NOTE

DELIBERATELY DIFFERENT: A NEW TEST TO DETERMINE DELIBERATE INDIFFERENCE IN TITLE IX CASES

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“There has to be a shift in culture. We have to have conversations about systems that are built that allow sexual violence to flourish.”

–Tarana Burke1

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INTRODUCTION

After years of news scandals, massive institutional reforms, and destigmatization regarding reporting, it has become overwhelmingly clear that sexual misconduct remains a massive problem on college campuses. Up to sixty-two percent of women and sixty-one percent of men experience sexual harassment in some form during college. Furthermore, according to a recent study by the Association of American Universities, approximately twenty percent of female undergraduates experience sexual assault before graduation. Something clearly needs to change—but what? Many institutions have taken significant steps to limit sexual misconduct, but complaints against schools—such as recent accusations against Liberty University for failing to respond to reports of sexual assault against students—suggest that institutions remain responsible. This is especially true in situations where schools are aware of specific instances of peer-on-peer misconduct that has occurred but fail to take proper steps after learning of the misconduct. It is not clear what exactly those steps are and, thus, what a school must do to avoid liability.

Schools are well-established to have a degree of responsibility regarding the sexual misconduct that occurs on their campuses. The Supreme Court affirmed this with the use of two seemingly simple but—in

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2 For the purposes of this Note, “sexual harassment” refers to any “unwelcome advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature in the . . . learning environment” per the Equal Employment Opportunity Commission. Sexual Harassment, RAINN, https://www.rainn.org/articles/sexual-harassment (last visited May 1, 2022). “Sexual assault” refers to any uses of force to make a person physically perform a sexual activity without their consent. Sexual Assault and Harassment, PLANNED PARENTHOOD, https://www.plannedparenthood.org/about-us/newsroom/campaigns/sexual-assault-and-harassment (last visited May 11, 2022). While sexual harassment and sexual assault are two separate categories of harm, this Note will use the term “sexual misconduct” to refer to the two in tandem, as both are actions that are prohibited by Title IX. See Know Your Rights, DEPT. OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html (last modified Dec. 4, 2020).

3 Statistics of Sexual Harassment, K12 ACADS., https://www.k12academics.com/education-issues/sexual-harassment/statistics (last visited May 10, 2022). While the study is from 2006, it appears to remain the most comprehensive piece of research focused on prevalence of sexual harassment in colleges and universities, and continues to be cited by scholars today. See Jennifer M. Wolff, Kathleen M. Rospenda, & Anthony S. Colaneri, Sexual Harassment, Psychological Distress, and Problematic Drinking Behavior Among College Students: An Examination of Reciprocal Causal Relations, 54 J. SEX RES. 362, 364 (Mar. 16, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5045312/.

4 Martha Nussbaum, Thoughts About Sexual Assault on College Campuses, BROOKINGS (Oct. 21, 2021), https://www.brookings.edu/research/thoughts-about-sexual-assault-on-college-campuses/. For reference, it is estimated that six to eight percent of males experience this misconduct. Id.

Deliberately Different

reality—exceedingly complex words: “deliberate indifference.”6 “Deliberate indifference” initially came into prominence in the 1999 case *Davis v. Monroe County Board of Education*.7 The Supreme Court held in *Davis* that schools in Title IX cases are liable:

only where they were deliberately indifferent to sexual harassment,8 of which they have actual knowledge, that is so severe, pervasive, and objectively offensive . . . to deprive the victims of access to the educational opportunities or benefits provided by the school.9

However, different circuits have come to define “deliberate indifference” in different ways. While some circuits hold that schools can be found liable solely based on victims potentially being vulnerable to sexual misconduct, others hold that, for schools to be found liable, such misconduct must have already occurred.10

This Note will advocate for a new universal solution for courts to use when determining deliberate indifference that focuses on balancing various interests. It will start by explaining the background of Title IX and the legislation’s history of ambiguity. It will then demonstrate the different ways in which circuits have defined “deliberate indifference” and explain why none of these tests are an optimal solution for nationwide adoption. It will then propose a novel test, taking inspiration from the prominent administrative law case *Mathews v. Eldridge*, and explain how such a test would work in practice. It will conclude by explaining the implications such a test would have for colleges and universities and pose suggestions for these institutions regarding compliance with the test.

I. BACKGROUND

Title IX of the Education Amendments of 1972 officially came into law on June 23, 1972.11 Title IX states that “[n]o person in the United

8 Note that the *Davis* standard has been applied by courts for instances of sexual assault as well. See infra Part II (containing multiple examples of such application). At times, courts appear to use the terms interchangeably. See infra Part II.
9 *Davis*, 526 U.S. at 650.
States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”12 Despite being considered one of the most influential pieces of legislation in contemporary American history,13 Title IX began as a “little-noted provision buried in omnibus education legislation.”14 While it is largely associated with providing access to equality within sports and college athletics,15 the legislation also pertains to sexual harassment at colleges and universities.16 This became more apparent to the general public during the Obama administration, under which the Department of Education Office for Civil Rights (OCR) promulgated defined rules regarding sexual harassment and engaged in “hundreds” of investigations of schools across the country pertaining to sexual misconduct.17 The number of lawsuits being filed against colleges and universities for mishandling Title IX complaints has at the same time sharply increased over the last decade.18 Some of these lawsuits have involved shockingly high costs for schools—for instance, in 2017 the University of Southern California paid out a settlement of over $1.1 billion dollars (spread across 710 complainant-victims) after it was found to have failed to properly investigate complaints against a faculty member for various forms of sexual harassment.19

12 20 U.S.C. § 1681. Note that “any education program or activity receiving federal financial assistance” encompasses virtually all institutions of higher education, including private institutions, because those schools receive federal funding for financial aid purposes. Naomi Shatz, Beyond Sports and Sex Part 4: When Does Title IX Apply to Religious Schools?, Bos. Law. Blog (Mar. 7, 2018), https://www.bostonlawyerblog.com/beyond-sports-sex-part-4-title-ix-apply-religious-schools/. While some schools have taken steps to ensure they receive no federal funding for Title IX purposes—including preventing students from taking out federal loans or arguing for a religious exemption to the requirements—these cases appear to be uncommon. See id.


16 Id. Interestingly, the language of Title IX listed above specifically says nothing about either sexual harassment or sports. Id.; see 20 U.S.C. § 1681.

17 Menlick, supra note 14.


Title IX’s history has been fraught with controversy and ambiguity. For instance, Congress failed to specifically establish the concrete effects of the legislation on colleges and universities until the 1980s.\(^{20}\) This led to general confusion regarding which programs and entities were covered by Title IX—complicated further by a series of controversial judicial rulings—until Congress provided further guidance.\(^{21}\) More recently, controversy has developed regarding the relationship between Title IX and sexual harassment. The actions of the Obama administration received criticism from “conservatives. . . . [c]ivil libertarians, bar associations, groups representing professors and many legal scholars . . . for threatening both due process and freedom of speech.”\(^{22}\) After the inauguration of President Donald Trump in 2017, the incoming presidential administration began taking steps to roll back many of these initiatives (although the impact of these steps is yet to be fully realized at the time of writing, even after Trump has left office).\(^{23}\) Reports emerging in early 2022 that the Biden administration is planning to yet again reverse the Trump-era changes have only further complicated things.\(^{24}\)

In part due to this ambiguous history, \textit{Davis}, in 1999, was the first peer-on-peer sexual harassment case granted certiorari by the Supreme Court in the history of Title IX—being decided almost thirty years after the law’s inception.\(^{25}\) The case came in response to a series of incidents of sexual harassment exhibited by a fifth-grade boy against a fifth-grade girl in a Georgia elementary school.\(^{26}\) After the boy’s harassment escalated to the point where he ended up pleading guilty in court for battery, the mother of the victim sued the school for failing to respond properly after the incidents had been consistently reported.\(^{27}\) All the school had done in response to these reports was vaguely threaten the harasser and allow the victim to move seats.\(^{28}\)

In a 5-4 decision, the Supreme Court—in an opinion written by Justice Sandra Day O’Connor—held that schools could face Title IX liabil-

\(^{20}\) Paul M. Anderson, \textit{Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law}, 22 MARQ. SPORTS L. REV. 325, 325.

\(^{21}\) Id. at 328. For a comprehensive explanation of this confusion and the case law contributing to it, see Shatz, \textit{supra} note 12.

\(^{22}\) Melnick, \textit{supra} note 14.

\(^{23}\) Id.


\(^{27}\) Davis, 74 F.3d at 1189.

\(^{28}\) Id.
ity for a peer sexual harassment case.\textsuperscript{29} The case was particularly notable in this regard—previously, while schools had faced liability for teacher-student or staff-student sexual misconduct, peer-on-peer misconduct traditionally did not put schools in any real danger of institutional liability.\textsuperscript{30} As noted earlier, the Court stated that schools can be liable in situations where they were deliberately indifferent to sexual harassment, had actual knowledge of the harassment, and the harassment was so severe as to deprive the victim of educational opportunities.\textsuperscript{31} The Court reasoned in its decision that institutions that exhibit deliberate indifference “violate[] the intent and spirit of Title IX” by subjecting a student to discrimination.\textsuperscript{32} \textit{Davis} was widely considered to be one of the most significant education-related court rulings of its time, and the decision was celebrated as one that would have massive effects for schools.\textsuperscript{33} Nonetheless, \textit{Davis} sets a high bar for what makes a school liable,\textsuperscript{34} and it has been criticized over the years for setting too stringent of a standard.\textsuperscript{35} Most significantly, however, the \textit{Davis} opinion caused conflicting views over what exactly constituted deliberate indifference in the first place. Over the ensuing years, different circuits have come to vastly different conclusions, with each to have ruled on this issue falling into one of what this Note outlines as three general categories.\textsuperscript{36}

\textsuperscript{30} Goodwin, \textit{supra} note 25 at 806.
\textsuperscript{31} \textit{Davis}, 526 U.S. at 650.
\textsuperscript{32} \textit{Id}. at 807.
\textsuperscript{33} See Lindsay Havern, \textit{Davis v. Monroe County Board of Education: Setting a Stringent Standard of Proof for School Liability in Peer Sexual Harassment Under Title IX-Demanding Responsible Proactive Protection}, 28 Pepper. L. Rev. 195, 214-218 (discussing the immediate and long-term implications of \textit{Davis} on schools at the time of the decision); see also Verna Williams, \textit{A New Harassment Ruling: Implications for Colleges}, \textit{The Chron. of Higher Educ}. (June 18, 1999), \url{https://www.chronicle.com/article/a-new-harassment-ruling-implications-for-colleges/} (stating that the case was a “wake-up call” for colleges and universities regarding how they handle complaints of peer-on-peer sexual harassment).
\textsuperscript{34} Joan Biskupic, \textit{Schools Liable for Harassment}, \textit{Wash. Post} (May 25, 1999), \url{https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/court052599.htm} (noting that the standard established in \textit{Davis} is “a much higher standard than what adult workers claiming sex harassment face in lawsuits against their employers”).
\textsuperscript{35} Goodwin, \textit{supra} note 25 at 807 n.15 (2002); see also Fatima Goss Graves, \textit{Restoring Effective Protections for Students Against Sexual Harassment in Schools: Moving Beyond the Gebser and Davis Standards} 2, \textit{Nat’l Women’s L. Ctr.} (2015), \url{https://nwlc.org/wp-content/uploads/2015/08/ACS-Article-Moving-Beyond-Gebser-and-Davis-Final.pdf} (citing this standard as “rais[ing] the bar, in perverse and unacceptable ways, for bringing private lawsuits for damages under Title IX”).
\textsuperscript{36} \textit{Infra} Part II.A-II.C.
II. Analysis

A. “Actual Cause” Circuits

1. Sixth Circuit

In 2020, the Sixth Circuit held in Foster v. Board of Regents of University of Michigan that the University of Michigan was not deliberately indifferent despite “inadequate and ineffective action” taken by the institution in response to learning of incidences of sexual harassment and assault. Foster involved a complainant-victim who attended a university-sponsored MBA program located in Los Angeles, California. While a student there, she received a series of unwanted physical contacts—including having her butt grabbed, being kissed without her consent, and being forced onto a bed—by a classmate. While the plaintiff reported the incidents and the school responded by placing certain limitations on the respondent, the respondent was still allowed to attend class with the complainant-victim, who duly argued that the accommodations were not enough. Furthermore, the school became aware—both from the plaintiff as well as the respondent—that the latter was not following the requirements of their no-contact order, but it did not take any action, and harassment against the complainant-victim continued.

Despite all of this, the court affirmed the district court’s determination that the University of Michigan acted “promptly, compassionately, and effectively” to the needs and requests of the complainant-victim. The court reasoned that Davis establishes a high bar for imposing Title IX liability on schools for deliberate indifference and that doing so helps schools “hold the thin line between immediately protecting [the complainant-victim] and denying the harasser process before expelling him.” The court remained divided, however, with the dissent accusing the majority of utilizing a “good faith” standard for deliberate indifferent-

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37 Johnson & Gafkay, supra note 18 (citing Foster v. Bd. Of Regents, 982 F. 3d 960 (6th Cir. 2020)).
38 Foster, 982 F.3d at 962.
39 Id. at 972.
40 Id. at 973-74.
41 Id. at 976.
43 Foster, 982 F.3d at 979.
44 Id at 969.
ence despite Davis calling for a “clearly unreasonable in light of the known circumstances” test.\(^{45}\)

While controversial, the Sixth Circuit’s ruling in Foster is, at the very least, consistent with past precedent (albeit seemingly only some of it).\(^{46}\) In a case decided the previous year involving four Michigan State students who sued their school for inadequately responding to their complaints after consistently running into their assailters, the court found that no deliberate indifference had occurred because the misconduct was deemed not significant enough in the first place and because no additional harassment had occurred.\(^{47}\) However, more importantly, the court established that such indifference, even if it exists, must have directly led to future instances of harassment, stating that:

\[
\text{[t]he plaintiff must plead, and ultimately prove, an incident of actionable sexual harassment, the school’s actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school’s response, and that the Title IX injury is attributable to the post-actual-knowledge further harassment.}^{48}\]

This essentially means that unless a school exhibited deliberate indifference to a complainant’s experience of sexual misconduct and that indifference directly led to further misconduct, it will generally not be found liable for such indifference, even if it took place.

At the same time, however, lower courts have issued still-valid rulings that suggest otherwise. In C.R. v. Novi Community School District, a 2017 case involving sexual harassment involving 12 and 13-year-old children at school in which the school attempted to place the students in the same classroom again, the Eastern District of Michigan found that a school could be found liable if its deliberate indifference (in this case, not keeping the parties separated in the classroom) left students more vulnerable to future abuse.\(^{49}\) When coupled with the dissent in Foster, which was itself decided only after a rehearing,\(^{50}\) this case suggests further division within the Sixth Circuit regarding this issue.

\(^{45}\) Burton, supra note 42.
\(^{46}\) Supra note 43.
\(^{48}\) Id. at 623-24 (emphasis added).
\(^{50}\) Burton, supra note 42.
2. Eighth Circuit

The Eighth Circuit made a similar determination to the Sixth Circuit in 2017, concluding in *K.T. v. Culver-Stockton College* that for a school to have been deliberately indifferent, there must have been a “causal nexus between the school’s inaction and the student experiencing sexual harassment.”51 The complainant-victim in this case—a woman’s soccer recruit visiting the school as part of its athletic recruitment process—argued that Culver-Stockton College was indifferent by failing to provide her with any resources after she was sexually assaulted at a fraternity party during her visit.52 The court reasoned that, because this inaction did not perpetuate further sexual misconduct (even if it did contribute to emotional trauma), this inaction on the institution’s part cannot constitute deliberate indifference.53

3. Ninth Circuit

The Ninth Circuit has also emphasized the need for direct causation. In 2000, the court held in *Reese v. Jefferson School District. No. 14J*, as part of a broader test to determine school liability, that schools “cannot be liable for deliberate indifference unless such indifference subjected its students to harassment.”54 The court elaborated on this twenty years later, establishing four requirements that must be met for a pre-assault claim based on deliberate indifference to survive a motion to dismiss:

(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school’s control, and (4) as a result, “the plaintiff . . . suffered harassment that [was] so severe, pervasive, and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school.”55

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51 Wamer v. Univ. of Toledo, 27 F.4th 461, 467 (6th Cir. 2022), citing K.T. v. Culver-Stockton Coll., 865 F.3d 1054, 1058 (8th Cir. 2017) (internal quotations omitted).
53 *Id.* at 1058; see also Shrum ex rel. Kelly v. Kluck, 249 F.3d 773, 782 (8th Cir. 2001) (“[D]eliberate indifference must either directly cause the abuse to occur or make students vulnerable to such abuse”).
54 208 F.3d 736, 739.
55 Karasek v. Regents of Univ. of Calif., 956 F.3d 1093, 1112 (9th Cir. 2020) (emphasis added). While the Court appears to suggest that direct causation is not required, and even cites the Tenth Circuit as inspiration for this test, it creates such a high standard of establishing deliberate indifference that its essentially still requires a direct causal relationship between the institution’s actions and further harassment. *Id.*
B. “Increased Likelihood” Circuits

Some circuits, however, have taken a vastly different approach to interpreting Davis. The First, Tenth, and Eleventh Circuits all consider the case’s ruling to imply that a school’s deliberate indifference made future harassment more likely and not that it directly caused any further misconduct.\footnote{Johnson & Gaufkay, supra note 18, citing Wamer, 27 F.4th at 469.}

1. First Circuit

One of the earlier Circuits to take a defined stance on this issue, the First Circuit in 2007 addressed its interpretation of deliberate indifference in Fitzgerald v. Barnstable School Committee.\footnote{Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 172-73 (1st Cir. 2007), rev’d on other grounds, 555 U.S. 246 (2009).} In Fitzgerald, which involved a series of instances of sexual harassment on a school bus in 2001, the court stated that one single instance of “peer-on-peer” harassment could potentially lead to Title IX liability for a school if the harassment was sufficiently pervasive and the school’s response was so unreasonable as to essentially deprive access to an educational program or activity.\footnote{Id.} Such an interpretation would open the doors for colleges and universities to face Title IX liability should their procedures be inadequate, even if they do not cause further harassment. The focus is instead on whether the institution’s actions make the complainant more vulnerable to such harassment or more likely to experience it again in the future.\footnote{Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019) (citing Fitzgerald, 504 F.3d at 172).}

2. Tenth Circuit

The Tenth Circuit has held that if a school’s indifference to reports of sexual misconduct cause victims of such assault to become more vulnerable to harassment in the future, then it can be liable—even if it is not a but-for cause of that misconduct.\footnote{See id. at 1103–05.} In Farmer v. Kansas State University, a case decided in 2019, the complainant-victims in various sexual assault cases alleged that the university requiring them to continue to attend school with their assaulters (who were also students at the same university) constituted deliberate indifference.\footnote{Id. at 1097.} The court noted that doing so had the potential to “embolden” the assailters and that the complainants found themselves unable to participate in various educational programs and opportunities out of fear of running into their assailters.\footnote{Id. at 1098.}
3. Eleventh Circuit

In 2007, the same year that the First Circuit decided Fitzgerald, the Eleventh Circuit also determined that a school’s deliberate indifference need not directly lead to further harassment to invoke Title IX liability. In Williams v. Board of Regents of University System of Georgia., the court found that a victim of peer-on-peer sexual assault could make a claim for deliberate indifference despite having withdrawn from the university.63 The court reasoned that, because the university in the case failed to properly respond to the misconduct, the student’s subsequent withdrawal represented a failure on behalf of the university in providing her the educational opportunity that comes with attendance.64

C. “Reasonable Calculation”

1. Second Circuit (Title VII)

A third approach—evaluating an institution’s deliberate indifference based on the reasonableness of the institution’s response to an incident of misconduct—has also been used on occasion by courts. In the Second Circuit, even if an institution responds to an occurrence of sexual assault or harassment, if the response involves efforts that are not reasonably calculated to end the misconduct, then it is considered to have exhibited deliberate indifference.65 While Zeno involved Title VII66 and not Title IX, the court still interpreted the language of Davis (which, as previously discussed, is a Title IX-focused case) regarding deliberate indifference and used it to determine institutional liability regarding an instance of race-based (as opposed to gender-based) harassment.67 While the Second Circuit does not appear to have ruled on deliberate indifference specifically in the context of Title IX, the adoption of the standard by the Fourth Circuit and the structural similarities between the two pieces of legislation suggests that the test would be used in Title IX situations as well.68

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63 477 F.3d 1282, 1297-98 (11th Cir. 2007).
64 Id.
68 See id.; infra Part II.C.2.
2. Fourth Circuit

The Fourth Circuit has also adopted this approach for Title IX cases. In other words, it requires that a school engage in efforts that are “reasonably calculated” to end any misconduct that occurred to avoid Title IX liability. For example, in Feminist Majority Foundation v. Hurley, the court found a university liable for Title IX for its response to students facing harassment through a university-operated social media platform. Citing the Second Circuit’s interpretation in Zeno and applying it to Title IX, the court reasoned that the school’s efforts to stop the harassment—which included listening circles, a general email to the student body, and on one single instance sending a police officer to be with a victim who felt unsafe—were not reasonably calculated to end the harassment.

D. Deliberate Indifference: A Universal Solution

This inconsistency between circuits causes confusion and complexities for institutions of higher education while also creating uncertainty for student-victims of sexual misconduct in terms of the remedies available to them. For the benefit of students and schools alike, a universal standard of “deliberate indifference” to establish institutional liability should be established. Furthermore, each aforementioned approach suffers from key issues that cast doubt on their efficacy as a nationwide solution. If read word-for-word, the “direct cause” test permits colleges and institutions to provide minimal supportive measures for victims. The psychological effects of sexual harassment can be immense, and simply allowing schools to do the bare minimum in terms of supportive measures for students may put the health and well-being of those students at serious risk. The “increased likelihood” test seems likely to prevent this, but it also presents its own issues. A counterfactual is statistically impossible to prove, which would make it difficult to prove that an institu-

70 Feminist Majority Found., 911 F.3d at 689.
71 See id. at 680.
72 Listening circles are a form of restorative justice with roots in indigenous cultures. Listening Circles, THE CO-INTELLIGENCE INST. (2008), https://co-intelligence.org/P-listeningcircles.html. They consist of people sitting in a circle with some sort of object (such as a stick) that one must have possession of to speak. Id. The goal of these circles is to allow people to better understand each other’s experiences and provide a space to share one’s experiences. Id.
73 Feminist Majority Found., 911 F.3d at 690-91.
74 Wolff, Rospenda, & Colaneri, supra note 3 (noting the likelihood that sexual harassment negatively impacts the “professional, persona, and educational functioning” of college-aged victims).
tional action made future instances of misconduct more or less likely to occur. The third test, also known as the “reasonable calculation” test, is perhaps the most viable of the three, but it invokes similar problems to the original Davis conundrum—what defines a “reasonable calculation”? What factors should a court consider when making such a determination? Facially, at least, there seem to be no established answers (even if courts have implied different points of consideration). Nonetheless, a failure to make those points of consideration uniform could simply pave the way for a further circuit split.

1. An Unlikely Source of Inspiration: Mathews v. Eldridge

The test proposed in this Note takes inspiration from the well-known Supreme Court case Mathews v. Eldridge. A staple case for many administrative law courses, Mathews involved the Social Security Administration (SSA) terminating disability benefits it had previously been providing to the plaintiff. The plaintiff argued that, because the termination occurred without a hearing, the SSA violated his due process rights. The Supreme Court ruled in favor of the SSA, but more relevant to this Note is the method by which it did so. The Court established a now-famous balancing test to determine what due process rights Eldridge had at stake. The test weighed three major factors: on one side, the interests of the claimant in maintaining the property and the risk of erroneous deprivation (and the value any additional procedural safeguards would have in preventing such risk); and on the other side the interests of the state—in other words, the administrative burden that such procedural safeguards may have imposed on the state.

2. Creating a New Standard

While it may be true that procedural due process in administrative law cases is a different issue than school liability in Title IX cases, upon further analysis, they involve similar points of consideration that lend

75 David K. Lewis, COUNTERFACTUALS, in ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH (Sage Publications, 1973). http://www-personal.umd.umich.edu/~delittle/Encyclopedia%20entries/Counterfactual.htm. Counterfactuals are arguments or assertions that consider what a result would have been had events happened in a different way than they actually did. Id. In cases considering deliberate indifference under this test, the counterfactuals would be any determination about whether further harassment would have not occurred (or been less likely to have occurred) had the institution in question responded to the initial harassment in a different manner. See generally Daniel H Cohen, THE PROBLEM OF COUNTERFACTUALS, 29 NOTRE DAME J. OF FORMAL LOGIC 91 (1998) (describing this problem in a theoretical manner).
76 Supra Part II.A-II.C.
78 Id. at 324-25.
79 Id. at 334-35.
80 Id.
themselves well to the creation of a new analogous standard for the latter. For instance, while a complainant’s property interest may not be at stake, the complainant inevitably does have an interest in being able to properly enjoy their educational experience. For the purposes of this test, such enjoyment includes, among other things, feeling comfortable attending classes and feeling safe around campus. The other two factors from *Mathews* align somewhat easily with those relevant to Title IX institutional liability cases. The risk of erroneous deprivation from *Mathews* naturally translates in these cases to the risk of further sexual misconduct against the student (or, potentially, against students at the school in general), while the value of additional procedural safeguards translates to the effects that the school’s actions had on preventing the misconduct (whether that effect is positive or negative). While this is in effect the increased likelihood test, it overcomes the fact that it is impossible to determine with certainty the direct effects of a school’s actions with the idea that, to remain consistent with *Davis*, deliberate indifference has to somehow be determined retroactively in these cases—and because of the consideration of other factors it involves less reliance on one hypothetical determination. While additional misconduct need not have occurred, should the institution have acted in a way that should have been expected to limit the possibility of the harm from occurring, the balancing should account for this. The state’s interest component would essentially remain unchanged in this context—while, in an ideal world, colleges and universities would be able to (and, thus, be expected to) implement infinite measures and investigative procedures to prevent further harassment from occurring, doing so would incur heavy administrative costs that would likely be impossible for schools, especially those with smaller budgets, to afford.

In summation, this proposed balancing test involves courts weighing three factors when determining if a school exhibited deliberate indifference in sexual harassment cases: the effects of the institution’s response on the complainant, the response that was taken and the effects that those steps had on the likelihood of future misconduct, and the burden additional actions would have had on the institution. Should the interests of the complainant-victim, along with the risk of further harassment after accounting for the institutional response, be found to outweigh the interests of the institution, then the school would be considered to have been deliberately indifferent. If not, then it would not be.

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81 See *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 650 (1999) (acknowledging the potential for institutional Title IX liability when a student’s access to educational programs and benefits are affected).

In the interest of clarity, consider this hypothetical situation: Student R sexually harasses Student C. Both students attend University. Student C files a report against Student R and, while Student R admits to the offense, University fails to provide any supportive measures to Student C, such as a no-contact order (NCO) or preventing the two students from having classes together. Nor does it impose any sanctions on Student R. Student R harasses student C again after a class they have together.

While a bit of an extreme case, this demonstrates how the balancing would work. Here, the interests of Student C seem rather high. Not only have they been harassed again, but having to continue to see Student R regularly at class and having no way to keep Student R away from them likely affects their ability to engage in the academic programs provided by University. Here, the school did nothing, and the risk of further harassment in this situation appears to have been high given the lack of action taken (it clearly must have been greater than zero, given that a harassment in fact occurred). On the other side of the balance would be the burden that imposing further measures or sanctions would have had on the school. This balancing seems straightforward—it is unlikely that University could have any real interest that outweighs the high interest of Student C (it certainly does not require too much time or manpower to support Student C and provide them with an NCO, for instance) and the (probably) high risk that existed for further harassment given their inaction. Here, University would be determined to have acted with deliberate indifference. The test would work the same way for cases of sexual assault or any other form of sexual misconduct.

3. Application

This proposed test would feature a couple of further nuances as well. For example, such balancing would be done in a manner that is most favorable to the complainant (in the same way that courts interpret evidence in the way that most favors the accused). While courts have acknowledged fears of respondent-harassers filing erroneous outcome claims, the Supreme Court (and, subsequently, the Department of Justice) has clearly indicated that Title IX has two specific objectives—preventing federal support for discriminatory practices and protecting citizens from discrimination. Title IX is first and foremost focused on protecting those at risk of discrimination—not institutions or

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83 Klocke v. Univ of Tex. at Arlington, 938 F.3d 204, 210 (5th Cir. 2019). Notably, the Fifth Circuit (which ruled on this case) is one of the few circuits that does not appear to have an established position on this issue. Supra Part II.A-II.C.


even alleged discriminators.\textsuperscript{86} While those interests are relevant, they come secondarily, and the interests of the complainant-victim must come first. Additionally, at this point in any hypothetical case, the harassment has generally already been determined (whether it be by the institution itself or a court) to have occurred—whether the school is then found liable as well has no real bearing on the status of the respondent-harasser. Applying this to the example above, the court would consider these factors in the way that most favors the interests of Student C. Should a court find that the three factors balance evenly, the interests of Student C would tip the scale in their favor. Note that this is not contingent on the second harassment having occurred—it certainly hurts University’s position, but if Student C was being negatively affected enough by the encounter and subsequent interactions with Student R and the court determines that the risk of further harassment at the time of the suit’s filing was high enough, Student C could still prevail.

Furthermore, courts would be expected to make these determinations on a case-by-case basis, paying special attention to the identity of the parties involved and the context in which the harassment occurred. This is a departure from \textit{Mathews};\textsuperscript{87} however, such case-by-case assessment is particularly important for instances of sexual harassment due to the role of identity and context in the experience of complainant-victims.\textsuperscript{88} For instance, everything from someone’s race, gender, personal history, socioeconomic status, and cultural backgrounds, among other factors, affects the way that a victim processes and works through their harassment.\textsuperscript{89} Thus, the level of vulnerability of each complainant-victim changes based on their identity and the context in which the misconduct occurred. Again, going back to the example, this means that the court would consider each of these factors with an eye on identity and context. Perhaps the harassment occurred at a fraternity party as opposed to in the classroom or at Student C’s home, which may be relevant to determining the best course of action in terms of the likelihood that misconduct would happen again. Perhaps Student R found themselves in a place of power in their dynamic with Student C due to age, gender, so-

\textsuperscript{86} This Note does not seek to argue that these interests are unimportant, rather that they are secondary in the eyes of Title IX to those of victims of discrimination.

\textsuperscript{87} Terri J. Lacy, \textit{Mathews v. Eldridge: Procedural Due Process Requirements in Social Security Disability Benefit Terminations}, 30 Sw. L. J. 647, 651 (1972) (“Finding that the credibility of medical evidence would be in question only in a rare number of cases, the majority assumed, with the petitioner, that procedural rules are designed for the general case and not the exception”). The \textit{Mathews} case has been criticized in the past for generalizing its methodology for specific groups of plaintiffs. See id. at 652 (“the most valid criticism of the Court’s reasoning . . . arises from the majority’s reliance on generalities”).

\textsuperscript{88} \textit{Personal Identity & Sexual Assault, Univ. of Conn.}, https://titleix.uconn.edu/more-information/sexual-assault/personal-identity-sexual-assault/ (last visited May 4, 2022).

\textsuperscript{89} \textit{Id.}
cioeconomic status, or any other relevant factor, which may mean that further actions would likely have been needed to be taken to prevent further assault. Courts would be expected to keep this in mind when balancing.

A concern that may arise with a case-by-case system is that, compared to a uniform or generalist system, it requires more judicial time and resources (especially in the case of the “direct cause” circuits, which would often dismiss these claims immediately). However, such fears are rooted in the assumption that the same amount of claims courts receive regarding schools’ deliberate indifference would remain the same should this test be adopted. This would likely not be the case. First, having a clearer requirement for what constitutes deliberate indifference may help deter frivolous claims that clearly would not pass the test (alternatively, schools may not contest clear situations where they plainly acted in such a manner). Furthermore, colleges and universities have demonstrated their desire to avoid liability. For instance, after the 2011 Dear Colleague letter, in which the Obama administration implemented many of the changes discussed earlier, most affected schools quickly took action to meet the new standards to remain compliant with the law.90 This behavior suggests that, should a test like this be implemented, schools with procedures and tendencies to act in ways that would be considered “deliberately indifferent” would likely modify those practices to meet the new requirement, in turn reducing the amount of litigation focused on this issue (and, more importantly, reducing the need for such litigation in the first place).

4. Impact on Schools

The implementation of such a test would likely change the legal outlook for many schools—especially those in the Sixth, Eighth, and Ninth Circuits—that can no longer defend their actions in these cases based solely on the fact that they did not incite misconduct. These schools would have to work on their Title IX processes and procedures to ensure that they are not at risk of violating the balance, and they would need to do so in ways that cater to the unique identities of their students.

Schools could take several actions to help improve their systems. For instance, having a webpage that adequately explains the school’s Title IX policies and the resources available to complainants helps to en-

sure that complainants and respondents alike can best understand their potential options. A faculty-run investigative committee from the University of Western Kentucky also determined a number of helpful suggestions for schools to improve their Title IX practices. For instance, from a procedural standpoint, schools should review their existing policies to ensure that they address “definitions; statutory references; prevention and awareness; intervention practices including intake, reporting, investigation, due process hearing, discipline and appeals; training for faculty, staff and students; and external resources.”

Furthermore, the same committee noted that much of Title IX web training for college and university employees is focused not on the interests of complainant-victims, but on the avoidance of liability and, perhaps somewhat ironically, recommended a shift in such focus to better train employees about properly supporting students. This would be especially beneficial for the training provided to Title IX Office employees—an emphasis on avoiding liability would seemingly encourage doing the bare minimum to protect the university rather than to act in the best interests of the complainant-victim, and seems to go against the purpose of Title IX discussed earlier.

Schools could also help themselves comply with the proposed standard by publishing (if they are not already) yearly data on information such as the number of cases reported, the success rate for complainant-victims, and how long cases generally lasted. Doing so would help establish what these processes actually look like for complainant-victims and help them have a reasonable understanding of what the process might look like, while also serving as a source of accountability for schools to take these issues seriously.

Schools can also limit their liability by working to prevent sexual misconduct from occurring on their campuses in the first place.

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93 Id.
94 Id.
95 While outside the scope of this Note, given that cases of deliberate indifference arise after an instance of misconduct has been deemed to have occurred, improved training and a shift in focus from one of liability for hearing panel members could also help to better ensure justice from and instill confidence in these processes.
96 While schools cannot release information on specific sanctions for respondent-harassers due to the Family Educational Rights and Privacy Act, they can release data on complainant-victim success rates.
schools are not responsible for every incidence of misconduct that occurs, they do have immense power to help establish cultural norms to disincentivize these cases from happening. School-sponsored peer education groups such as the Culture of Respect Educators at the University of Virginia98 or the Title IX Peer Educator Program at Flagler University provide institutional training and academic credit for students to present on issues of gender-based violence and general sexual misconduct to students across campus.99 Empirical data has shown how influential college students can be on one another, and that peer education can be an especially effective way of encouraging a variety of behaviors, including healthy gender norms and sexual habits.100 Getting students involved in these measures provides the additional benefit of limiting the burden on university administration in limiting sexual misconduct (although it is important to note that peer advisors should not be taken advantage of for their contributions).

CONCLUSION

Title IX’s history has been fraught with a lack of overall clarity. While each of the existing tests to determine institutional deliberate indifference is rooted in sensible reasoning, none of them are both effective enough in protecting the needs of the complainant-victim and clear enough to prevent arbitrariness. The proposed balancing test meets both requirements and considers the interests of all parties in a way that is consistent with the purpose of Title IX. The simplest steps schools could take to comply with this standard would be to ensure the effectiveness and transparency of their current Title IX accommodations and adjudicatory processes and engage in efforts to prevent such harassment from occurring in the first place.

It is true that colleges and universities are not directly responsible for longstanding cultural norms that contribute to sexual misconduct in general (and that are outside the scope of this Note).101 However, once a school is aware that an instance of sexual misconduct is occurring, it is

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responsible for (a) supporting the complainant-victim and (b) implementing proper, good-faith measures to prevent further harassment. Generally speaking, if a school does these two things, it should pass this test, barring any major oversights on its end. Even if the institution did not directly cause the misconduct, these steps would help disincentivize further sexual harm or—even better—promote a healthier sexual culture on campus.

*Mathews* is an interesting case—it has been considered by some to have had an unjust outcome due to its ultimate denial of disability benefits.\(^{102}\) Ironically enough, however, the Court’s test in *Mathews* could be the ideal solution to resolving the national ambiguity surrounding the meaning of a school being “deliberately indifferent” and ensuring justice for complainant-victims of sexual harassment.

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\(^{102}\) See Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 30 (1976) (labelling the decision as “unresponsive to the full range of concerns embodied in the due process clause”).