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. However, there was not a happily ever after for Sara Weckhorst, a freshman at KSU. While at an off-campus fraternity, Ms. Weckhorst partook in drinking the alcohol provided by the fraternity and blacked out. A fraternity member raped her in his truck while other students watched. The fraternity member then raped her twice more. After leaving her “naked and passed out,” another member of the fraternity raped her. 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.

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

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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].
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. 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.

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. 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. 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. 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. As
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.”

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. 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. 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. 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?

In March 2019, the Court of Appeals for the Tenth Circuit answered this question in Farmer. 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. 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. 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.”).


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.\textsuperscript{23} This Case Note will argue that the \textit{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.\textsuperscript{24} In fact, the \textit{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.\textsuperscript{25} Survivors such as the plaintiffs in \textit{Farmer} should not have to experience rape a second time to receive Title IX protection.\textsuperscript{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.\textsuperscript{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.\textsuperscript{28}

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

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} See id.
  \item \textsuperscript{25} See 20 U.S.C. § 1681(a).
  \item \textsuperscript{26} See \textit{Farmer}, 918 F.3d at 1104–05.
  \item \textsuperscript{27} See id.
  \item \textsuperscript{28} See infra Section IV.A.
  \item \textsuperscript{29} See infra Part I.
  \item \textsuperscript{30} See infra Sections II.A–II.B.
  \item \textsuperscript{31} See infra Section II.C.
  \item \textsuperscript{32} See infra Part III.
  \item \textsuperscript{33} See infra Section IV.A.
\end{itemize}
\end{footnotesize}
a circuit split demonstrating why Farmer is correct in holding that vulnerability to further harassment is sufficient harm under Title IX.\textsuperscript{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.\textsuperscript{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.’”\textsuperscript{36} While the Civil Rights Act is almost indistinguishable from Title IX, it does not provide protection from discrimination based on sex.\textsuperscript{37}

Eight years later, Congress passed Title IX.\textsuperscript{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

\textsuperscript{34} See infra Section IV.B.


\textsuperscript{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,

\begin{quote}
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 . . . .
\end{quote}

110 CONG. REC. 1540 (1964).

\textsuperscript{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).

\textsuperscript{38} See 20 U.S.C. § 1681(a).
Federal financial assistance..." 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. 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. 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.

Moreover, Congress enacted Title IX under its spending power. It did so by conditioning federal funding on an educational institution's promise not to discriminate. 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."
2. Title IX Enforcement

Title IX is enforceable by federal administrative agencies and through private causes of action. In August 2020, the U.S. Department of Education under the Trump administration released its final regulations governing sexual assault under Title IX. 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.” The U.S. Department of Education, Office for Civil Rights (OCR) enforces and investigates Title IX regulations. Specifically, OCR files a complaint against a school and investigates a school’s failure to eliminate discrimination such as sexual harassment. If a recipients of federal financial assistance do not abide by the regulations, they risk losing their funding.

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

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.”).
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.\(^5\)

**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*.\(^5\) In *Davis*, the plaintiff, a fifth-grade student, was sexually harassed on several occasions by another fifth-grade student.\(^6\) 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.\(^7\) 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.\(^8\) 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.”\(^9\) 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.\(^10\) 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.\(^11\)

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\(^{54}\) *Id.* at 57. For further discussion on the Trump Administration’s regulations, see Kenneth Lasson, *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. Klasas, 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, perversiveness, 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.


\(^{65}\) *Davis*, 526 U.S. at 633.

\(^{66}\) Id.

been a denial of equal access to education.\textsuperscript{68} Though the court in \textit{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.\textsuperscript{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.\textsuperscript{70}

3. Actual Knowledge

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

4. Deliberate Indifference

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

\textsuperscript{68} \textit{Id.} at 30165.
\textsuperscript{69} \textit{See} Farmer v. Kan. State Univ., 918 F.3d 1094, 1103–06 (10th Cir. 2019).
\textsuperscript{70} \textit{See} Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 618 (6th Cir. 2019).
\textsuperscript{72} \textit{Id.} at 30040.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 30043.
in light of the known circumstances.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{78} The regulations also mandate the Title IX Coordinator to provide instructions on filing a formal complaint.\textsuperscript{79}

II. FACTS & PROCEDURAL HISTORY OF \textit{FARMER V. KANSAS STATE UNIVERSITY}

A. \textit{Plaintiff Tessa Farmer}

In March 2015, a KSU student named Tessa Farmer went to a fraternity party and became inebriated.\textsuperscript{80} A designated driver took her back to her dorm room.\textsuperscript{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.\textsuperscript{82} Farmer agreed, and the two had sex at the fraternity house.\textsuperscript{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.\textsuperscript{84} When T.R. returned, he was not surprised when he saw C.M.\textsuperscript{85}

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

\textsuperscript{76}\textit{Davis}, 526 U.S. at 648.
\textsuperscript{77} See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30044.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Farmer v. Kan. State Univ., 918 F.3d 1094, 1099 (10th Cir. 2019).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
Response and Education (CARE). 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.” 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. Then, Farmer “filed a complaint with KSU’s Office of Institutional Equity, alleging that C.M. had violated KSU’s sexual misconduct policy.” However, Farmer was told that “that policy did not cover fraternity houses.”

As a result of KSU’s refusal to investigate the rape, Farmer lived in fear of running into her attacker. More specifically, Farmer struggled in school, stopped seeing her friends, removed herself from KSU activities, fell into a depression, and began slitting her wrists. 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. Consequently, sending this message adversely impacted the educational environment of the university for survivors.

B. Plaintiff Sara Weckhorst

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

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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.\textsuperscript{99} Subsequently, another fraternity member named J.G. raped Weckhorst.\textsuperscript{100}

Like Farmer, Weckhorst gave actual notice to several school officials.\textsuperscript{101} She filed a complaint with the KSU Affirmative Action Office.\textsuperscript{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.\textsuperscript{103} Weckhorst then reported the rapes to the police.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{108} Her grades decreased, and she lost her academic scholarship.\textsuperscript{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.\textsuperscript{110} Like Farmer, Weckhorst alleged that KSU made students

\begin{itemize}
  \item[99] Id.
  \item[100] Id.
  \item[101] Id.
  \item[102] Id.
  \item[103] Id.
  \item[104] Id.
  \item[105] Id.
  \item[106] Id.
  \item[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.”).
  \item[108] See id. at 1101.
  \item[109] Id.
  \item[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’”).
\end{itemize}
more vulnerable to rape because it encouraged perpetrators to continue raping students without the fear of disciplinary action.\textsuperscript{111}

C. Procedural History

1. The District Court’s Holding

The plaintiffs sued KSU separately, both asserting claims under Title IX.\textsuperscript{112} The “[p]laintiffs base[d] their Title IX claims on “KSU’s deliberate indifference \textit{after} [they] reported to KSU that other students had raped them.”\textsuperscript{113} They relied on the \textit{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{117} KSU argued that in order to state a Title IX claim, the plaintiffs must allege that the university’s deliberate indifference \textit{actually caused} “each of them to undergo \textit{further incidents} of actual harassment by other students.”\textsuperscript{118} Citing \textit{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

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id. at 1098.
\item Id. at 1097; \textit{Davis} v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999).
\item \textit{Farmer}, 918 F.3d at 1097.
\item See id. at 1102.
\item Id.; see generally Fed. R. Civ. P. 12(b)(6).
\item Id. at 1097.
\end{enumerate}
\end{footnotesize}
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.”  

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 satisfied this pleading requirement.” The district court permitted KSU to pursue these interlocutory appeals.

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. 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.

Consequently, the Tenth Circuit affirmed the district court’s decision to deny KSU’s 12(b)(6) motions to dismiss. 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.”

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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.” 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. Thus, under this definition, a plaintiff is not required to prove that they suffered further actionable harassment.

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. 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.

The court did not require the plaintiffs to have experienced a second instance of actionable harassment as a result of KSU’s indifference. 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.

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

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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. The court further noted that the plaintiffs alleged more than just a fear of encountering their assailants. Rather, they alleged that their fears forced them to act in a way that denied them access to activities made available to other students. 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.”

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. 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. Further, Farmer is consistent with Tenth Circuit precedent. While there are other cases that held differently, they are distinguishable from Farmer or otherwise fail to properly interpret Title IX.

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.
139 See infra Section IV.A.2.
140 See infra Section IV.A.3.
141 See infra Sections IV.A.3–IV.B.
WHERE DO WE DRAW THE LINE

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

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\(^{142}\) 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.\textsuperscript{148} Notwithstanding the \textit{Davis} Court’s analysis of the word “subjects,” the plaintiffs in \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{153}

2. The Tenth Circuit’s Holding in \textit{Farmer} Is Sensible in Light of the Psychological Effects of Sexual Harassment

Though the \textit{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.\textsuperscript{154} Survivors of sexual assault “may experience the

\begin{footnotes}
\footnotetext[148]{Id.}
\footnotetext[149]{See Farmer v. Kan. State Univ., 918 F.3d 1094, 1104–05 (10th Cir. 2019).}
\footnotetext[150]{Id.}
\footnotetext[151]{See Know Your Rights: Sexual Harassment and Assault on Campus, supra note 143.}
\footnotetext[152]{See 20 U.S.C. § 1681(a).}
\footnotetext[153]{See Cannon v. Univ. of Chi., 441 U.S. 677, 677 (1979).}

impact of a sexual assault physically and psychologically over both the short and long term.” 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.” 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.”

According to cross-cultural psychologist Colleen Ward, survivors of sexual abuse undergo a two-stage Rape Trauma Syndrome. The acute or crisis stage occurs right after the sexual assault and can sometimes continue for a few days or weeks after the event. This phase can lead a victim to exhibit emotional reactions such as shock, shame, fear, and anxiety. 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. The second stage of the Rape Trauma Syndrome is one of ‘reintegration and reorganisation.’ 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.

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


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. 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. Overall, how much stress an individual experiences is subjective and varies from person to person. 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. 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. 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.

By creating an unsafe and intimidating environment, sexual harassment can impact a survivor’s academic performance, which can ultimately affect their career trajectory. 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. 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.

164 WARD & INSERTO, supra note 158, at 28–29.
165 Id. at 28–29.
166 Id.
167 See id.
168 See id.
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

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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. 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.

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. 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. In Fitzgerald, a kindergarten student claimed that a third-grade student made her lift her dress up on the bus. The parents of the kindergarten student reported the allegation to the school’s principal, who immediately opened an investigation into the matter. 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. After investigating and calling the police, the principal decided not to proceed with disciplinary measures. Since there was no disciplining or removal of the alleged perpetrator, the two students still encountered each other. The parents of the kindergarten student brought suit against the school system and superintendent for violating Title IX. 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.

180 Id.
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*. 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. 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.

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. 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. The next day, the female student reported the incident to the police, who, in turn, reported the incident to the university. The female student withdrew from the university and never returned. The university charged the three student-athletes with disorderly conduct under the university’s code of conduct. 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.

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

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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.
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. 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. The Williams court defined “further discrimination” as not requiring further actual harassment. 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. 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.

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. The court in Farmer addressed one easily overcome counterargument, and that is the Tenth Circuit’s prior decision in Escue v. Northern Oklahoma College. 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. In Escue, a female student alleged that a professor had sexually harassed her. After a number of alleged

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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.
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. The student had no further contact with the professor, and, after the meeting, there were no more allegations of further sexual harassment or discrimination. 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. The university decided to dismiss the professor at the end of the semester.

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. 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. The court in Farmer argued that this determination was made to highlight the adequacy of the university’s actions. 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. 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. 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.

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. In Kollaritsch, the plaintiffs were sexually assaulted by other students and claimed that the school’s response to their initial reports was

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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.
217 Id.
218 Id. at 1097.
219 Id.
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.
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.”

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.

Consequently, unlike in Farmer, the Sixth Circuit’s test under Kollaritsch opposes the goals of Title IX. 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. 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.

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. 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. 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

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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.


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.

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

246 Id.
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.
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. 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 See HARV. L. REV., supra note 64, at 2618.