civilly liable.¹²⁹ Courts have interpreted § 1983 to allow claims for violations of rights that were created by federal statute, which includes Title IX.¹³⁰ Title IX and § 1983 claims are often brought concurrently, but they have the potential to reach both different situations and different actors.¹³¹

Section 1983’s requirement that officials be acting under color of law when the violation of rights occurred requires proof that these individuals were acting as part of the school’s official policy.¹³² This indictment of a school or district’s policy would appear to line up with the pre-assault claims that can be brought under Title IX after *Karasek*. However, unlike Title IX, § 1983 requires proof of *intentional* discrimination, a higher bar.¹³³ Additionally, § 1983 has more limited options in terms of recovery—punitive damages can never be awarded under the statute.¹³⁴ Lastly, there is lingering doubt over whether claims against individual teachers or administrators under § 1983 are lawful. The Supreme Court has never explicitly ruled on whether or not this is the case,¹³⁵ and there is concern that allowing these kinds of claims under § 1983, based on the rights established by Title IX, which does not allow for suits against individuals, would disregard Congressional intent.¹³⁶ While § 1983 suits may be valuable for some plaintiffs, in cases where the district’s official policy regarding sexual harassment is at fault, Title IX *Karasek* claims provide a more fruitful and effective avenue of enforcement because they avoid the requirement that the district intentionally discriminate against the plaintiffs.

Another suggested avenue for sexual harassment and assault claims in K-12 schools is increased reliance on state tort law. Every state in the country has an anti-bullying law on the books.¹³⁷ Some of these statutes are stronger than others, both in the range of

129. 42 U.S.C. § 1983.

130. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (acknowledging that actions under § 1983 can be brought for violations of federal statutory law); Tanney, *supra* note 128, at 37 (explaining that in order for the rights created by the statute to be recognized under § 1983, the “statute must create binding obligations, rather than merely Congressional preferences, and the interest must not be vague and the statute must be intended to benefit the party bringing suit”) (footnote omitted).

131. Shailini Jandial George, *Do Sexual Harassment Plaintiffs Get Two Bites of the Apple?: Sexual Harassment Litigation After Fitzgerald v. Barnstable School Committee*, 59 DRAKE L. REV. 41, 59–60 (2010).

132. *Id.* at 60.

133. Tanney, *supra* note 128, at 41.

134. *Id.* at 39.

135. *Id.* at 54.

136. *Id.* at 61.

137. Tamer, *supra* note 128, at 191–93.

behavior and protected groups they cover and in their enforcement mechanisms.¹³⁸ However, they are currently much less effective than they could be—a 2015 survey found that over a quarter of schools did not have an anti-bullying policy that complied with their state’s law.¹³⁹ When effective, anti-bullying laws can be particularly valuable for their ability to reach low-level verbal harassment that, while often extremely painful for young people,¹⁴⁰ does not meet the “severe and pervasive” threshold required to bring a suit under Title IX.¹⁴¹ However, courts have repeatedly held school districts immune from the tort claims that arise from violations of these anti-bullying laws.¹⁴²

Supporters argue that abandoning Title IX as the main avenue for regulation of discriminatory behavior in schools, and turning instead to an expansion of state tort law to allow for claims under anti-bullying laws, would more effectively communicate “societal values” and force school districts to comply out of fear of liability.¹⁴³ However, falling back on state law necessitates abandoning the

138. *Id.* at 193–94.

139. RYAN M. KULL, JOSEPH G. KOSCIW & EMILY A. GREYTAK, GLSEN, FROM STATEHOUSE TO SCHOOLHOUSE: ANTI-BULLYING POLICY EFFORTS IN U.S. STATES AND SCHOOL DISTRICTS 5 (2015) (finding that 26.3% of districts in states with laws requiring an anti-bullying policy did not have one. Among states that named sexual orientation as a protected class in their anti-bullying law, 38.7% of schools did not provide protection based on actual or perceived sexual orientation. This number was even more stark for states that provided protection based on gender identity and expression: 60.3% of schools failed to provide protection based on those categories).

140. *See, e.g.*, Jannick Demanet & Mieke Van Houtte, *The Impact of Bullying and Victimization on Students’ Relationships*, 43 AM. J. HEALTH EDUC. 104, 108 (2012) (finding that both victims and perpetrators of bullying feel less connected to their peers, families, and teachers than their classmates that are not involved in bullying); Dieter Wolke, William E. Copeland, Adrian Angold & E. Jane Costello, *Impact of Bullying in Childhood on Adult Health, Wealth, Crime, and Social Outcomes*, 24 PSYCH. SCI. 1958, 1967 (2013) (“Involvement with bullying in any role was predictive of negative health, financial, behavioral, and social outcomes in adulthood.”); Dieter Wolke & Suzet Tanya Lereya, *Long-Term Effects of Bullying*, 100 ARCHIVES DISEASE CHILDHOOD 879, 880 (2015) (finding that children who were victims of bullying had worse mental health outcomes in adulthood, including increased levels of depression, anxiety, suicidal ideation, and psychotic experiences).

141. Tamer, *supra* note 128, at 176.

142. *See* Castillo v. Bd. of Educ., 103 N.E.3d 596, 598–601 (Ill. App. Ct. 2018) (finding that a school was not liable for violation of the district’s anti-bullying statute after a student was attacked off-campus and harassed on-campus because school officials were immune); A.F. v. Hazelwood Sch. Dist., 491 S.W.3d 628, 635 (Mo. Ct. App. 2016) (dismissing bullying claims against a school and school officials because the claims were barred by official immunity); Est. of Brown v. Cypress Fairbanks Indep. Sch. Dist., 863 F. Supp. 2d 632, 639 (S.D. Tex. 2012) (dismissing a claim arising from a school district’s violation of the state’s anti-bullying policy after a teenager committed suicide due to homophobic bullying for failure to state a claim upon which relief can be granted).

143. Tamer, *supra* note 128, at 198–99.

hope for federal consistency that a federal law like Title IX offers. Instead, the decisions on what qualifies as harassment, which categories are protected, and how to incentivize schools to comply, would be left up to states, resulting in a patchwork of enforcement. This is not mere speculation—a similar shift towards deference to state law is happening in the area of rights for transgender students in schools with disastrous consequences.¹⁴⁴

In 2016, the Obama DOE distributed a “Dear Colleague” letter instructing schools and universities that, under Title IX, transgender students were required to be treated in a way that was consistent with their gender identity, not their sex assigned at birth.¹⁴⁵ The letter stated that this required schools to allow transgender students to use bathrooms and locker rooms and to participate in sex-segregated athletics consistent with their gender identity.¹⁴⁶ The victory for trans youth was short-lived, however, as the Trump administration rescinded the letter, and the guidance along with it, in February 2017.¹⁴⁷ In the years since, there has been an increase in laws regulating treatment of transgender young people:¹⁴⁸ laws prohibiting schools from allowing transgender students to use the bathrooms or locker rooms that align with their gender identity, that ban their participation on sports teams that

144. Elly Belle, *What High School Is Like for Transgender Students*, TEEN VOGUE (Sept. 15, 2018), <https://www.teenvogue.com/story/what-high-school-is-like-for-transgender-students> [<https://perma.cc/S2SU-NDX5>] (detailing the challenges trans youth face at school); Rachel Savage, *Barred, Bullied, Depressed: Life for Many U.S. Trans Students*, REUTERS (Aug. 15, 2019), <https://www.reuters.com/article/us-usa-lgbt-education/barred-bullied-depressed-life-for-many-u-s-trans-students-idUSKCN1V609P> [<https://perma.cc/6RZ7-66NJ>] (detailing the disastrous mental health outcomes for trans students).

145. Dear Colleague Letter on Transgender Students, Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., Off. for Civ. Rts., U.S. Dep’t of Educ. 3 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/673W-G25H>].

146. *Id.*

147. Rebecca Hersher & Carrie Johnson, *Trump Administration Rescinds Obama Rule of Transgender Students’ Bathroom Usage*, NPR (Feb. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use> [<https://perma.cc/QPT2-6LKM>].

148. See Diana Ali, *The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans & Gender Non-Binary People*, NASPA (Apr. 2, 2019), <https://www.naspa.org/blog/the-rise-and-fall-of-the-bathroom-bill-state-legislation-affecting-trans-and-gender-non-binary-people> [<https://perma.cc/V8A9-4RK5>]; *The Coordinated Attack on Trans Student Athletes*, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbt-rights/the-coordinated-attack-on-trans-student-athletes/> [<https://perma.cc/7Q3Y-8SYD>]; *Legislative Tracker: Youth Sports Bans*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative-tracker/student-athletics/> [<https://perma.cc/6WU2-6XJD>] [hereinafter *Legislative Tracker*].

align with their gender identity, and that limit their access to healthcare are under consideration in several statehouses.¹⁴⁹ Transgender students in these states are subject to the debate over their right to do something as simple as use the bathroom safely, while their peers in the fifteen states that have laws protecting students on the basis of gender identity can attend school without these worries.¹⁵⁰ This unequal treatment from state to state is what we risk if Title IX enforcement is left to states, and students' safety in school and their legal recourse are too valuable to be dictated by where they live.

Ultimately, both § 1983 claims and state tort law fail students for the very same reason that some advocate for their use—they emphasize individual wrongdoing on the part of school officials. While there are of course instances of individuals failing students, a much larger concern for enforcing Title IX in K-12 schools is the institutional failures of districts that do not have effective anti-harassment policies, do not train teachers to recognize sexual harassment, and often ignore or mishandle reports of sexual harassment and assault when they are made aware of them. Any purported solution that focuses on the actions of individuals will be ineffective when the issue is system-wide. To truly improve

149. As of March 2021, twenty-two states have anti-trans bills under consideration. *Legislative Tracker*, *supra* note 148. See H.B. 1, 2021 Leg., Reg. Sess. (Ala. 2021) (requiring schools to, among other things, disclose students' gender identities to their parents); H.B. 3, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (requiring students to show proof of their sex assigned at birth in order to participate in sex-segregated athletics); S.B. 331, 58th Leg., 1st Sess. (Okla. 2021) (prohibiting students of the male sex from joining sports teams for women or girls); H.B. 1298, 67th Leg. Assemb., Reg. Sess. (N.D. 2021) (designating all athletic events as exclusively for males or exclusively for females, based upon sex assigned at birth); H.B. 1476, 67th Leg. Assemb., Reg. Sess. (N.D. 2021) (prohibiting, among many other things, "[e]xposing students to a curriculum concerning nonsecular self-asserted sex-based identity ideology or sexual orientation orthodoxy"); H.B. 1217, 96th Leg. Sess., Reg. Sess. (S.D. 2021) (establishing that female sports teams are only available to biologically female students); S.B. 373, 87th Leg., Reg. Sess. (Tex. 2021) (requiring students to participate in athletics based on sex assigned at birth); Jordan Williams, *Transgender Athletes Could Face Criminal Charges Under Proposed Minnesota Bill*, HILL (Mar. 2, 2021), <https://thehill.com/homenews/state-watch/541265-transgender-athletes-could-face-criminal-charges-under-minnesota-bill?rl=1> [<https://perma.cc/MB88-86G6>] (explaining a proposed Minnesota bill that would make transgender girls who participate in women's sports or use the women's bathroom or locker room guilty of a petty misdemeanor); Yue Stella Yu, *Tennessee Senate Passes Bill Barring Transgender Students from Playing High School Sports Under Their Gender Identity*, TENNESSEAN (Mar. 1, 2021), <https://www.tennessean.com/story/news/politics/2021/03/01/tennessee-senate-votes-pass-transgender-athlete-bill/6869465002/> [<https://perma.cc/558J-WSH7>].

150. *Equality Maps: Safe School Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/safe_school_laws [<https://perma.cc/4KWN-5ALZ>].

educational opportunity for children in the nation's schools, districts need to be incentivized to comply with Title IX by making their campuses safer and less conducive to sexual harassment and assault. Title IX pre-assault claims are the best legal strategy because their focus is on actions the school took before the incident occurred.

b. Increased reliance on criminal penalties for juvenile offenders

Another option for approaching the problem of instances of sexual harassment and assault in K-12 settings is pursuing criminal cases against young offenders. This approach shifts focus from the institution to individual wrongdoers, but advocates argue that it may make schools safer overall by both removing students who may be more “dangerous” and illustrating to other young people the high penalties associated with sexual harassment and assault.¹⁵¹ However, the benefits derived from harshly prosecuting juvenile sex offenses, and subsequently subjecting children and teenagers to a lifetime on the sex offender registry, seem negligible when compared with the high costs.¹⁵²

Unlike adult sex offenders, juveniles who commit sex crimes do not appear to be at high risk for recidivism.¹⁵³ This may have to do with the types of crimes for which young people are typically convicted: they tend to be prosecuted for statutory rape, often for consensual sex with other teens, and distributing child pornography (sometimes pictures they have taken of themselves).¹⁵⁴ Statutory rape laws in particular are troubling as they risk criminalizing “widespread and largely harmless conduct” and tend to result in convictions of Black boys and LGBTQ and gender nonconforming youth at higher rates than other kids.¹⁵⁵ Being placed on the sex offender registry is a harsh punishment that follows young people

151. See FINKELHOR ET AL., *supra* note 23, at 10 (discussing different community approaches to juvenile sex crimes, including an aggressive law enforcement approach). See VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (2010), for a more comprehensive discussion of the different theories of criminal punishment.

152. RICHARD B. BELZER, THE COSTS AND BENEFITS OF SUBJECTING JUVENILES TO SEX-OFFENDER REGISTRATION AND NOTIFICATION 5–8 (2015).

153. Elizabeth J. Letourneau & Michael F. Caldwell, *Expensive, Harmful Policies that Don't Work, or How Juvenile Sexual Offending Is Addressed in the U.S.*, 8 INT'L J. BEHAV. CONSULTATION & THERAPY 23, 26 (2013).

154. Charisa Smith, *#WhoAmI?: Harm and Remedy for the Youth of the #MeToo Era*, 23 U. PA. J. L. & SOC. CHANGE 295, 326–27 (2020).

155. Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 173, 216–21, 226–27 (2017).

for life and can be life-altering: dictating where they can live and work and branding them with a “scarlet letter” of sorts.¹⁵⁶ Judges and district attorneys know the harshness of this sentence, and there are indications that they may actually prosecute fewer juvenile sex crimes in states that have sex offender registry requirements.¹⁵⁷

As research about adolescent brain development progresses, and the reality of overcriminalization and over-policing of people of color, and Black boys in particular, enters the public consciousness, the trend has been to look for alternatives to criminal punishment for young offenders.¹⁵⁸ Schools have not been immune from this examination of racist patterns in policing. Since the murder of George Floyd by a Minneapolis police officer in May 2020, schools in Minneapolis, Denver, Seattle, and Portland have cut ties with their police departments, and many more districts have faced renewed pressure from activists to eliminate or drastically alter the use of police in schools.¹⁵⁹ A turn towards increasing criminalization of juvenile sex crimes would be a step in the wrong direction.

156. Letourneau & Caldwell, *supra* note 153, at 26; *see also* Sarah Stillman, *The List*, NEW YORKER (Mar. 6, 2016), <https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> [<https://perma.cc/QZ5K-L8UL>] (listing some of the consequences of being on the sex offender registry for crimes committed as a juvenile, such as “[h]omelessness; getting fired from jobs; taking jobs below minimum wage, with predatory employers; not being able to provide for your kids; losing your kids; relationship problems; deep inner problems connecting with people; deep depression and hopelessness; this fear of your own name; the terror of being Googled”).

157. Letourneau & Caldwell, *supra* note 153, at 27.

158. *See* Smith, *supra* note 154, at 342 (“[A] scientific consensus has emerged that adolescents should be considered within a special legal category; that the overwhelming majority of offending youth under eighteen should remain in juvenile court to account for their diminished culpability, developmental capacity, and amenability to rehabilitation and treatment; and that youth under eighteen are not as equally mature as adults.”).

159. *See* Dahlia Bazzaz & Hannah Furfaro, *Police Presence at Seattle Public Schools Halted Indefinitely*, SEATTLE TIMES (Aug. 12, 2020), <https://www.seattletimes.com/education-lab/police-presence-at-seattle-public-schools-halted-indefinitely/> [<https://perma.cc/2LDZ-S8AK>]; Kalyn Belsha, *Some School Districts Are Cutting Ties with Police. What's Next?*, CHALKBEAT (June 9, 2020), <https://www.chalkbeat.org/2020/6/9/21285709/some-school-districts-are-cutting-ties-with-police-whats-next> [<https://perma.cc/TC64-RZPF>]; Lauren Camera, *The End of Police in Schools*, U.S. NEWS (June 12, 2020), <https://www.usnews.com/news/the-report/articles/2020-06-12/schools-districts-end-contracts-with-police-amid-ongoing-protests> [<https://perma.cc/V4J9-SQ76>]; Katie Reilly, *Oakland Is Disbanding its School Police Force as George Floyd's Death Drives the Push for Police-Free Schools*, TIME (June 25, 2020), <https://time.com/5859452/oakland-school-police/> [<https://perma.cc/MVR7-D3XW>]; Mary Retta, *Minneapolis Public Schools Abolished Their Police First*, NATION (June 19, 2020), <https://www.thenation.com/article/activism/minneapolis-public-schools/> [<https://perma.cc/2NYG-JSWR>].

Instead, schools would be better off developing effective policies on sexual harassment and assault and communicating to teachers the best ways to recognize and shut down harassment when it occurs.

III. Fulfilling the Promise of Title IX For K-12 Students

A. *Karasek Can Reshape Liability and Restore Title IX, But Not Alone*

Like most solutions to complicated problems, pre-assault claims in the vein of *Karasek* and *Simpson* are not a cure-all for the ills of peer-on-peer sexual harassment and assault in the nation's primary and secondary schools. To truly revolutionize Title IX liability, we need a reimagining of how courts approach these cases. Why is this level of ignorance and dereliction of duty in schools acceptable? Children who are sexually harassed or assaulted in school by their peers are victimized twice: first by their classmates and then by the institutions who are supposed to protect them. In failing young victims, we fail young perpetrators as well, kids who often need just as much support as those they victimize.¹⁶⁰

Under the current system, parents who drop their kindergarteners off at school and head to their workplaces enjoy more robust protections against sexual harassment and assault than their children.¹⁶¹ Restructuring liability under Title IX so that schools no longer “have an incentive not to know about sexual harassment . . . and when they do, to do little to nothing about it”¹⁶² will undoubtedly be a long process, but a necessary one if the goal of equal access to education regardless of sex is to be realized. Pursuing *Karasek*-style pre-assault claims that hold institutions responsible for their failures to address sexual violence is only the first step. Real change will require not only legal and policy transformation but cultural shifts in schools and in society at large—a tall order.

B. *Recommendations for a New Department of Education Approach*

On December 22, 2020, then President-Elect Biden announced his plans to nominate Miguel Cardona as his Secretary of

160. See sources cited, *supra* note 23.

161. McGinley, *supra* note 103, at 209 (“[T]he 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.”).

162. MacKinnon, *supra* note 20, at 2085.

Education.¹⁶³ Cardona, who was confirmed by the Senate on March 1, 2021, inherits a DOE that is facing a wide variety of pressing issues.¹⁶⁴ Schools across the country are grappling with a mounting crisis as COVID case numbers continue to climb and districts must make tough decisions between delivering education remotely or in-person.¹⁶⁵ Under Betsy DeVos, the Trump administration's DOE attempted to promote alternatives to traditional public schools, rolled back Obama-era protections for transgender students, and passed new Title IX guidance, all of which advocates expect the Biden administration's DOE to address.¹⁶⁶ Cardona's first moves as Education Secretary have indicated that his primary goal is to get students back to in-person schooling as quickly as possible.¹⁶⁷ This is an admirable mission, as many students (and their caretakers) have struggled with remote learning.¹⁶⁸ As students return to in-

163. Elissa Nadworny & Cory Turner, *Biden Picks Connecticut Schools Chief Miguel Cardona as Education Secretary*, NPR (Dec. 22, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/22/949114642/biden-to-pick-connecticut-schools-chief-miguel-cardona-as-education-secretary> [<https://perma.cc/Q4WX-2QQ3>].

164. Michael Stratford, *Senate Confirms Cardona as Education Secretary*, POLITICO (Mar. 1, 2021), <https://www.politico.com/news/2021/03/01/senate-cardona-confirmation-education-secretary-472163> [<https://perma.cc/7G75-2VJP>].

165. *Operating Schools During COVID-19: CDC's Considerations*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> [<https://perma.cc/M5KP-5ANF>] (detailing CDC recommendations for how schools should operate during the pandemic); Dyani Lewis, *What New COVID Variants Mean for Schools Is Not Yet Clear*, NATURE (Jan. 21, 2021), <https://www.nature.com/articles/d41586-021-00139-3> [<https://perma.cc/B8HK-PWLF>] (explaining that new, more contagious variants of COVID may have an impact on the ability of children to attend in-person school); Kate Taylor, *13,000 School Districts, 13,000 Approaches to Teaching During Covid*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/us/schools-coronavirus.html> [<https://perma.cc/YH8R-T3DK>] (reporting on the many different measures schools are taking to educate students).

166. Erica L. Green, *Biden's Education Department Will Move Fast to Reverse Betsy DeVos's Policies*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/politics/biden-education-devos.html> [<https://perma.cc/4SMX-2BAG>]; Cory Turner, *How Education Secretary Betsy DeVos Will Be Remembered*, NPR (Nov. 19, 2020), <https://www.npr.org/2020/11/19/936225974/the-legacy-of-education-secretary-betsy-devos> [<https://perma.cc/WX4P-PVFF>]; Jo Yurcaba, *After Trump 'Onslaught': What LGBTQ Advocates Want from Biden's First 100 Days*, NBC NEWS (Jan. 19, 2021), <https://www.nbcnews.com/feature/nbc-out/what-lgbtq-advocates-want-biden-s-first-100-days-n1254751> [<https://perma.cc/3BQ3-BTZ7>].

167. Rachel Martin & Cory Turner, *New Education Secretary Miguel Cardona Wants Schools Open 'As Soon As Possible'*, NPR (Mar. 4, 2021), <https://www.npr.org/2021/03/04/973561015/education-secretary-cardona-has-a-plan-to-open-schools-for-in-person-learning> [<https://perma.cc/SB28-4YA2>].

168. See Ginia Bellafante, *Are We Losing a Generation of Kids to Remote Learning?*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/nyregion>

person learning, some will once again face in-person sexual harassment and assault and will need the support of their institutions. Other students will be dealing with the ramifications of sexual harassment that happened during online schooling.¹⁶⁹ Institutions will need to deal with these new instances of online sexual harassment as well as lingering effects from incidents that occurred before the switch to remote school occurred in March 2020.¹⁷⁰ Unfortunately, the vast majority of K-12 schools will be unprepared for this task.

A top priority for the new DOE should also be issuing guidance for school districts that establishes that districts have an affirmative duty to educate teachers and administrators on signs of student sexual abuse and how to address sexual harassment and abuse. Additionally, the administration should advocate for a legislative fix to Title IX that eliminates the *Gebser/Davis* standard, which would allow many more claims to survive even the pre-trial motion stage and put schools on notice that they must conform to Title IX regulations. To truly fix Title IX, schools need not only clear information on best practices with regards to dealing with sexual harassment and creating safe schools, but also the knowledge that the DOE takes enforcement of Title IX seriously. Without this kind of two-pronged approach, schools will not be incentivized to take proactive measures that prevent sexual assault before it occurs, and Title IX will continue to fail students around the country.

/nyc-remote-learning.html [https://perma.cc/8W2D-QZP2]; Erica L. Green, *Surge of Student Suicides Pushes Las Vegas Schools to Reopen*, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/2021/01/24/us/politics/student-suicides-nevada-coronavirus.html> [https://perma.cc/CTZ5-UG23]; Alec MacGillis, *The Students Left Behind by Remote Learning*, PROPUBLICA (Sept. 28, 2020), <https://www.propublica.org/article/the-students-left-behind-by-remote-learning> [https://perma.cc/N3ZK-KX9T]; Catherine E. Shoichet, *These Kids Are Getting Left Behind When Schools Go Online*, CNN (July 31, 2020), <https://www.cnn.com/2020/07/31/us/distance-learning-inequality/index.html> [https://perma.cc/EWE2-43R2]. *But see* Nora Fleming, *Why Are Some Kids Thriving During Distance Learning?*, EDUTOPIA (Apr. 24, 2020), <https://www.edutopia.org/article/why-are-some-kids-thriving-during-remote-learning> [https://perma.cc/3YYJ-WW2M] (detailing how children with social anxiety and some learning disabilities are doing better with remote learning).

169. *See* EQUAL RTS. ADVOCS., GUIDANCE FOR TITLE IX ADMINISTRATORS DURING COVID-19 (2020), <https://www.equalrights.org/issue/equality-in-schools-universities/covid19-guidance-title-ix-administrators/> [https://perma.cc/2JLF-4ZDV]; Shiwali Patel & Amy Leipziger, *Schools Adjusting to Remote Learning Are Leaving Survivors of Sexual Violence Behind*, HILL: CHANGING AMERICA: OPINION (Feb. 3, 2021), <https://thehill.com/changing-america/opinion/537218-schools-adjusting-to-remote-learning-are-leaving-survivors-of-sexual> [https://perma.cc/8QMM-RAL7].

170. EQUAL RTS. ADVOCS., *supra* note 169.

Conclusion

When Title IX was passed in 1972, it was seen as a workaround for the stalled Equal Rights Amendment.¹⁷¹ In the popular imagination, it remains largely a federal law governing women's participation in high school and college sports.¹⁷² Title IX's potential is huge: the promise of an educational environment in which no student is subject to harassment or abuse on the basis of sex is one that many people have fought for. Unfortunately, the current state of Title IX precedent when it comes to peer-on-peer sexual assault at the K-12 level falls far short of this promise. Children across the country are subject to horrifying instances of sexual harassment and assault while at school, and the teachers and administrators who are supposed to protect them are either unaware, ignorant, or incompetent. The possibility of bringing *Karasek*-style pre-assault claims that force schools to take a more holistic approach to the evaluation of not only Title IX reporting procedures, but the culture of their institutions, offers a promising avenue of Title IX liability. While pre-assault claims at the K-12 level will not fix sexual assault and harassment in schools overnight, it offers a chance to materially improve the lives of many thousands of children in the nation's schools, and to send a message to all school districts and officials that the federal government takes adherence to Title IX standards seriously.

171. Dana Hunsinger Benbow, *Sen. Birch Bayh, in Tears: 'I Had No Idea That Title IX Would Have This Kind of Impact'*, INDYSTAR (Mar. 14, 2019), <https://www.indystar.com/story/sports/2019/03/14/sen-birch-bayh-tears-i-had-no-idea-title-ix-would-have-impact/3161553002/> [<https://perma.cc/5S68-LKTD>].

172. See sources cited *supra* note 30.