

WHERE DO WE DRAW THE LINE? THE DELIBERATE
INDIFFERENCE STANDARD AND WHY
VULNERABILITY TO SEXUAL HARASSMENT
MATTERS IN TITLE IX LIABILITY

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INTRODUCTION

With its large green fields and buildings that look like castles, Kansas State University’s (KSU) campus makes one feel like they are in a fairy tale.¹ However, there was not a happily ever after for Sara Weckhorst, a freshman at KSU.² While at an off-campus fraternity, Ms. Weckhorst partook in drinking the alcohol provided by the fraternity and blacked out.³ A fraternity member raped her in his truck while other students watched.⁴ The fraternity member then raped her twice more.⁵ After leaving her “naked and passed out,” another member of the fraternity raped her.⁶ When Ms. Weckhorst reported the assaults to an investigator in the university’s Affirmative Action Office, they refused to investigate the rapes because they occurred off campus and were therefore not under the control of the university.⁷

For decades, student-on-student sexual assault has been a significant problem on college and university campuses.⁸ Many

¹ See *An Ariel View of the Kansas State University Campus* (photograph), in Tim Fitzgerald, *From Fitz: Student’s Tweet Draws Quick Reaction*, GOPOWERCAT (June 26, 2020), <https://247sports.com/college/kansas-state/Article/Kansas-State-University-reaction-student-tweet-George-Floyd-148576271> [<https://perma.cc/U2AS-Y7S8>].

² See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1100 (10th Cir. 2019).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST, TARA D. WARNER, BONNIE S. FISHER & SANDRA L. MARTIN, NAT’L INST. OF JUST., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY*:

institutions of higher education have purposefully ignored the student-on-student sexual assaults that occur on their campuses and have deterred survivors from reporting or pressing criminal charges against their alleged perpetrators.⁹ As a result, many sexual assault survivors have pursued legal action against their schools for failing to provide sufficient investigative and judicial proceedings when responding to accusations of assault.¹⁰

In order to pursue such legal action, victims use Title IX of the Education Amendments of 1972, a federal civil rights law that prohibits sex-based discrimination in federally funded education programs and activities.¹¹ The Supreme Court has held that Title IX establishes a private cause of action for students who experience sexual harassment at an educational institution that receives federal funding.¹² This private cause of action permits recovery of monetary damages when the institution is deliberately indifferent to the harassment of a student after it is notified of prior harassment.¹³ An educational institution acts with “deliberate indifference” when it has notice that sexual harassment has occurred but then ignores the harassment by not properly investigating it or not implementing supportive measures for the complainant.¹⁴ As

FINAL REPORT, at xviii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/G8VB-TMUQ>]. For information regarding statistics on sexual assault, see NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [<https://perma.cc/5GZX-6QBZ>] (indicating that “[o]ne in 5 women and one in 16 men are sexually assaulted while in college”).

⁹ See Lauren P. Schroeder, Comment, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1216 (2014); see also Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 219–20 (2011) (discussing the information problem that creates incentives for schools to avoid knowledge of campus sexual violence); Tyler Kingkade, *USC Mislabels Sexual Assault to Keep Crime Numbers Low, Clery Complaint Says*, HUFFPOST: COLLEGE (Aug. 12, 2013, 8:06 PM), https://www.huffpost.com/entry/usc-sexual-assault_n_3741267 [<https://perma.cc/Z3U8-VL3E>] (discussing recent allegations by students at the University of Southern California that the school failed to both respond to and disclose reports of sexual assault).

¹⁰ See, e.g., Allie Grasgreen, *Wrong People on Trial?*, INSIDE HIGHER ED (June 7, 2011), <https://www.insidehighered.com/news/2011/06/07/wrong-people-trial> [<https://perma.cc/J3M9-BF5L>].

¹¹ 20 U.S.C. § 1681(a).

¹² *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (explaining the evolution of the Title IX private cause of action in Supreme Court case law).

¹³ Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1, 3 (2017).

¹⁴ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30044 (May 19, 2020) (codified at 34 C.F.R. pt.

a result of an educational institution's deliberate indifference after receiving an initial report of assault, some plaintiffs experience harassment a second time, also known as "post-notice harassment."¹⁵

However, courts are split over whether a student may recover monetary damages if the institution's deliberate indifference did not result in actual post-notice harassment and only vulnerability to it.¹⁶ For instance, the Sixth Circuit has held that in order for a plaintiff to demonstrate that an institution was deliberately indifferent post-harassment, the plaintiff must undergo actual harassment a second time.¹⁷ Conversely, the Tenth Circuit in *Farmer v. Kansas State University*, as well as the First and Eleventh Circuits, has focused on the severity of the initial harassment and how an institution's deliberate indifference during a rape investigation can lead to further harm that is not necessarily sexual in nature but may lead to a denial of equal access to education.¹⁸ In other words, is it enough for a plaintiff to be merely vulnerable to further harassment, or must a plaintiff suffer actual harassment a second time to state a viable Title IX claim?¹⁹

In March 2019, the Court of Appeals for the Tenth Circuit answered this question in *Farmer*.²⁰ It affirmed the district court's holding that KSU violated Title IX by being deliberately indifferent to reports it received of student-on-student sexual harassment, in this case, rape.²¹ The court reasoned that it was sufficient for the students to allege that the university turning a blind eye to their assaults made them "vulnerable to" sexual harassment without requiring an allegation of further actionable sexual harassment.²² In doing so, the court rejected KSU's claim that in order for the students to state a Title IX claim, they

106); *id.* at 30181 ("[S]upportive measures must be designed to restore or preserve equal access and must not unreasonably burden the other party, which may include measures also designed to protect safety or the recipient's educational environment, or deter sexual harassment.").

¹⁵ Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 618, 623 (6th Cir. 2019).

¹⁶ *Id.*; Boggs, *Circuit Split: University Harassment Claim Requires Further Student-on-Student Harassment*, LEXICOLOGY (Jan. 10, 2020), <https://www.lexology.com/library/detail.aspx?g=306c07fb-fc1c-4774-8e83-a52c8481e3d5> [https://perma.cc/8JAT-XYR4].

¹⁷ *Id.* at 618.

¹⁸ See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1105 (10th Cir. 2019); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007); *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007).

¹⁹ See *Farmer*, 918 F.3d at 1105 ("Future cases will undoubtedly be asked to draw lines on when a victim's fear of further sexual harassment is sufficient to deprive that student of educational opportunities that the educational institution offers to others . . .").

²⁰ *Id.* at 1094.

²¹ *Id.*

²² *Id.* at 1097.

must have alleged that the university's deliberate indifference caused each plaintiff to experience further actionable incidents of harassment by other students, such as being raped again.²³

This Case Note will argue that the *Farmer* court correctly concluded that vulnerability to subsequent harassment caused by a university's deliberate indifference is sufficient harm to state a viable Title IX claim.²⁴ In fact, the *Farmer* interpretation better encompasses the ultimate goal of Title IX: to prevent discrimination that could lead to the injury of being denied access to educational activities that all students deserve.²⁵ Survivors such as the plaintiffs in *Farmer* should not have to experience rape a second time to receive Title IX protection.²⁶ Simply living in fear of being sexually harassed again should be enough to state a viable Title IX claim if that fear prevents a student from accessing an educational institution's programs and activities.²⁷ Such an interpretation is better supported by scientific research on the psychological effects of sexual harassment, would make it less daunting for survivors to report sexual assault, and would hold educational institutions more accountable and push them to develop more rigorous investigative processes.²⁸

Part I of this Case Note explores the legal background of the *Farmer* case by discussing the text and history of Title IX legislation as well as the Supreme Court's interpretation of the statute.²⁹ Part II goes on to examine the facts of *Farmer*.³⁰ Part II continues by discussing the procedural history of *Farmer*, which includes the district court's holding and KSU's appeal.³¹ Part III establishes the Tenth Circuit Court of Appeals' holding.³² Part IV analyzes *Farmer* and argues that the court correctly decided that vulnerability to sexual harassment is sufficient harm to state a claim under Title IX.³³ Part IV goes on to interpret cases with opposite holdings to that of *Farmer*, which reveals the presence of

²³ *Id.*

²⁴ *See id.*

²⁵ *See* 20 U.S.C. § 1681(a).

²⁶ *See Farmer*, 918 F.3d at 1104–05.

²⁷ *See id.*

²⁸ *See infra* Section IV.A.

²⁹ *See infra* Part I.

³⁰ *See infra* Sections II.A–II.B.

³¹ *See infra* Section II.C.

³² *See infra* Part III.

³³ *See infra* Section IV.A.

a circuit split demonstrating why *Farmer* is correct in holding that vulnerability to further harassment is sufficient harm under Title IX.³⁴

I. BACKGROUND

A. *Title IX Legislation*

1. 20 U.S.C. § 1681(a)

Title IX was modeled after the Civil Rights Act of 1964.³⁵ “Title VI of the Civil Rights Act provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³⁶ While the Civil Rights Act is almost indistinguishable from Title IX, it does not provide protection from discrimination based on sex.³⁷

Eight years later, Congress passed Title IX.³⁸ Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving

³⁴ See *infra* Section IV.B.

³⁵ 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, 326 (2012). For further discussion of the Civil Rights Act of 1964, see *Cannon v. Univ. of Chi.*, 441 U.S. 677, 684–85 (1979).

³⁶ Anderson, *supra* note 35, at 326 (alteration in original) (quoting 42 U.S.C. § 2000d) (noting that Senator Birch Bayh of Indiana introduced an amendment in the Senate that led to our current-day Title IX statute). As Representative John Lindsay commented,

Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual

110 CONG. REC. 1540 (1964).

³⁷ Anderson, *supra* note 35, at 326. As Senator John Pastore commented, “the purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination.” 110 CONG. REC. 7062 (1964).

³⁸ See 20 U.S.C. § 1681(a).

Federal financial assistance”³⁹ Senator Birch Bayh of Indiana explained that the purpose of this new legislation was to combat the destructive discrimination against women in the American educational system.⁴⁰ Senator Bayh went on to note that because education provides access to jobs and financial security, discrimination becomes even more detrimental in the realm of educational institutions.⁴¹ Thus, he believed there was a need for far-reaching measures to provide women with effective legal protection from the lasting discrimination that was only serving to maintain second-class citizenship for American women.⁴²

Moreover, Congress enacted Title IX under its spending power.⁴³ It did so by conditioning federal funding on an educational institution’s promise not to discriminate.⁴⁴ While the express language of Title IX only forbids “sex discrimination,” “courts have determined that the term ‘discrimination’ also encompasses sexual harassment, hostile educational environment, and sexual assault.”⁴⁵

³⁹ *Id.*; see also *Higher Education Amendments of 1970: Hearings Before the Subcomm. on Educ. of the Comm. on Lab. and Pub. Welfare*, 91st Cong. 268–69 (1970) (“The Congress hereby declares it to be the policy of the United States to provide equality of educational opportunity to all persons regardless of race, color, religion, sex, national origin, or social class. Although the American education system has pursued this objective, inequalities of opportunity remain pronounced. To achieve equality will require far more dependable knowledge about the processes of learning and education than now exists or can be expected from present research and experimentation in this field.”).

⁴⁰ 118 CONG. REC. 5803 (1972). Senator Bayh explained that the purpose of Title IX was to combat “the continuation of corrosive and unjustified discrimination against women” in the American educational system. He decried the “sex discrimination [that] reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.” *Id.*; see also Rachel Schwarz, Note, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-Evaluate the Three-Prong Compliance Test*, 20 WASH. & LEE J. C.R. & SOC. JUST. 633, 637 (2014) (“Title IX’s original purpose was to grant women more academic opportunities, better employment options after college, and aimed to prohibit sex discrimination generally.”); EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS* 77–112 (2008) (evaluating the history of Title IX and the buildup that led to its enactment).

⁴¹ See 118 CONG. REC. at 5806–07.

⁴² *Id.* at 5804 (“Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.”).

⁴³ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

⁴⁴ *Id.* at 275.

⁴⁵ Cormier, *supra* note 13, at 6 (footnotes omitted); see also *Morgan v. Town of Lexington*, 823 F.3d 737, 745 (1st Cir. 2016) (“Sexual harassment in schools can constitute prohibited sex-based discrimination actionable under Title IX where there is a ‘hostile environment’” (quoting *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65–66 (1st Cir. 2002)); Seth Michael Engel, *Fostering a Safe Warfighting Environment: Applying Title IX and Student Discipline in Higher Education to the Military’s Fight Against Sexual Assault*, 32 WIS. J.L. GENDER & SOC’Y 133, 138 (2017) (“[S]ex discrimination has been interpreted to include both sexual harassment and

2. Title IX Enforcement

Title IX is enforceable by federal administrative agencies and through private causes of action.⁴⁶ In August 2020, the U.S. Department of Education under the Trump administration released its final regulations governing sexual assault under Title IX.⁴⁷ Title IX requires that agencies enact regulations “to provide guidance to recipients of federal financial assistance who administer education programs or activities on Title IX enforcement.”⁴⁸ The U.S. Department of Education, Office for Civil Rights (OCR) enforces and investigates Title IX regulations.⁴⁹ Specifically, OCR files a complaint against a school and investigates a school’s failure to eliminate discrimination such as sexual harassment.⁵⁰ If a recipients of federal financial assistance do not abide by the regulations, they risk losing their funding.⁵¹

Even so, this does not mean that educational institutions must promise that sexual harassment will never take place on their campuses.⁵² However, they will be held responsible for responding to sexual harassment in a way that prevents a survivor’s equal access to education.⁵³ While universities cannot guarantee that sexual

sexual assault. Title IX requires schools to address sexual assault not as a crime but as a form of discrimination and to take action to remedy the discriminatory harms caused by sexual assault.” (footnote omitted)).

⁴⁶ Farmer v. Kan. State Univ., 918 F.3d 1094, 1098 (10th Cir. 2019).

⁴⁷ See generally Off. for C.R., Dep’t of Educ., 34 C.F.R. pt. 106 (2020).

⁴⁸ *Synopsis of Purpose of Title IX, Legislative History, and Regulations*, JUSTIA (Apr. 2018), <https://www.justia.com/education/docs/title-ix-legal-manual/synopsis-of-purpose-of-title-ix> [<https://perma.cc/4DKC-BEJB>].

⁴⁹ See 20 U.S.C. § 1682; David Lanser, Comment, *Title IX, and How to Rectify Sexism Entrenched in NCAA Leadership*, 31 WIS. J.L. GENDER & SOC’Y 181, 191–92 (2016); see also *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, U.S. DEP’T OF EDUC. (Dec. 4, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html> [<https://perma.cc/A7U8-PMSX>].

⁵⁰ See sources cited *supra* note 49.

⁵¹ See sources cited *supra* note 49. For further discussion of Title IX enforcement, see David Lanser, *supra* note 49, at 191–92 (“If the institution is unwilling to cooperate, OCR can either initiate procedures to terminate the institution’s federal funding or refer the case to the U.S. Department of Justice, which can then enforce Title IX in federal court.”).

⁵² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30046 (May 19, 2020) (codified at 34 C.F.R. pt. 106) [hereinafter *Nondiscrimination on the Basis of Sex in Education Programs*]; see sources cited *supra* note 49.

⁵³ See *Nondiscrimination on the Basis of Sex in Education Programs*, *supra* note 52, at 30046.

harassment will never occur on their campuses, they must investigate and adjudicate whenever a complainant files a formal complaint.⁵⁴

B. *The Davis Deliberate Indifference Standard*

1. *Davis v. Monroe County Board of Education*

The leading Supreme Court case interpreting Title IX is *Davis v. Monroe County Board of Education*.⁵⁵ In *Davis*, the plaintiff, a fifth-grade student, was sexually harassed on several occasions by another fifth-grade student.⁵⁶ The fifth grader's parents reported the harassment to several school officials, but the school did not take any action to investigate or discipline the classmate for a period of five months.⁵⁷ The majority of the conduct took place in the actual classroom, which meant that the school did have control over the harasser and should have known about the harassment.⁵⁸ According to *Davis*, schools can only face liability under Title IX if the school "exercises substantial control over both the harasser and the context in which the known harassment occurs."⁵⁹ If the educational institution does not directly engage in the harassment, or rather does not have control over the harasser, "it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment," that is to make a plaintiff "liable," "vulnerable," or "expose[d]" to sexual harassment.⁶⁰ In other words, an educational institution's deliberate indifference must either cause a plaintiff to experience further actionable harassment *or* make them vulnerable to it.⁶¹

⁵⁴ *Id.* at 57. For further discussion on the Trump Administration's regulations, see Kenneth Lason, *Title IX and the Failure of Due Process*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 35 (2020).

⁵⁵ See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); see also Julie A. Klusas, Note, *Providing Students with the Protection They Deserve: Amending the Office of Civil Rights' Guidance or Title IX to Protect Students from Peer Sexual Harassment in Schools*, 8 TEX. F. ON C.L. & C.R. 91, 98 (2003) ("The Supreme Court first examined a school's liability for peer sexual harassment in *Davis v. Monroe County Board of Education*." (emphasis added)).

⁵⁶ *Davis*, 526 U.S. at 633–34.

⁵⁷ *Id.* at 634–35, 649.

⁵⁸ *Id.* at 646.

⁵⁹ *Id.* at 645.

⁶⁰ *Id.* at 644–45 (first alteration in original) (emphasis added).

⁶¹ *Id.* at 645 ("[T]he deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." (second alteration in original) (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966))).

Furthermore, *Davis* describes the amount and type of sexual harassment that constitutes sex discrimination under Title IX.⁶² The Court held that a private Title IX damages action may lie against a school board in cases of student-on-student harassment; however, this is only the case where an educational institution is deliberately indifferent to sexual harassment of which it has “actual knowledge, [and the harassment] is so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”⁶³ Because the *Davis* Court defined sexual harassment as having to be severe, pervasive, and objectively offensive, the present circuit split is over whether the Court meant to include vulnerability to harassment as its own separate cause of action.⁶⁴

2. Sexual Harassment

The Court in *Davis* established a four-part test to determine whether a plaintiff’s Title IX claim of sexual harassment can survive.⁶⁵ As mentioned above, in order for a plaintiff to win a Title IX claim, they must prove that the sexual harassment was severe, pervasive, objectively offensive, and that, as a result, they were denied equal access to education.⁶⁶ The federal regulations further explain that these elements “must be evaluated in light of the known circumstances[,] [] depend on the facts of each situation, [and are] determined from the perspective of a reasonable person standing in the shoes of the complainant.”⁶⁷ The regulations interpret *Davis* as subjective with respect to “whether the complainant viewed the conduct as unwelcome,” while the elements of severity, pervasiveness, and objective offensiveness are interpreted under a reasonable person standard to determine whether there has

⁶² See *id.* at 650–51.

⁶³ *Id.* at 650.

⁶⁴ See *infra* Sections IV.A.3–IV.B. Compare *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007) (vulnerability is sufficient), with *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019) (plaintiff must prove actual harassment). See also Recent Case, *Kollaritsch v. Michigan State University Board of Trustees: Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims.*, 133 HARV. L. REV. 2611, 2614 (2020) [hereinafter HARV. L. REV.].

⁶⁵ *Davis*, 526 U.S. at 633.

⁶⁶ *Id.*

⁶⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30156 (May 19, 2020) (codified at 34 C.F.R. pt. 106).

been a denial of equal access to education.⁶⁸ Though the court in *Farmer* did not dispute whether the victims suffered sexual harassment, it focused on the severity and pervasiveness of the initial assaults to determine the significance of KSU's inaction and whether the plaintiffs' vulnerability to harassment as a result of such inaction was sufficient to deny them equal access to education.⁶⁹ The Sixth Circuit, on the other hand, only focused on the subsequent reports of harassment without considering the severity or pervasiveness of the initial assaults.⁷⁰

3. Actual Knowledge

The Trump Administration's Title IX regulations provided that actual knowledge means either notice or allegations of sexual harassment.⁷¹ In postsecondary institutions, "notice to the Title IX Coordinator or any official with authority conveys actual knowledge" to the educational institution.⁷² Notice exists whenever any official with authority witnesses, hears, or receives a written or verbal complaint about sexual harassment.⁷³ Postsecondary institutions have wide discretion to create their own employee reporting policy to decide which employees are mandatory reporters.⁷⁴

4. Deliberate Indifference

The Court in *Davis* held that an educational institution with actual knowledge of sexual harassment commits intentional discrimination if it responds in a deliberately indifferent manner.⁷⁵ *Davis* states that an educational institution acts with deliberate indifference when it responds to sexual harassment in a manner that is "clearly unreasonable

⁶⁸ *Id.* at 30165.

⁶⁹ See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103–06 (10th Cir. 2019).

⁷⁰ See *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 618 (6th Cir. 2019).

⁷¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30192 (May 19, 2020) (codified at 34 C.F.R. pt. 106).

⁷² *Id.* at 30040.

⁷³ *Id.*

⁷⁴ *Id.* at 30043.

⁷⁵ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30038.

in light of the known circumstances.”⁷⁶ The Trump Administration’s regulations adopted *Davis*’s definition of deliberate indifference but also provided more information about what makes an educational institution’s response reasonable.⁷⁷ For example, the regulations provide that what amounts to reasonableness includes when an educational institution’s response is prompt, consists of supportive measures to the complainant, and ensures that the Title IX Coordinator contacts each complainant to discuss supportive measures.⁷⁸ The regulations also mandate the Title IX Coordinator to provide instructions on filing a formal complaint.⁷⁹

II. FACTS & PROCEDURAL HISTORY OF *FARMER V. KANSAS STATE UNIVERSITY*

A. Plaintiff Tessa Farmer

In March 2015, a KSU student named Tessa Farmer went to a fraternity party and became inebriated.⁸⁰ A designated driver took her back to her dorm room.⁸¹ Subsequently, another KSU student named T.R. invited Farmer to the fraternity house where the party was continuing and offered to pick her up and drive her there.⁸² Farmer agreed, and the two had sex at the fraternity house.⁸³ After T.R. left the room, another KSU student named C.M., who had been hiding in the closet, emerged from the closet and raped Farmer.⁸⁴ When T.R. returned, he was not surprised when he saw C.M.⁸⁵

Following this, Farmer gave actual notice of the rapes to several different school officials.⁸⁶ She reported the rape to the Riley County Police Department and to the director of the KSU Center for Advocacy,

⁷⁶ *Davis*, 526 U.S. at 648.

⁷⁷ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30044.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1099 (10th Cir. 2019).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

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Response and Education (CARE).⁸⁷ The CARE director told Farmer that, “although she could report the rape to the KSU Interfraternity Council (IFC), the IFC would not investigate the rape but only the fraternity more generally.”⁸⁸ Nevertheless, Farmer filed a complaint with the IFC; three months later, the IFC told Farmer that the fraternity chapter had not violated any IFC policies.⁸⁹ Then, Farmer “filed a complaint with KSU’s Office of Institutional Equity, alleging that C.M. had violated KSU’s sexual misconduct policy.”⁹⁰ However, Farmer was told that “that policy did not cover fraternity houses.”⁹¹

As a result of KSU’s refusal to investigate the rape, Farmer lived in fear of running into her attacker.⁹² More specifically, Farmer struggled in school, stopped seeing her friends, removed herself from KSU activities, fell into a depression, and began slitting her wrists.⁹³ Farmer alleges that by refusing to investigate the rape, KSU made students more vulnerable to rape because it sent a message to perpetrators that students can rape other students without fearing disciplinary action.⁹⁴ Consequently, sending this message adversely impacted the educational environment of the university for survivors.⁹⁵

B. *Plaintiff Sara Weckhorst*

In April 2014, another KSU student named Sara Weckhorst attended a fraternity party where she became inebriated and blacked out.⁹⁶ J.F., another KSU student, raped Weckhorst in a truck in front of fifteen other students.⁹⁷ J.F. then drove Weckhorst back to the fraternity house and sexually assaulted her on the way there.⁹⁸ Once at the fraternity house, J.F. raped Weckhorst again and left her naked and

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1099–1100 (“Farmer . . . missed classes, struggled in school, secluded herself from friends, withdrew from KSU activities in which she had previously taken a leadership role, fell into a deep depression, slept excessively, and engaged in self-destructive behaviors such as excessive drinking and slitting her wrist.”).

⁹⁴ *Id.* at 1100.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

passed out.⁹⁹ Subsequently, another fraternity member named J.G. raped Weckhorst.¹⁰⁰

Like Farmer, Weckhorst gave actual notice to several school officials.¹⁰¹ She filed a complaint with the KSU Affirmative Action Office.¹⁰² However, the investigator who interviewed Weckhorst told her that KSU could not do anything about the rapes or the two student-assailants because the rapes did not occur on campus.¹⁰³ Weckhorst then reported the rapes to the police.¹⁰⁴ In the meantime, the KSU Women's Center called the two assailants and told them that Weckhorst had filed charges against them, giving them the opportunity to coordinate their stories.¹⁰⁵ Weckhorst later met with two associate deans for student life at KSU who told her they could not do anything because the rapes occurred off campus.¹⁰⁶ Without Weckhorst's permission, one of the associate deans took language from one of Weckhorst's emails and used it to file a complaint, which released Weckhorst's private information to student peers on the IFC board.¹⁰⁷

As a result of KSU's refusal to investigate the rape and the unauthorized release of information, Weckhorst was effectively denied access to her education.¹⁰⁸ Her grades decreased, and she lost her academic scholarship.¹⁰⁹ Weckhorst not only suffered academically, but she also experienced a myriad of emotional harms such as posttraumatic stress disorder and dissociation from her friends and family.¹¹⁰ Like Farmer, Weckhorst alleged that KSU made students

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1100–01. (“This action ‘released Sara’s highly sensitive, private information . . . without any chance of this action benefitting Sara’ because the Office of Greek Affairs ‘did not have jurisdiction to punish the student-assailants, only the fraternity.’ Because of this unauthorized release of information, Weckhorst has lived day-to-day not knowing who she might encounter who knows the details about the nightmare she endured.”).

¹⁰⁸ *See id.* at 1101.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (explaining that Weckhorst suffered from “‘post-traumatic stress disorder,’ ha[d] nightmares, ha[d] distanced herself from family and friends, and ‘ha[d] decreased her involvement in her sorority and philanthropy and ha[d] turned down leadership opportunities’”).

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more vulnerable to rape because it encouraged perpetrators to continue raping students without the fear of disciplinary action.¹¹¹

C. Procedural History

1. The District Court's Holding

The plaintiffs sued KSU separately, both asserting claims under Title IX.¹¹² The “[p]laintiffs base[d] their Title IX claims on “KSU’s deliberate indifference *after* [they] reported to KSU that other students had raped them.”¹¹³ They relied on the *Davis* vulnerability standard, which states that a university’s deliberate indifference must, at a minimum, cause students to undergo further actionable harassment or make them vulnerable to it.¹¹⁴ The plaintiffs asserted that KSU’s deliberate indifference to their reports of rape made them vulnerable to further harassment because the perpetrators were left unchecked, which led them “to be deprived of educational benefits that were available to other students.”¹¹⁵ In other words, it was the *risk* of actual further harassment, rather than actual further harassment itself, that formed the basis of the plaintiffs’ complaint.¹¹⁶

In each case, while KSU did not deny that its actions were deliberately indifferent, it filed a Rule 12(b)(6) motion to dismiss all claims, as the plaintiffs “had failed to allege that any deliberate indifference by KSU had caused harm . . . that is actionable under Title IX.”¹¹⁷ KSU argued that in order to state a Title IX claim, the plaintiffs must allege that the university’s deliberate indifference *actually caused* “each of them to undergo *further incidents* of actual harassment by other students.”¹¹⁸ Citing *Davis*, the district court disagreed, holding that each plaintiff had sufficiently alleged an actionable Title IX violation because, under Title IX, a plaintiff must only allege (1) that the sex discrimination “occurred within a KSU educational program or activity;” (2) that “KSU had actual knowledge of, but was deliberately indifferent to, sexual harassment that was so severe, pervasive and

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1098.

¹¹⁴ *Id.* at 1097; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).

¹¹⁵ *Farmer*, 918 F.3d at 1097.

¹¹⁶ *See id.* at 1102.

¹¹⁷ *Id.*; *see generally* Fed. R. Civ. P. 12(b)(6).

¹¹⁸ *Id.* at 1097.

objectively offensive” that it denied them equal access to education; and (3) that KSU’s deliberate indifference caused each plaintiff “to undergo harassment *or made her liable or vulnerable to it.*”¹¹⁹

2. KSU’s Appeal

Because the denial of a motion to dismiss is not ordinarily immediately appealable, KSU requested that the district court allow an interlocutory appeal to determine the following: (1) whether the plaintiff was required to allege that KSU’s deliberate indifference caused her to suffer *actual* further harassment, rather than only alleging that it made her liable or vulnerable to harassment; and (2) if the plaintiff was “required to plead actual further harassment, whether her allegations of deprivation of access to [equal] educational opportunities satisf[ied] this pleading requirement.”¹²⁰ The district court permitted KSU to pursue these interlocutory appeals.¹²¹

III. TENTH CIRCUIT COURT OF APPEALS HOLDING

In the Tenth Circuit Court of Appeals, the issue the court faced was not whether KSU was deliberately indifferent, since the court accepted as true the plaintiffs’ factual allegations indicating that it was.¹²² Rather, what makes *Farmer* different from other Tenth Circuit cases is that the court discussed what happens *after* a plaintiff reports a rape and the university is deliberately indifferent post-harassment.¹²³

Consequently, the Tenth Circuit affirmed the district court’s decision to deny KSU’s 12(b)(6) motions to dismiss.¹²⁴ The court held that it must consider each part of the *Davis* vulnerability standard, meaning “that [p]laintiffs can state a viable Title IX claim by alleging alternatively *either* that KSU’s deliberate indifference to their reports of rape caused [p]laintiffs “to undergo” harassment *or* “made them liable or vulnerable” to it.”¹²⁵

¹¹⁹ *Id.* at 1101–02 (emphasis added).

¹²⁰ *Id.* at 1002; *see* 28 U.S.C. § 1292(b).

¹²¹ *Farmer*, 918 F.3d at 1102.

¹²² *Id.* at 1097.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 1103 (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999)).

To begin, in order to conclude that the vulnerability standard provides a private cause of action when an educational institution is deliberately indifferent, the court drew attention to *Davis*'s definition of the word "subject," as in when a university's "deliberate indifference 'subject[s]' its students to harassment;" in this sense, "subjects" includes "to make liable or vulnerable; [to] lay open; [to] expose."¹²⁶ Through this definition of "subject," the court in *Farmer* reasoned that *Davis*'s inclusion of vulnerability to harassment was meant to broaden the causation element.¹²⁷ Thus, under this definition, a plaintiff is not required to prove that they suffered further actionable harassment.¹²⁸

Then, the court concluded that it must give effect to each part of the *Davis* deliberate indifference standard, as doing so was consonant with Title IX's objectives, "which include protecting individual students against discriminatory practices" that could ultimately deny them equal access to education.¹²⁹ Because KSU had "actual knowledge of sexual harassment that [was] severe, pervasive, and objectively offensive enough to deprive a student of access to the educational benefits and resources [that KSU] offers," and because it "turn[ed] a blind eye to that harassment," KSU's deliberate indifference made the plaintiffs vulnerable to further harassment even though they did not experience actual sexual harassment again.¹³⁰ The court did not require the plaintiffs to have experienced a second instance of actionable harassment as a result of KSU's indifference.¹³¹ Rather, because KSU's conduct and lack of investigation made the plaintiffs vulnerable to being raped again and ultimately excluded them from the educational opportunities KSU provided, the plaintiffs stated a viable Title IX claim.¹³²

Finally, the court held that the plaintiffs sufficiently pled that KSU made them vulnerable to harassment.¹³³ The plaintiffs alleged that the fear of running into their student-rapists caused them to struggle in

¹²⁶ *Id.* at 1103–04 (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966)). The word "subjects" in the *Davis* definition comes directly from the language of Title IX. See 20 U.S.C. § 1681(a).

¹²⁷ See *Farmer*, 918 F.3d at 1103–04.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1104 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)); see also Penny Venetis, *Misrepresenting Well-Settled Jurisprudence: Peddling "Due Process" Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women*, 40 WOMEN'S RTS. L. REP. 126, 132–33 (2018); *infra* Section IV.A.1.

¹³⁰ *Farmer*, 918 F.3d at 1104.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1104–05.

school, lose their scholarships, withdraw from KSU activities, and feel unsafe on campus to the point where they needed someone to accompany them wherever they went.¹³⁴ The court further noted that the plaintiffs alleged more than just a fear of encountering their assailants.¹³⁵ Rather, they alleged that their fears forced them to act in a way that denied them access to activities made available to other students.¹³⁶ Though the court conceded that a plaintiff's fear of seeing their alleged harasser must be objectively reasonable, the court determined that the facts of this case were so "horrific" that the plaintiffs sufficiently pled that KSU's deliberate indifference to their reports of rape "reasonably deprived them of educational opportunities available to other students at KSU."¹³⁷

IV. ANALYSIS

A. *The Farmer Court Correctly Held That Vulnerability to Sexual Harassment Is Sufficient Harm to State a Claim Under Title IX*

Farmer was correctly decided because it better effectuates the two goals of Title IX: to ensure that educational institutions do not use federal funding to promote discrimination and to protect individuals from discrimination.¹³⁸ As supported by studies on the psychological effects of sexual harassment, vulnerability to further harassment can have devastating emotional and physical consequences that could exclude a student from educational programs and activities.¹³⁹ Further, *Farmer* is consistent with Tenth Circuit precedent.¹⁴⁰ While there are other cases that held differently, they are distinguishable from *Farmer* or otherwise fail to properly interpret Title IX.¹⁴¹

¹³⁴ *Id.* ("Plaintiffs sufficiently pled that KSU's deliberate indifference to their reports of rape made them vulnerable to harassment by alleging that the fear of running into their student-rapists caused them, among other things, to struggle in school, lose a scholarship, withdraw from activities KSU offers its students, and avoid going anywhere on campus without being accompanied by friends or sorority sisters.").

¹³⁵ *Id.* at 1105.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

¹³⁹ See *infra* Section IV.A.2.

¹⁴⁰ See *infra* Section IV.A.3.

¹⁴¹ See *infra* Sections IV.A.3–IV.B.

1. The Tenth Circuit's Holding in *Farmer* Is Consistent with the Dual Goals of Title IX

By interpreting the *Davis* causation element as allowing a plaintiff to state a viable Title IX claim by either alleging actual post-notice harassment or mere liability or vulnerability to it, the court in *Farmer* reached the correct decision because this interpretation is consistent with the text and the dual goals of Title IX: first, to avoid the use of federal resources to support discrimination and second, to provide individual citizens effective protection against such discrimination.¹⁴²

First, Title IX does not require plaintiffs to suffer actual discrimination nor does it state how many times a plaintiff must experience discrimination to make a valid claim.¹⁴³ If Title IX required the *Farmer* plaintiffs to experience actual harassment a second time to state a viable claim, then the court would essentially be encouraging the kind of discrimination Title IX is trying to avoid, which would go against the first objective of *Cannon*.¹⁴⁴ Furthermore, whether the plaintiffs suffered actual post-notice harassment or mere vulnerability to it, the court would still meet *Cannon*'s second objective of providing students with effective protection against discrimination.¹⁴⁵ If KSU was not held liable for letting its female students live in fear of running into their assailants every day, then it would lead to the discrimination of such students by treating them differently from other students and not protecting them from either actual post-notice harassment or a risk of it.¹⁴⁶

Second, the language of Title IX demonstrates how discrimination is one of three elements a plaintiff can use to state an operable Title IX claim.¹⁴⁷ Title IX contains an inclusive "or" that takes into account three different scenarios: exclusion from, denial of, or being subjected to

¹⁴² *Cannon*, 441 U.S. at 704.

¹⁴³ See *Know Your Rights: Sexual Harassment and Assault on Campus*, AAUW, <https://www.aauw.org/resources/legal/laf/title-ix> [<https://perma.cc/TRL5-7DFP>] ("Title IX also prohibits sex-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.").

¹⁴⁴ See *Cannon*, 441 U.S. at 677; see also HARV. L. REV., *supra* note 64, at 2618.

¹⁴⁵ See *Cannon*, 441 U.S. at 677.

¹⁴⁶ See BERNICE R. SANDLER, THE RESTORATION OF TITLE IX: IMPLICATIONS FOR HIGHER EDUCATION 6 (1989) ("In instances of individual or gang rape or other forms of sexual assault and abuse, refusal to investigate or take corrective action would be construed as a violation of Title IX because the institution would be handling crimes against women differently from other campus crimes.").

¹⁴⁷ See 20 U.S.C. § 1681(a).

discrimination in an education program or activity that receives federal funding.¹⁴⁸ Notwithstanding the *Davis* Court's analysis of the word "subjects," the plaintiffs in *Farmer* were in fact excluded from and denied access to KSU's educational activities because of discrimination; so, based on the exact language of Title IX, they did have a viable claim.¹⁴⁹ Thus, though the plaintiffs did not experience actual post-notice harassment, KSU's deliberate indifference to their initial assaults subjected them to further harassment by making them vulnerable to it, to the point where KSU's conduct excluded them from and denied them access to KSU's educational programs.¹⁵⁰

In sum, Title IX does not require a plaintiff to suffer further actionable harassment in order to seek relief as long as some form of discrimination has denied them access to educational programs.¹⁵¹ Rather, it tries to avoid discrimination altogether so that there is no exclusion or denial of access to a student's education in the first place.¹⁵² A separate vulnerability standard would not only discourage educational institutions from supporting discrimination by making them more accountable in the investigative process, but it would also add another layer of protection from the discrimination that Title IX is trying to prevent from happening.¹⁵³

2. The Tenth Circuit's Holding in *Farmer* Is Sensible in Light of the Psychological Effects of Sexual Harassment

Though the *Farmer* court did not go into the psychological effects of sexual harassment, research shows that living in fear post-harassment can deny a plaintiff equal access to education just as much as actual harassment can.¹⁵⁴ Survivors of sexual assault "may experience the

¹⁴⁸ *Id.*

¹⁴⁹ See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1104–05 (10th Cir. 2019).

¹⁵⁰ *Id.*

¹⁵¹ See *Know Your Rights: Sexual Harassment and Assault on Campus*, *supra* note 143.

¹⁵² See 20 U.S.C. § 1681(a).

¹⁵³ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 677 (1979).

¹⁵⁴ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30043 (May 19, 2020) (codified at 34 C.F.R. pt. 106). As noted in the Title IX regulations, "[u]nsupportive institutional responses increase the effects of trauma on complainants." *Id.*; see also Lindsey L. Monteith, Nazanin H. Bahraini, Bridget B. Matarazzo, Kelly A. Soberay & Carly Parnitzke Smith, *Perceptions of Institutional Betrayal Predict Suicidal Self-Directed Violence Among Veterans Exposed to Military Sexual Trauma*, 72 J. CLINICAL PSYCH. 743, 749–51 (2016); Rebecca Campbell, Emily Dworkin & Giannina Cabral, *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE & ABUSE 225, 234 (2009) (explaining that survivors of sexual violence

impact of a sexual assault physically and psychologically over both the short and long term.”¹⁵⁵ These impacts can include “shock and anger,” “fear and anxiety,” “disrupted sleep,” “nightmares,” “tendency to isolate oneself,” “feelings of detachment,” and “a sense of shame.”¹⁵⁶ In a Harvard T.H. Chan School of Public Health study on the health consequences of sexual assault, women in the study who reported prior sexual assault were two times as likely “to have elevated anxiety than women without a history of sexual trauma.”¹⁵⁷

According to cross-cultural psychologist Colleen Ward, survivors of sexual abuse undergo a two-stage Rape Trauma Syndrome.¹⁵⁸ The acute or crisis stage occurs right after the sexual assault and can sometimes continue for a few days or weeks after the event.¹⁵⁹ This phase can lead a victim to exhibit emotional reactions such as shock, shame, fear, and anxiety.¹⁶⁰ Not only could a survivor experience psychological trauma, but they may also have to deal with the physical trauma of rape, including pregnancy and venereal disease.¹⁶¹ “The second stage of the Rape Trauma Syndrome is one of ‘reintegration and reorganisation.’”¹⁶² While most survivors are able to overcome the psychological effects of sexual harassment by returning to school, some become overwhelmed and try to escape a hostile environment by dropping out of school, abusing drugs, or in extreme cases, attempting suicide.¹⁶³

already feel powerless, and policies that increase a survivor’s lack of power over their situation contribute to the trauma they have already experienced).

¹⁵⁵ LORI HASKELL & MELANIE RANDALL, IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS: WHAT THE CRIMINAL JUSTICE SYSTEM NEEDS TO KNOW 7–8 (2019); *see also* Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. MEDICINE 111, 114 (2006).

¹⁵⁶ HASKELL & RANDALL, *supra* note 155, at 9.

¹⁵⁷ Sandee LaMotte, *Sexual Assault and Harassment Linked to Long-Term Health Problems for Women, Study Says*, CNN (Oct. 3, 2018, 3:06 PM), <https://www.cnn.com/2018/10/03/health/sexual-assault-harassment-health-effects-study/index.html> [<https://perma.cc/2JUJ-U3CT>].

¹⁵⁸ COLLEEN WARD & FATHIAH INSERTO, VICTIMS OF SEXUAL VIOLENCE: A HANDBOOK FOR HELPERS 27 (1990). For further discussion on the Rape Trauma Syndrome, *see* Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591 (2000).

¹⁵⁹ WARD & INSERTO, *supra* note 158, at 27.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 27–28. For more information on the statistics associated with the health effects of sexual assault, *see* *Statistics*, KNOW YOUR IX, <https://www.knowyourix.org/issues/statistics> [<https://perma.cc/UG3X-ENG3>].

Importantly, it is almost impossible to predict how each individual will react to a crisis.¹⁶⁴ It depends on the severity of the assault as well as the survivor's characteristics, such as the availability of social support, lack of self-confidence, or chronic anxiety.¹⁶⁵ Overall, how much stress an individual experiences is subjective and varies from person to person.¹⁶⁶ This further emphasizes the difficulty in determining whether or not an incident of unwanted sex-based conduct meets the *Davis* elements of "severe and pervasive," as what may seem severe and pervasive to one person may not to another.¹⁶⁷ It also makes the "objectively offensive" element of the *Davis* test problematic, as it is difficult to be objective and put oneself in the shoes of someone who experienced trauma, since everyone experiences trauma in their own unique way.¹⁶⁸ In light of these potential shortcomings in the *Davis* test, the separate vulnerability standard embraced by the *Farmer* court accurately recognized the scope of the *Davis* deliberate indifference standard to plaintiffs who may not experience further actionable harassment but are still deprived of an education.¹⁶⁹

By creating an unsafe and intimidating environment, sexual harassment can impact a survivor's academic performance, which can ultimately affect their career trajectory.¹⁷⁰ According to Catherine Lhamon, then Assistant Secretary for Civil Rights in the Department of Education, the damage to a survivor's physical and emotional health leads to the deprivation of an education altogether.¹⁷¹ As Senator Bayh articulated back in 1972, this relates to the reason why Title IX came to fruition in the first place: discrimination in the field of education is especially harmful because education provides access to a career and financial security.¹⁷²

¹⁶⁴ WARD & INSERTO, *supra* note 158, at 28–29.

¹⁶⁵ *Id.* at 28–29.

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1109 (10th Cir. 2019).

¹⁷⁰ Shawn Meghan Burn, *The Psychology of Sexual Harassment*, 46 TEACHING PSYCH. 96, 96 (2018). *See generally* James E. Gruber & Susan Fineran, *Sexual Harassment, Bullying, and School Outcomes for High School Girls and Boys*, 22 VIOLENCE AGAINST WOMEN 1 (2015). For example, in American middle and high schools, sexual harassment affects school engagement and academic achievement. *Id.* at 124–25.

¹⁷¹ *Sexual Assault on Campus: Working to Ensure Student Safety: Hearing of the Committee on Health, Educ., Lab., and Pensions*, 113th Cong. 7 (2014) (statement of Catherine E. Lhamon, Assistant Secretary for Civil Rights, Department of Education).

¹⁷² 118 CONG. REC. 5803 (1972).

Based on these findings, if a plaintiff was only allowed to prove actual harassment to sustain a Title IX claim, it would thwart Title IX's goal of protecting individuals from discriminatory practices.¹⁷³ In light of this concern, the *Farmer* court correctly recognized that a court should be able to consider whether the mere vulnerability of being attacked again is enough to deny a survivor's equal access to education where the initial incident and funding recipient's lack of investigation leads a survivor to experience any of the psychological consequences described above.¹⁷⁴

3. The Tenth Circuit's Holding in *Farmer* Is Consistent with Tenth Circuit Precedent and Other Circuits

There is another Tenth Circuit case that supports the holding in *Farmer*.¹⁷⁵ In *Rost v. Steamboat Springs RE-2 School District*, a special education student alleged that several of her male high school classmates coerced her into performing sexual acts with them.¹⁷⁶ Unlike *Farmer*, this case dealt with the question of whether the school's response to the initial report of assault was deliberately indifferent, rather than whether a deliberately indifferent response leaving a survivor vulnerable to future harassment could be the basis for a Title IX claim.¹⁷⁷ The court in *Rost* held that the school was not deliberately indifferent because there was no evidence that the school district's response of contacting law enforcement officials and cooperating in the investigation was so unreasonable as to amount to deliberate indifference.¹⁷⁸ Additionally, there was no opportunity for further harassment because the victim's mother withdrew the victim from the school.¹⁷⁹ However, the court noted that the complainant would have

¹⁷³ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

¹⁷⁴ See *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1104 (10th Cir. 2019). As the court in *Farmer* noted, "that a student must be harassed or assaulted a second time before the school's clearly unreasonable response to the initial incident becomes actionable . . . runs counter to the goals of Title IX." *Id.*

¹⁷⁵ See *id.* at 1106.

¹⁷⁶ *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1117 (10th Cir. 2008).

¹⁷⁷ *Id.* at 1118.

¹⁷⁸ *Id.* at 1121; see also Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 UNIV. ILL. L. REV. 175, 191 ("Rost appears to stand for the proposition that as long as the school undertakes some action involving outside criminal investigations, even if its action is not reasonably calculated to resolve the bullying issue in question in the school environment, the court will defer to that judgment as long as it is not 'clearly unreasonable.'").

¹⁷⁹ See *Rost*, 511 F.3d at 1124.

successfully made a Title IX claim if she had returned to the school and school officials had not provided a “safe educational environment” for her upon her return.¹⁸⁰ This is exactly the issue faced by the *Farmer* court, as the plaintiffs wanted to remain on campus, but, by leaving their assailants unchecked, KSU did not provide them with a safe educational environment.¹⁸¹

Moreover, the *Farmer* decision is also consistent with other circuits’ interpretations of Title IX. In fact, very similar to *Farmer*, the First Circuit held that a plaintiff does not need to suffer further actionable harassment if they can prove that they were merely vulnerable to further harassment.¹⁸² In *Fitzgerald v. Barnstable School Committee*, the First Circuit applied the most guiding reasoning to conclude that Title IX liability only involves the likelihood of post-notice harassment.¹⁸³ In *Fitzgerald*, a kindergarten student claimed that a third-grade student made her lift her dress up on the bus.¹⁸⁴ The parents of the kindergarten student reported the allegation to the school’s principal, who immediately opened an investigation into the matter.¹⁸⁵ Following this incident, the parents of the kindergarten student informed the principal that their daughter had now reported that the alleged perpetrator had also asked her to pull down her underwear and spread her legs.¹⁸⁶ After investigating and calling the police, the principal decided not to proceed with disciplinary measures.¹⁸⁷ Since there was no disciplining or removal of the alleged perpetrator, the two students still encountered each other.¹⁸⁸ The parents of the kindergarten student brought suit against the school system and superintendent for violating Title IX.¹⁸⁹ The district court sided with the defendants because the plaintiff did not experience sexual harassment that was so severe, pervasive, and objectively offensive after the defendant first acquired actual knowledge of the offending conduct; the First Circuit affirmed the district court’s holding.¹⁹⁰

¹⁸⁰ *Id.*

¹⁸¹ *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1100–01 (10th Cir. 2019).

¹⁸² Cormier, *supra* note 13, at 16. *See generally* *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007).

¹⁸³ *See generally* *Fitzgerald*, 504 F.3d 165.

¹⁸⁴ *Id.* at 169.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 169–70.

¹⁸⁸ *Id.* at 170.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 172–73.

The First Circuit analyzed *Davis*'s definition of "subjected" the same way the Tenth Circuit did in *Farmer*.¹⁹¹ The court in *Fitzgerald* interpreted the *Davis* Court's vulnerability language as establishing a cause of action not only where the school's deliberate indifference caused the student to undergo post-notice actual harassment, but also where the deliberate indifference made the student more vulnerable to it or more likely to experience it, even if further actionable harassment did not occur.¹⁹² Thus, even though the kindergarten student in *Fitzgerald* did not experience further actual harassment after the school was first notified of the alleged harassment, the school system could be liable for damages simply because the student was vulnerable to the possibility of the perpetrator sexually harassing her again.¹⁹³

Just like in *Farmer*, the Eleventh Circuit opined that if a university does not investigate a report of sexual harassment and that leaves a plaintiff vulnerable to further harassment, then a plaintiff has a viable Title IX claim.¹⁹⁴ In *Williams v. Board of Regents of University System of Georgia*, a case from the Eleventh Circuit, a female student was allegedly sexually assaulted by three student-athletes in one of the aggressors' apartments.¹⁹⁵ The next day, the female student reported the incident to the police, who, in turn, reported the incident to the university.¹⁹⁶ The female student withdrew from the university and never returned.¹⁹⁷ The university charged the three student-athletes with disorderly conduct under the university's code of conduct.¹⁹⁸ A university judiciary panel held a hearing on the disciplinary matter almost one year after the incident took place, at which it decided not to sanction the student-athletes.¹⁹⁹

The *Williams* court interpreted the *Davis* vulnerability language the same way as did the court in *Farmer*.²⁰⁰ The court held that the

¹⁹¹ See *id.* at 172; *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103–04 (10th Cir. 2019).

¹⁹² *Fitzgerald*, 504 F.3d at 171–73 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999)). The court in *Fitzgerald* held that "a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity." *Id.* at 172–73.

¹⁹³ Cormier, *supra* note 13, at 16.

¹⁹⁴ *Williams v. Bd. of Regents*, 477 F.3d 1282, 1296–97 (11th Cir. 2007).

¹⁹⁵ *Id.* at 1288.

¹⁹⁶ *Id.* at 1289.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See *id.*; *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1105 (10th Cir. 2019); see also Caitlin M. Cullitan, Note, "I'm His Coach, Not His Father." *A Title IX Analysis of Sexual Harassment in*

university was deliberately indifferent after the student's alleged assault because the university had waited eight months to hold a disciplinary hearing regarding the incident, which was a long time after it received police reports that could have corroborated the student's allegations.²⁰¹ The university was deliberately indifferent because its failure to take action against the perpetrators was itself discrimination against the female student since it denied her an opportunity to continue to attend the university.²⁰² The *Williams* court defined "further discrimination" as not requiring further actual harassment.²⁰³ Rather, the Eleventh Circuit recognized that the injuries the plaintiff suffered, which were similar to those that the plaintiffs in *Farmer* suffered, would satisfy the "further harassment" requirement.²⁰⁴ The injuries included the university's failure to take any safeguards that would prevent future attacks by the student-rapists themselves, even though the student had withdrawn from the university and had not alleged any further harassment.²⁰⁵

B. *Cases Holding Differently than Farmer Are Distinguishable or Inconsistent with Title IX*

There are cases that reject Title IX liability where further harassment does not occur after notice.²⁰⁶ The court in *Farmer* addressed one easily overcome counterargument, and that is the Tenth Circuit's prior decision in *Escue v. Northern Oklahoma College*.²⁰⁷ In *Escue*, the Tenth Circuit provides a reasoning behind the importance of demanding the need for actual, post-notice harassment in order to support a Title IX claim.²⁰⁸ In *Escue*, a female student alleged that a professor had sexually harassed her.²⁰⁹ After a number of alleged

College Sports, 12 TEX. REV. ENT. & SPORTS L. 53, 75 (2010) ("[A]n institution can insulate itself from Title IX liability if it implements and maintains a sexual harassment policy that enumerates what sexual harassment is, what the potential punishment for sexual harassment is, and what steps will be taken if a sexual harassment claim is brought against a student-athlete.").

²⁰¹ *Williams*, 477 F.3d at 1296–97.

²⁰² *Id.*

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1296–97.

²⁰⁶ *See Cormier*, *supra* note 13, at 19.

²⁰⁷ *See Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1106–07 (10th Cir. 2019). *See generally Escue v. N. Okla. Coll.*, 450 F.3d 1146 (10th Cir. 2006).

²⁰⁸ *Cormier*, *supra* note 13, at 18; *see Escue*, 450 F.3d 1146.

²⁰⁹ *Escue*, 450 F.3d at 1149–50.

incidents, the student and her father met with the university president to report the student's complaint.²¹⁰ The student had no further contact with the professor, and, after the meeting, there were no more allegations of further sexual harassment or discrimination.²¹¹ In response to the student's allegations, the university allowed the student to transfer out of one course, and for another course, the university allowed the student to take the grade that she had on the date when she reported the sexual harassment.²¹² The university decided to dismiss the professor at the end of the semester.²¹³

Based on the facts above, the Tenth Circuit's decision in *Escue* rested on the school's actions after the initial report of sexual harassment.²¹⁴ The student brought a Title IX claim against the university, and the Tenth Circuit determined that the school's actions were sufficient to rebut the student's allegation that the university had been deliberately indifferent.²¹⁵ The court in *Farmer* argued that this determination was made to highlight the adequacy of the university's actions.²¹⁶ It further went on to note that the *Escue* case did not hold or even suggest that a plaintiff would have to show further sexual harassment as a causation element in order to prevail even after a university is found to have been deliberately indifferent.²¹⁷ In *Farmer*, the court did not evaluate the acceptableness of KSU's actions since the parties did not dispute that KSU was deliberately indifferent in its investigation of the rapes.²¹⁸ Rather, *Farmer* analyzed what type of harm a plaintiff must allege to show further sexual harassment, making it a noteworthy case in the Tenth Circuit.²¹⁹

The deeper problem is the one at the core of the circuit split noted in the Introduction, and that is the Sixth Circuit's contrary decision in *Kollaritsch v. Michigan State University Board of Trustees*.²²⁰ In *Kollaritsch*, the plaintiffs were sexually assaulted by other students and claimed that the school's response to their initial reports was

²¹⁰ *Id.* at 1150.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 1154–56.

²¹⁵ *Id.* As the Tenth Circuit noted, “Ms. Escue does not allege that further sexual harassment occurred as a result of [the school’s] deliberate indifference.” *Id.* at 1155.

²¹⁶ *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1107 (10th Cir. 2019).

²¹⁷ *Id.*

²¹⁸ *Id.* at 1097.

²¹⁹ *Id.*

²²⁰ *Kollaritsch v. Mich. State Univ. Bd. of Tr.*, 944 F.3d 613 (6th Cir. 2019).

insufficient and therefore deliberately indifferent.²²¹ One of the plaintiffs saw her assailant at least nine times after her initial report, which led her to have panic attacks and a fear of being attacked again.²²² The Sixth Circuit held that the school's conduct must either directly lead to more harassment or, in the alternative, be so deficient that no safeguards whatsoever are put in place to protect the victim from harassment that actually occurs.²²³ The court understood the *Davis* standard as providing two unreasonable responses that could lead to further harassment: either "directly causing further harassment" or "creating vulnerability that leads to further harassment."²²⁴ The court did not think that the subsequent encounters were sexual in nature or severe, pervasive, and objectively unreasonable since none of the plaintiffs "suffered any actionable sexual harassment after the school's response."²²⁵ Unlike in *Farmer*, where the court based its reasoning on the initial incident of harassment and KSU's lack of reaction to it,²²⁶ the court in *Kollaritsch* based its reasoning on the allegations of subsequent harassment and whether or not they constituted further actionable harassment.²²⁷

The court came to this conclusion by *incorrectly* applying tort law to Title IX by combining "the two analytically separate elements of causation and injury."²²⁸ In tort law, the causation element requires that the defendant's wrongful act be the cause-in-fact and proximate cause of the plaintiff's injury.²²⁹ As recognized in both *Davis* and *Kollaritsch*, an "injury" within the meaning of Title IX denotes a denial of "access to the educational opportunities or benefits provided by the school" that are available to all students.²³⁰ "The proper causation analysis, then, [as used by the court in *Farmer*,] would require the court to examine whether [an educational institution's] actions caused the plaintiffs'

²²¹ *Id.* at 618.

²²² *Id.* at 624.

²²³ *Id.* at 622–23.

²²⁴ *Id.* at 623.

²²⁵ *Id.* at 618; *see also* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). In order for a plaintiff to win a Title IX claim, they must prove that the sexual harassment was severe, pervasive, objectively offensive, and that, as a result, they were denied equal access to education. *Id.*

²²⁶ *See* *Farmer v. Kan. State Univ.*, 918 F.3d 1094 (10th Cir. 2019).

²²⁷ *See* *Kollaritsch*, 944 F.3d at 618, 620.

²²⁸ *See* HARV. L. REV., *supra* note 64, at 2617.

²²⁹ *Id.* at 2617–18; *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 26 (AM. L. INST. 2010).

²³⁰ *Kollaritsch*, 944 F.3d at 622 (quoting *Davis*, 526 U.S. at 650); *see* HARV. L. REV., *supra* note 64, at 2618.

alleged Title IX injuries, such as their leaves of absence or withdrawal from school activities.”²³¹ Rather, the court in *Kollaritsch* asked whether the plaintiffs suffered further actionable harassment, which opposes Title IX’s goal of preventing a plaintiff from being denied equal access to education.²³²

Consequently, unlike in *Farmer*, the Sixth Circuit’s test under *Kollaritsch* opposes the goals of Title IX.²³³ Under the Sixth Circuit’s interpretation, a plaintiff’s claim against a university for its deliberately indifferent response depends entirely on whether a third-party student commits another actionable incident of sexual harassment that is severe, pervasive, and objectively offensive.²³⁴ This would mean that a plaintiff must wait to be sexually harassed again before they are able to bring a viable Title IX claim, which one, encourages educational institutions to ignore discrimination since they do not have to implement preventative measures, and two, does nothing to protect students from being discriminated against.²³⁵

Of great consequence, “the Sixth Circuit further defined ‘pervasive’ to require ‘multiple incidents,’” which suggests that a plaintiff must prove that post-notice harassment itself constitutes multiple acts.²³⁶ Thus, in order to determine whether a plaintiff has been left vulnerable to harassment, “courts are left to decide exactly how many acts of sexual harassment” a plaintiff must go through before a university can be held liable.²³⁷ Ultimately, this means that one act of sexual assault will not be enough to sustain a cause of action under Title IX, which goes against

²³¹ HARV. L. REV., *supra* note 64, at 2618.

²³² See *Kollaritsch*, 944 F.3d at 622; see also HARV. L. REV., *supra* note 64, at 2618 (“By construing *Davis*’s causation analysis as one that does not directly link the wrongful act—deliberate indifference—to the injury—loss of educational opportunities—the court implicitly conceded that tort law and Title IX are an awkward fit.”).

²³³ See HARV. L. REV., *supra* note 64, at 2618.

²³⁴ *Id.*

²³⁵ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (“Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.”); see also 117 CONG. REC. 39252 (1971) (“Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.” (statement of Rep. Patsy Mink)).

²³⁶ HARV. L. REV., *supra* note 64, at 2618 (quoting *Kollaritsch*, 944 F.3d at 620).

²³⁷ *Id.*

Title IX's goals of preventing discrimination altogether and protecting victims from discrimination that denies them access to education.²³⁸

In light of the split in circuit authority, the plaintiffs in *Kollaritsch* petitioned for the United States Supreme Court to issue a writ of certiorari.²³⁹ They made similar arguments as the court in *Farmer*.²⁴⁰ In their petition, despite the university's argument that vulnerability must be more than a perpetrator's mere presence on campus after an allegation, the plaintiffs argued that the case concerned fears of further assault as a result of the university's failure to respond.²⁴¹ The plaintiffs went on to note that fear by itself can deny a survivor equal access to educational opportunities, which is exactly what Title IX admonishes.²⁴² Most interestingly, the plaintiffs asserted that the university required the Court to make a factual decision, rather than one of pure law, in deciding whether and how much more harassment is required when fear itself should be enough.²⁴³ Ultimately, the Court denied the plaintiffs writ of certiorari, which means the split between the circuits and the jurisdictional divide over the *Davis* Court's definition of "subjected" is still out there.²⁴⁴

²³⁸ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30028 (May 19, 2020) (codified at 34 C.F.R. pt. 106); see also 118 CONG. REC. 5806–07 (1972). Senator Bayh noted that Title IX "is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers." *Id.*

²³⁹ See Reply Brief for Petitioners, *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613 (2019) (No. 20-10).

²⁴⁰ See Reply Brief for Petitioners, *supra* note 239. See generally *Farmer v. Kan. State Univ.*, 918 F.3d 1094 (10th Cir. 2019).

²⁴¹ Reply Brief for Petitioners, *supra* note 239, at 12 ("[V]ulnerability must consist of something greater than a[n] assaulter or harasser's] mere presence (or even potential presence) on campus after the allegation.' The case, though, concerns well-founded fear of further assault resulting from the school's failure to respond adequately to, in one case, the victim's attempted rape and later sexual assault by an identified attacker." (alteration in original) (citation omitted) (quoting Brief in Opposition, *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613 (2019) (No. 20-10))).

²⁴² *Id.* at 12 ("Fear alone can deny the victim equal access to educational opportunities, exactly what Title IX bars.").

²⁴³ *Id.* at 12.

²⁴⁴ See *Kollaritsch v. Michigan State University Board of Trustees*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/kollaritsch-v-michigan-state-university-board-of-trustees> [<https://perma.cc/4GSE-HP22>]. Plaintiffs' petition for certiorari was denied on October 13, 2020. *Id.*

CONCLUSION

In *Farmer*, the court answered the question of when a survivor's fear of further sexual harassment is sufficient to deprive that student of available educational opportunities.²⁴⁵ The court reasoned that because the initial rapes were so harrowing, it was reasonable for the plaintiffs to have the kind of fear that would deprive them of educational opportunities available to other students.²⁴⁶ The court in *Kollaritsch* reached a different conclusion.²⁴⁷ It focused on post-notice harassment and found that even though the plaintiffs' fear of seeing their assailants deprived them of educational opportunities like the plaintiffs in *Farmer*, because the plaintiffs did not suffer any further actionable harassment, they could not state a viable Title IX claim.²⁴⁸ The opposite holdings in these two cases raise a question that future courts will need to resolve: Does the initial act of harassment and a university's indifference to that harassment need to meet the *Davis* elements, or does only the subsequent harassment need to meet the elements to win a Title IX claim?²⁴⁹ When other courts encounter this issue or the Supreme Court resolves the split, those courts should not just follow the reasoning in *Farmer* but should also follow the legislative history and text of Title IX, as well as what research can tell us about the psychological effects of sexual harassment.²⁵⁰

Notwithstanding the Sixth Circuit's contrary view, *Farmer* is the correct approach.²⁵¹ Once a plaintiff proves that a university receiving federal funding has been deliberately indifferent, a plaintiff should not have to suffer further actionable harassment.²⁵² If it was a requirement that plaintiffs suffer sexual harassment several times before a university is held liable for violating Title IX, the consequences of such a requirement would leave a significant impact on future survivors of campus sexual assault and would violate the text and dual purposes of Title IX.²⁵³ As a result, there would be no effective protection from sexual harassment for students on college campuses.²⁵⁴ A separate

²⁴⁵ *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1104–05 (10th Cir. 2019).

²⁴⁶ *Id.*

²⁴⁷ *See Kollaritsch v. Mich. State Univ. Bd. of Tr.*, 944 F.3d 613, 627 (6th Cir. 2019).

²⁴⁸ *Id.* at 624–25.

²⁴⁹ *Farmer*, 918 F.3d at 1105.

²⁵⁰ *See supra* Part IV.

²⁵¹ *See supra* Part IV.

²⁵² *See supra* Part IV.

²⁵³ *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

²⁵⁴ *See id.*

vulnerability standard would also make sure that educational institutions are doing their due diligence the very first time a report of sexual harassment is made by conducting an effective investigation and implementing supportive measures.²⁵⁵ Otherwise, survivors of sexual harassment would be left to wonder how much harassment is enough, when Title IX should provide them with the certainty that no harassment should occur at all.²⁵⁶

²⁵⁵ See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30044 (May 19, 2020) (codified at 34 C.F.R. pt. 106).

²⁵⁶ See HARV. L. REV., *supra* note 64, at 2618.