THE TWO TITLE IXS*

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Title IX, a law that mandates equality, operates unequally. Title IX prohibits sex discrimination of all forms, including sexual harassment, in public schools. When students assert Title IX sexual harassment claims, one standard exists for determining Title IX's violation. The Supreme Court held that schools violate Title IX when they respond with deliberate indifference to sexual harassment. Despite Title IX's broad proscription on sex discrimination and this uniform standard for evaluating sexual harassment claims, the lower federal courts' assessments of those claims produce disparities. Counterintuitively, given that K–12 students both suffer more sexual harassment and more harm from it, courts provide them less protection from sexual harassment under Title IX than students in higher education. The courts thus create two sets of Title IX protections, or two Title IXs.

Further, these disparities implicate race. By affording more protection from sexual harassment to higher education students than K–12 students, the courts provide more safeguards in the schools that enroll mostly white students and fewer in the schools that increasingly, often predominantly, enroll Black and Latinx students. Because Black and Latina girls under the age of eighteen suffer more sexual harassment than older students or white students of any age, the courts deny the full force of Title IX's protections to the students who need them most.

To remedy these multilayered disparities in Title IX protections, identified here for the first time in the academic literature, this Article proposes both individual and structural reforms. In individual student Title IX claims, it recommends changes to the articulation and application of the deliberate indifference standard. Structurally, it identifies ways laws that work in conjunction with Title IX should be amended to provide K–12 students protections that are

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currently only available in higher education. With such changes, Title IX will be better able to fulfill its powerful equality mandate.

INTRODUCTION

Students in kindergarten through twelfth grade ("K–12") public schools suffer more sexual harassment and endure more harms from it than students in higher education.[1] Nearly twice as many students in grades seven through twelve experience sexual assault as all students in higher education.[2] The majority of these younger survivors of sexual harassment is also disproportionately students of color.[3] Title IX, the law that bans sex

1. *See* CATHERINE HILL & HOLLY KEARL, AM. ASS'N OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2 (2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf [https://perma.cc/WL3L-YML8]; DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, SHAUNA HARPS, REANNE TOWNSEND, GAIL THOMAS, HYUNSUIK LEE, VANESSA KRANZ, RANDY HERRISON & KRISTEN MADDEN, ASS'N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT xiii, 47 (Jan. 17, 2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/N84X-GMXS]; Vaughn I. Rickert, Constance M. Weimann, Roger D. Vaughan & Jacquelyn W. White, *Rates and Risk Factors for Sexual Violence Among an Ethnically Diverse Sample of Adolescents*, 158 ARCHIVES PEDIATRIC ADOLESCENT MED. 1132, 1132 (2004); Nancy J. Thompson, Robin E. McGee & Darren Mays, *Race, Ethnicity, Substance Use, and Unwanted Sexual Intercourse Among Adolescent Females in the United States*, 13 W.J. EMERGENCY MED. 283, 283 (2012); Ángel Castro, Javier Ibanez, Berta Mate, Jessica Esteban & Juan Ramon Barrada, *Childhood Sexual Abuse, Sexual Behavior, and Revictimization in Adolescence and Youth: A Mini Review*, 10 FRONTIERS PSYCH. 1, 2 (2019); Kevin Lalor & Rosaleen McElvaney, *Child Sexual Abuse, Links to Later Sexual Exploitation/High-Risk Sexual Behavior, and Prevention/Treatment Programs*, 11 TRAUMA, VIOLENCE, & ABUSE 159, 163 (2010).

2. *See* HILL & KEARL, *supra* note 1, at 2; CANTOR ET AL., *supra* note 1, at xiii, 47. These statistics include both undergraduate and graduate students in higher education. *See infra* Section I.A.1.

3. *See* Dorothy L. Espelage, Jun Sung Hong, Sarah Rinehart & Namrata Doshi, *Understanding Types, Locations, & Perpetrators of Peer-to-Peer Sexual Harassment in U.S. Middle Schools: A Focus on Sex, Racial, and Grade Differences*, 71 CHILD. & YOUTH SERVS. REV. 174, 180 (2016); LAURA KANN, TIM MCMANUS, WILLIAM A. HARRIS, SHARI L. SHANKLIN, KATHERINE H. FLINT, BARBARA QUEEN, RICHARD LOWRY, DAVID CHYEN, LISA WHITTLE, JEMEKIA THORNTON, CONNIE LIM, DENISE BRADFORD, YOSHIMI YAMAKAWA, MICHELLE LEON, NANCY BRENER & KATHLEEN A. ETHIER, CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WEEKLY REPORT: YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2017, at 20 (2018), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf [https://perma.cc/5H23-TJAL]; KAYLA PATRICK & NEENA CHAUDHRY, NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 2–3 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence.pdf [https://perma.cc/P8M9-QPL5].

discrimination in public education, should protect these younger survivors from sexual harassment, but it does not.[4] More precisely, it does not protect them to the same extent that it protects older, particularly older white, students in higher education.[5]

Title IX's purpose is to protect all individuals from sex discrimination in public education without qualification.[6] Over thirty years ago, the Supreme Court recognized that Title IX's prohibition on sex discrimination includes sexual harassment.[7] At the same time, the Court established the standard for determining when schools have violated Title IX's proscription on sexual harassment.[8] The Court held that schools are liable for sexual harassment when they know about such harassment and respond with deliberate indifference.[9]

Although the Supreme Court established this one deliberate indifference standard for evaluating all Title IX sexual harassment claims, the lower federal courts' assessments of that standard offer students varying degrees of protection.[10] The degree of protection students enjoy depends on whether the students are in the K–12 public schools or higher education.[11] Counterintuitively, given younger students' greater vulnerability to sexual harassment and its harms, the lower federal courts' evaluations of the deliberate indifference standard provide students in higher education more protection from sexual harassment than students in K–12 public schools.[12]

4. *See infra* Section I.B. For the sake of brevity, references in this Article to "sexual harassment" include all forms of sexual violence, including verbal sexual harassment and sexual assault.

5. *See infra* Sections I.B, II.A–B.

6. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); *see infra* note 70 and accompanying text.

7. 20 U.S.C. § 1681(a).

8. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

9. *Davis*, 526 U.S. at 648; *Gebser*, 524 U.S. at 290–91.

10. *See infra* Section I.B.

11. *See infra* Section I.B.

12. At least six federal circuit courts offer higher education students a comparatively enhanced degree of protection from sexual harassment under Title IX. Farmer v. Kan. State Univ., 918 F.3d 1094, 1102 (10th Cir. 2019); Doe v. Univ. of Ky., 959 F.3d 246, 251–52 (6th Cir. 2020); Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999); Karasek v. Univ. of Cal., 956 F.3d 1093, 1106 (9th Cir. 2020); Feminist Majority Found. v. Hurley, 911 F.3d 674, 693 (4th Cir. 2018); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1293 (11th Cir. 2007). *But see* J.M. *ex rel.* Morris v. Hilldale Indep. Sch. Dist. No. 1-29, 397 F. App'x 445, 453–54 (10th Cir. 2010) (concluding that a jury could find that a lack of an investigation by a high school principal was not reasonable and constituted deliberate indifference); McCoy v. Bd. of Educ., Columbus City Schs., 515 F. App'x 387, 391–92 (6th Cir. 2013) (finding that a response from the school district of sending letters ordering a teacher not to use physical contact was not deliberately indifferent); Porto v. Town of Tewksbury, 488 F.3d 67, 72 (1st Cir. 2007) (concluding that a school's response of separating a middle school student from the harassing student made it not deliberately indifferent); Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 168 (4th Cir. 2015) (per curiam) (finding that the school board was not deliberately indifferent when a more thorough investigation could have stopped further harassment of a middle school student); GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 915 (11th Cir. 2018) (per curiam) (concluding that a

This Article argues that the courts have created two levels of protection from sexual harassment under Title IX in ways not sanctioned by either Title IX itself or Supreme Court doctrine.[13] Further, this Article demonstrates how this disparity implicates race.[14] Because the colleges and universities that are most likely to enforce Title IX overwhelmingly enroll white students, the relatively enhanced Title IX safeguards afforded to higher education students primarily apply to white higher education students.[15] Meanwhile, the K–12 public school population is increasingly and predominantly comprised of students of color in many states and regions of the country.[16] The courts thus provide fewer protections from sexual harassment for the students in schools that enroll more—often, a majority of—students of color.[17]

In making these arguments, this Article is the first to both identify the differences in courts' treatment of students' Title IX claims based on the educational level of the student and to highlight the problem as one that concerns race.[18] Other scholars have compellingly critiqued Title IX's deliberate indifference standard generally as too vacuous to provide adequate protection from sex discrimination.[19] They have also explored the racial ramifications of Title IX's rules regarding school athletics programs and Title IX's evidentiary requirements in the higher education context.[20] However, the academic

middle school's response involving meeting with parents and removal of harassing classmate was not deliberate indifference); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000) (concluding that a middle school's response involving meeting with parents and removal of harassing classmate was not deliberate indifference).

13. *See infra* Section I.B.

14. *See infra* Sections II.A–B.

15. *See infra* Section II.A. Racial diversity in higher education exists largely in the community college context, and community colleges have much less occasion to enforce Title IX. *See, e.g.*, Greta Anderson, *New Requirements, More Costs*, INSIDE HIGHER ED (June 10, 2020), https://www.insidehighered.com/news/2020/06/10/community-colleges-burdened-new-title-ix-regulations [https://perma.cc/4DFJ-FZX9 (dark archive)].

16. *See infra* Sections II.A–B.

17. *See infra* Sections II.A–B.

18. This Article expands on my prior scholarship. Previously, I have critiqued courts' assessments of both the actual notice and deliberate indifference standards in K–12 public school students' Title IX claims. No scholar has yet to do a comparative analysis of how the courts treat higher education students' Title IX claims or yet explored the related racial implications. *See* Emily Suski, *Subverting Title IX*, 105 MINN. L. REV. 2259, 2260–61 (2021) [hereinafter Suski, *Subverting Title IX*]; Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147, 1151–52 (2020) [hereinafter Suski, *Title IX Paradox*].

19. *E.g.*, Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2091–92 (2016).

20. *E.g.*, Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 311 (2019) (arguing that under recently promulgated Title IX regulations, "changes to the evidentiary standard will enable attacks against the rights of other protected classes, including victims of racial and other forms of discriminatory harassment, not just sexual harassment"); Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT.

literature has yet to consider the distinct treatment of K–12 public school students' Title IX sexual harassment claims as compared to higher education students' claims, how that distinct treatment makes the standard uniquely problematic for K–12 students, or the related racial implications.[21]

The lower federal courts distinguish their treatment of K–12 and higher education students' sexual harassment claims and thus provide higher education students relatively enhanced protections from such harassment in two ways.[22] First, some courts articulate a more rigorous (and therefore more protective) version of the deliberate indifference standard in higher education students' cases than in cases brought by K–12 public school students.[23]

Second, some courts articulate the deliberate indifference standard uniformly across higher education and K–12 students' Title IX claims but apply it more rigorously in higher education students' claims.[24] In assessing a college or university's response to sexual harassment for deliberate indifference, these courts inquire into what more a college or university could have done to address that sexual harassment.[25] These same courts refuse, however, to make that inquiry in K–12 students' cases.[26] Instead, these courts are willing to find that any response by the K–12 schools other than none at all satisfies the deliberate indifference standard.[27]

In addition, a further disparity affects the protections afforded to students in higher education as compared to those in the K–12 public schools. Other laws, principally the Clery Act,[28] provide students in higher education procedural and substantive protections from sexual harassment that are not available to K–12 public school students.[29] Students in higher education, therefore, have a higher baseline level of protection from sexual harassment than do K–12 public school students.[30] But even when courts articulate and apply the deliberate indifference standard uniformly, students in higher education still

L.J. 199, 202 (2008) (examining "how race and educational equity issues shape women's sports experiences" and arguing that "[t]he absence of attention to these issues in the discourse and public policy debates surrounding Title IX undermines the law's transformative potential and its ability to succeed in enhancing the sports experiences of all women").

21. *See, e.g.*, MacKinnon, *supra* note 19, at 2040–41; Cantalupo, *supra* note 20, at 311; Brake & Williams, *supra* note 20, at 202.

22. *See infra* Section I.B.

23. *See infra* Section I.B.1.

24. *See infra* Section I.B.2.

25. *See infra* Section I.B.2.

26. *See infra* Section I.B.2.

27. *See infra* Section I.B.2.

28. Student Right-To-Know and Campus Security Act, Pub. L. No. 89-329, tit. IV, 79 Stat. 1232–54 (codified as amended in scattered sections of 20 U.S.C.).

29. *See* 20 U.S.C. § 1092(f).

30. *See id.*

regularly receive more protection from sexual harassment than do K–12 public school students.[31]

Title IX, a law that mandates equality, thus operates unequally.[32] Interrogating the lower federal courts' assessments of Title IX in higher education and K–12 public school students' sexual harassment claims, this Article also demonstrates how the court-developed inequalities in Title IX protections extend to race.[33] By establishing one set of protections from sexual harassment in higher education students' cases and another in K–12 public school students' cases, the courts afford more overall protection from sexual harassment to older, white students and less to younger Black and Latinx students.[34] The courts produce this racial inequality in two ways. First, the courts generate institutional-level race disparities in Title IX protections.[35] By requiring more under Title IX of colleges and universities, the courts demand that the schools that primarily enroll white students provide more protections from sexual harassment than the K–12 public schools that enroll higher proportions, and often a majority, of students of color.[36]

Second, the courts produce individual-level race disparities in Title IX protections.[37] The lower federal courts' assessments of the deliberate indifference standard provide less protection to the individual students who are also the most likely to suffer more sexual harassment: school-aged Black and Latina girls.[38] Empirical research shows that Black and Latina girls under the age of eighteen are more susceptible to suffering more types of sexual harassment than are older students and white students of any age.[39] By providing K–12 public school students less protection from sexual harassment under Title IX, the courts provide less protection to these individual Black and Latina students who are more vulnerable to suffering it.[40] The courts thus

31. *See infra* Section I.B.3.

32. *See infra* Section I.B.3.

33. *See infra* Sections II.A–B.

34. *See infra* Sections II.A–B.

35. *See infra* Section II.A.

36. *See infra* Section II.A.

37. *See infra* Section II.B.

38. *See* Espelage et al., *supra* note 3, at 180; KANN ET AL., *supra* note 3, at 20; PATRICK & CHAUDHRY, *supra* note 3, at 2–3.

39. *See* Espelage et al., *supra* note 3, at 180; KANN ET AL., *supra* note 3, at 20; PATRICK & CHAUDHRY, *supra* note 3, at 2–3.

40. *See* Espelage et al., *supra* note 3, at 180; KANN ET AL., *supra* note 3, at 20; PATRICK & CHAUDHRY, *supra* note 3, at 2–3. The point here is not to ignore the existence of racial disparities in Title IX's application in higher education. A debate exists about those disparities, whom they affect, and what to do about them. *See, e.g.*, Kamillah Willingham, *To the Harvard Law 19: Do Better*, MEDIUM (Mar. 24, 2016), https://medium.com/@kamily/to-the-harvard-law-19-do-better-1353794288f2 [https://perma.cc/UX6R-C8M3] (critiquing Harvard Law professors for "claiming without evidence that Black men are disproportionately and wrongly implicated in on-campus sexual assault proceedings

marginalize, if not erase, these girls' experiences of sexual harassment.[41] To make these disparities worse, both the schools and the students who attend them are disproportionately low-income.[42] They are therefore disproportionately ill-equipped to address the effects of sexual harassment.[43]

One might be tempted to rationalize courts' differential treatment of K–12 and higher education students. Arguably, K–12 students benefit from the protections of their parents, whereas at least some higher education students are essentially adolescents trying to navigate the world independently.[44] Yet, that argument presupposes a capacity on the part of parents to protect students in the K–12 public schools that parents simply lack.[45] For instance, parents have little access to their children during school and so can do little to protect them in those settings.[46] The divergent treatment of the rights of K–12 and higher education students is particularly suspect in light of the strong correlation of these two groups with race.[47] Thus, courts are not only offering older students more protection than younger ones, but they are also protecting white students more vigorously than students of color.

The lower federal courts have, then, created layers of disparities with their treatment of students' sexual harassment claims.[48] Despite Title IX's broadly protective purpose, under courts' assessments, younger students, particularly younger students of color, who are disproportionately low-income, have less refuge in Title IX than older students and white students.[49] The students with the greatest need for Title IX's protections, therefore, are often the least likely to receive the full force of those protections.[50]

[while] ignor[ing] well-established research on the disproportionate rate at which women of color are sexually assaulted"); Jeannie Suk Gerson, *Shutting Down Conversations About Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school [https://perma.cc/W24Z-YJ3R (dark archive)] (observing that "[a]dministrators and faculty who routinely work on sexual-misconduct cases, including my colleague Janet Halley, tell me that most of the complaints they see are against minorities, and that is consistent with what I have seen at Harvard"). Rather, the point here is to bring focus to the layered disparities created by the courts' different treatment of K–12 as compared to higher education students' Title IX claim.

41. *See infra* Section II.B.

42. *See infra* Sections II.A–C.

43. *See infra* Sections II.A–C.

44. *See infra* Section I.C.

45. *See infra* Section I.C.

46. *See* Morrow v. Balaski, 719 F.3d 160, 190 (3d Cir. 2013); *see infra* note 216 and accompanying text.

47. *See infra* Sections II.A–B.

48. *See infra* Sections II.A–B.

49. *See* Espelage et al., *supra* note 3, at 180; KANN ET AL., *supra* note 3, at 20; PATRICK & CHAUDHRY, *supra* note 3, at 2–3.

50. *See* Espelage et al., *supra* note 3, at 180; KANN ET AL., *supra* note 3, at 20; PATRICK & CHAUDHRY, *supra* note 3, at 2–3; *infra* Sections I.B.1–3.

To remedy the disparities in courts' assessment of students' Title IX claims, this Article recommends a threefold approach.[51] First, it proposes changes to the articulation and application of the deliberate indifference standard.[52] Currently, half of the federal circuits either articulate or apply the deliberate indifference standard more rigorously in higher education students' Title IX claims than in K–12 public school students' claims.[53] Courts should deploy that more robust articulation of the standard, which requires schools to protect against further sexual harassment, in *all* students' Title IX sexual harassment claims no matter their educational level.[54] Additionally, in applying that more protective standard, courts should uniformly ask what more schools could have done to protect students from sexual harassment in all students' Title IX claims, not just in some higher education students' claims.[55]

Second, this Article offers a two-part framework for evaluating that potentially powerful "what more" question.[56] This question asks courts to examine what more a school could have done to prevent sexual harassment and what more it could have done to address the harassment that did occur.[57] Although this framework can and should operate in both the higher education context as well as in the K–12 public schools, the focus here is on the framework's operation in the K–12 public schools.[58] This Article concentrates on the K–12 public school students' sexual harassment because courts have long failed to meaningfully consider K–12 public schools' responses to student sexual harassment under Title IX.[59] It therefore calls for particular scrutiny of K–12 public schools' responses to perpetrators of sexual harassment.[60] It takes this approach because addressing the causes of sexual harassment—specifically, the perpetrators' behavior—offers the best means of preventing further harassment.[61] In doing so, this framework explicitly abandons the long-held assumption among courts and schools that student discipline is the primary, or only, response to student perpetrators of sexual harassment.[62] Instead, it insists

51. *See infra* Sections III.A–C.
52. *See infra* Section III.A.
53. *See infra* Sections I.B.1–2.
54. *See infra* Section III.A.
55. *See infra* Section III.A.
56. *See infra* Section III.B.
57. *See infra* Section III.B.
58. *See infra* Section III.B.
59. *See infra* Section I.B.
60. *See infra* Section III.B.1.
61. *See, e.g.*, Bitna Kim, Peter J. Benekos & Alida V. Merlo, *Sex Offender Recidivism Revisited: Review of Recent Meta-Analyses on the Effects of Sex Offender Treatment*, 17 TRAUMA, VIOLENCE, & ABUSE 105, 114–15 (2016); *infra* note 388 and accompanying text.
62. *See infra* Section III.B. The student disciplinary system is infused with racism. *See* Jason P. Nance, *Dismantling the School to Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 313 (2016); *see*

that schools use differentiated, trauma-informed responses with survivors of sexual harassment as well as perpetrators of peer sexual harassment.[63] In addition, by evaluating what more schools could have done to address student sexual harassment, this framework demands an assessment of the extent to which all schools have reckoned with and addressed the effects of race in their responses to sexual harassment.[64]

Third, this Article recommends structural reforms. Recognizing that complying with the requirements of a differentiated, trauma-informed assessment of deliberate indifference could particularly burden low-income K–12 schools, it identifies ways that an overlooked part of another federal education statute, the Every Student Succeeds Act[65] ("ESSA"), can assist.[66] It proposes amendments to Part IV of the ESSA, which currently provides federal funds to schools to implement programs supporting the safety and health of students. This proposal would provide those Title VI funds to low-income school districts specifically to prevent sexual harassment and to ameliorate its harms.[67] Because the ESSA just expired, it is ripe for these revisions.[68] In addition, to resolve substantive disparities created by a law that only provides protections from sexual harassment to students in higher education, this Article also proposes changes to the Clery Act that would enable it to more capably cover different forms of sexual harassment and better apply to K–12 public schools.[69]

This Article proceeds in three parts. Part I describes how sexual harassment is both more prevalent and its harms often more pronounced for students in the K–12 public schools than students in higher education. It then demonstrates how the lower federal courts nevertheless offer higher education students more protection from sexual harassment under Title IX than they do for K–12 public school students. It further explains how these distinctions in

also ADVANCEMENT PROJECT, EQUALITY FED'N INST. & GAY STRAIGHT ALL. NETWORK, POWER IN PARTNERSHIPS: BUILDING CONNECTIONS AT THE INTERSECTION OF RACIAL JUSTICE AND LGBTQ MOVEMENTS TO END THE SCHOOL-TO-PRISON PIPELINE 2–3 (2015), https://advancementproject.org/wp-content/uploads/1970/01/899c2f19d719059027_h3cm6wplt.pdf [https://perma.cc/NL8F-SPSD] [hereinafter POWER IN PARTNERSHIPS].

63. *See infra* Section III.B.1.

64. *See infra* Section III.B.2.

65. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802 (codified as amended in scattered sections of 20 U.S.C.).

66. Although scholars have evaluated the utility, among other things, of the ESSA, they have not focused on Title IV of the ESSA. *See, e.g.*, Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1309 (2017).

67. *See infra* Section III.C.

68. The funding for the law has been extended on a limited basis. *Elementary and Secondary School Emergency Relief Fund*, OFF. ELEMENTARY & SECONDARY EDUC. (Dec. 15, 2022), https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/ [https://perma.cc/JH6T-42RU].

69. *See* 20 U.S.C. § 1092.

the treatment of students' claims cannot be justified based on differences in the higher education and the K–12 public school student populations. Part II contends that this distinction in treatment in students' Title IX cases concerns more than simply age or school level. It represents a distinction in treatment by race. When the lower federal courts afford more Title IX protections to higher education students, they effectively require that the schools that enroll predominantly white students provide more protections under Title IX than the K–12 public schools that tend to enroll more students of color. Further, both the schools that these Black and Latinx students attend and these students themselves are disproportionately low-income. This low-income status only exacerbates these race-based disparities. Part III offers ways to resolve this multilayered disparate treatment of students' Title IX claims. It proposes modifications to courts' evaluations of individual Title IX sexual harassment claims that would require K–12 public schools to offer students more protection from sexual harassment and would further require all schools to consider race in their responses to sexual harassment. It also suggests amendments to the ESSA, as well as the Clery Act, to help effect these changes, particularly in low-income K–12 public schools. Such changes will not only work to correct Title IX's race problem but will also ensure that Title IX operates to protect students equally in purpose as well as effect.

I. TWO TITLE IXS

Students in the K–12 public schools, who suffer more sexual harassment than older students and more harms as a result, receive less protection under Title IX.[70] K–12 public school students receive less protection in spite, not because, of Supreme Court doctrine.[71] The Supreme Court has been unequivocal about Title IX's fundamentally protective purpose and has laid out one standard for assessing its violation in sexual harassment claims.[72] The Court said that in enacting Title IX, "Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide individual citizens effective protection against those practices."[73] The Supreme Court consequently concluded more than four decades ago that persons subject to sex discrimination in public schools have an implied private right of action under

70. *See infra* Sections I.A.1, I.B.1–3.

71. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998).

72. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 287 ("Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds.").

73. *Cannon*, 441 U.S. at 704.

Title IX to enforce its protections.[74] More than twenty years ago, the Court further said that when either teachers or students subject others to sexual harassment in school, schools will be liable under Title IX if they know about the harassment and then act with deliberate indifference to it.[75]

Although the Supreme Court established this one deliberate indifference standard, the lower federal courts treat that standard differently in higher education students' Title IX claims than in K–12 public school students' claims.[76] The courts' treatment of the standard affords higher education students more protection from sexual harassment than students in the K–12 public schools.[77] First, they articulate the deliberate indifference standard more rigorously in higher education students' claims.[78] Second, they apply the standard more rigorously in those claims.[79] The courts thus essentially create two sets of protections under Title IX, or two Title IXs.[80]

A further disparity exacerbates the courts' establishment of two levels of Title IX protections.[81] Laws that work in conjunction with Title IX provide students in higher education, but not K–12 public school students, added procedural and substantive protections from sexual harassment.[82] Therefore, even when some courts articulate and apply the deliberate indifference standard evenly, students in higher education still have more protection from sexual harassment than K–12 public school students.[83]

These disparities exist without justification. K–12 students deserve as much protection from sexual harassment as higher education students.[84] Yet, in the current analysis, K–12 public school students receive the opposite treatment.[85]

74. *Id.* at 709. Although Title IX has a public enforcement scheme that is administered through the U.S. Department of Education, the Supreme Court found that system to be inadequate for remedying individual discrimination. *Id.* It said, "[I]t makes little sense to impose on an individual whose only interest is in obtaining a benefit for herself . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate." *Id.* at 705.

75. *Gebser*, 524 U.S. at 292; *Davis*, 526 U.S. at 646–47. The Court also said that schools must have actual notice of their harassment. *See Gebser*, 524 U.S. at 292; *Davis*, 526 U.S. at 646–47. In the interest of conciseness, references to sexual harassment by "teachers" in this Article include sexual harassment by any school staff member.

76. *See infra* Section I.B.

77. *See infra* Section I.B.

78. *See infra* Section I.B.1.

79. *See infra* Section I.B.2.

80. *See infra* Section I.B.

81. *See infra* Section I.B.3.

82. *See* 20 U.S.C. § 1092(f).

83. *See infra* Section I.B.3.

84. *See infra* Section I.C.

85. *See infra* Section I.B.

A. *The Relative Scope and Comparatively Acute Harms of K–12 Sexual Harassment*

If students in the K–12 public schools did not suffer much, or any, sexual harassment, then their relative lack of protection from harassment under courts' assessments of their Title IX claims arguably might not matter.[86] However, students under the age of eighteen suffer more sexual harassment than older students.[87] In addition, they suffer significant, long-lasting harms from sexual harassment, some of which are more acute than the harms suffered from sexual harassment by individuals over the age of eighteen.[88]

The point in comparing the scope and severity of the harms suffered by K–12 public school students to those endured by students in higher education is not to minimize higher education students' trauma.[89] Rather, it is to say that the scope and severity of the problem for K–12 public school students warrant protections from sexual harassment under Title IX that are at least as strong as those available to college and university students.[90]

86. *See infra* Section II.B.

87. *See* HILL & KEARL, *supra* note 1, at 2; CANTOR ET AL., *supra* note 1, at xiii, 47. Unsurprisingly, then, most individuals also report experiencing sexual harassment for the first time before they reach college. *See* HOLLY KEARL, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 8 (2018) [hereinafter KEARL, THE FACTS], https://stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf [https://perma.cc/AG54-RQ8N]; *see also* Thompson et al., *supra* note 1, at 283; SHARON SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 4 (2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf?fbclid=IwAR0qqOqAUCWt3VnrktrR-UrNiT4Gqx4AmSN2fWyhRFbivkLZfJ5DkQRaFj8 [https://perma.cc/7ZFT-CKL7].

88. *See, e.g.*, Rickert et al., *supra* note 1, at 1132; Thompson et al., *supra* note 1, at 284–85; Castro et al., *supra* note 1, at 2; Lalor & McElvaney, *supra* note 1, at 163.

89. The college sexual harassment problem deserves all the attention it gets and more for many reasons, including the recent changes to Title IX's public enforcement system that particularly affect college students. *See, e.g.*, Cantalupo, *supra* note 20, at 307–08; *infra* note 164 and accompanying text; Press Release, Nancy Pelosi, Speaker of the House, Pelosi Statement on Trump Administration's Rule Dismantling Title IX Protections for Students and Survivors (May 6, 2020), https://www.speaker.gov/newsroom/5620 [https://perma.cc/EF8F-WR5Y] (objecting strenuously and calling the new Title IX rules "callous, cruel, and dangerous, threatening to silence survivors and endanger vulnerable students" and describing "[c]ampus sexual assault [a]s an epidemic in America, with one in four women experiencing harassment or abuse on college campuses"); *see also* Jeannie Suk Gerson, *How Concerning Are the Trump Administration's New Title IX Regulations?*, NEW YORKER (May 16, 2002), https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations [https://perma.cc/CMV9-6DZT (dark archive)] (arguing that "[t]he suggestion that even the most controversial provisions of the regulations allow rape with impunity speaks to a disturbingly large gap between reality and rhetoric on the topic" and citing to higher education examples as proof of that contention).

90. *See supra* Section I.A.

1. The Wide Scope of the K–12 Sexual Harassment Problem

Both girls and boys under the age of eighteen experience more sexual harassment than do women and men who are over eighteen. Moreover, these younger survivors suffer much of this sexual harassment in school.[91] Undeniably, higher education students also experience considerable sexual harassment.[92] But they experience less of it than students in the K–12 public schools.[93] Just under forty-two percent of students in all higher education suffered sexual harassment, compared to the forty-eight percent in grades seven through twelve alone.[94]

The absolute numbers behind those percentages reveal an even more stark difference in the prevalence of sexual harassment between educational levels.[95] In 2018, 26.7 million students were enrolled in middle and high school.[96] Therefore, approximately 12.8 million students in middle and high school

91. Espelage et al., *supra* note 3, at 179. These findings are consistent with other studies concluding that girls under eighteen experience more sexual harassment, and more suffer from it for the first time before they turn eighteen than girls over eighteen or same-age boys. Thompson et al., *supra* note 1, at 283 (reporting that "the most likely victims of sexual violence are young and female [and t]he vast majority of victims experience their first sexual assault before 18 years old"); HILL & KEARL, *supra* note 1, at 2. In addition, according to a 2015 study by the Gay, Lesbian and Straight Education Network ("GLSEN"), 59.6% of LGBTQ students experienced physical sexual harassment, and 67.4% heard homophobic slurs used frequently at school. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY 4–5 (2015), https://www.glsen.org/sites/default/files/2019-10/GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Executive%20Summary.pdf [https://perma.cc/524M-43YX].

92. CANTOR ET AL., *supra* note 1, at xiii, 47.

93. *Id.* at xiii.

94. *Id.*; HILL & KEARL, *supra* note 1, at 2; *Table 203.10: Enrollment in Public Elementary and Secondary Schools, by Level and Grade: Selected Years, Fall 1980 Through Fall 2029*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d20/tables/dt20_203.10.asp [https://perma.cc/8FT8-8Q2B] [hereinafter *Table 203.10*]. Another recent study found that 57% of women experience sexual harassment for the first time before the age of eighteen, while only 15% experienced sexual harassment for the first time between the ages of eighteen and twenty-two. *See* KEARL, THE FACTS, *supra* note 87, at 8, 27. Similarly, 42% of men had their first experiences of sexual harassment before they were eighteen years old, and fewer than 15% experienced sexual harassment for the first time during between age eighteen and twenty-two. *Id.* at 27; *see also* SMITH ET AL., *supra* note 87, at 4 ("Among female victims of completed or attempted rape, 43.2% (an estimated 11.0 million victims) reported that it first occurred prior to age 18, with 30.5% (about 7.8 million victims) reporting that their first victimization occurred between the ages of 11 and 17, and 12.7% (an estimated 3.2 million victims) at age 10 or younger."). Although sixteen- to twenty-four-year-old women do experience the highest rates of rape and other physical sexual assault, individuals under eighteen still experience more sexual harassment, broadly defined. MICHAEL R. RAND, U.S. DEP'T OF JUST., NO. NCJ 224390, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2007, at 4 (2008), https://bjs.ojp.gov/content/pub/pdf/cv07.pdf [https://perma.cc/5LBK-8QED]; CANTOR ET AL., *supra* note 1, at xiii.

95. *See* NAT'L CTR. FOR EDUC. STATS., *Undergraduate Enrollment*, *in* THE CONDITION OF EDUCATION 2022, at 1 (2022) [hereinafter NAT'L CTR. FOR EDUC. STATS., *Undergraduate Enrollment*], https://nces.ed.gov/programs/coe/pdf/2022/cha_508.pdf [https://perma.cc/YVZ7-DGHZ]; CANTOR ET AL., *supra* note 1, at xiii.

96. In 2018, 50.7 million students were enrolled in the public schools. *Table 203.10*, *supra* note 94.

suffered sexual harassment.[97] In 2019, 16.6 million students were enrolled in all of higher education, including graduate school, meaning that roughly 6.9 million students in higher education survived sexual harassment.[98] In other words, almost twice as many students in middle and high school suffer sexual harassment as students in all of higher education.[99]

2. The Acute Harms Caused by Sexual Harassment of K–12 Public School Students

While any student, no matter their school level, can suffer significant harm as a result of sexual harassment, students in the K–12 public schools suffer particularly acute harms from it.[100] Further, once an individual has experienced sexual harassment prior to the age of eighteen, they face an increased likelihood of experiencing sexual harassment again after the age of eighteen.[101] These younger survivors, therefore, are susceptible to compound harms from the multiple, long-lasting effects of their childhood sexual harassment as well as the increased probability of additional effects from later sexual harassment.[102]

When students under the age of eighteen suffer sexual harassment, they not only endure multiple immediate and long-term harms, but are also more prone to suffering at least some of these harms than are older students.[103] In the short term, sexual harassment can cause younger survivors harms, including a heightened propensity to engage in substance abuse and to experience

97. *Id.*; HILL & KEARL, *supra* note 1, at 2.

98. NAT'L CTR. FOR EDUC. STATS., *Undergraduate Enrollment*, *supra* note 95, at 2–4.

99. *Id.*

100. *See, e.g.*, Rickert et al., *supra* note 1, at 1132; Thompson et al., *supra* note 1, at 283; Castro et al., *supra* note 1, at 2; Lalor & McElvaney, *supra* note 1, at 163.

101. Rickert et al., *supra* note 1, at 1132 ("A robust risk factor for the occurrence of sexual violence is a history of sexual victimization as either a child (aged <14 years) or an adolescent (aged ≤18 years)."); Castro et al., *supra* note 1, at 2 ("Some studies have reported that female victims of [child sexual assault] are three to five times more likely to suffer further sexual assault than those who have not suffered [child sexual assault]."); Lalor & McElvaney, *supra* note 1, at 163 (finding children who were raped or assaulted are fourteen times more likely to "experience a rape or attempted rape in their first year of college").

102. *See* Rickert et al., *supra* note 1, at 1132; Thompson et al., *supra* note 1, at 284–85; Castro et al., *supra* note 1, at 2; Lalor & McElvaney, *supra* note 1, at 163.

103. *See* Thompson et al., *supra* note 1, at 283 ("Experiences of sexual assault, in particular, during adolescence are associated with a number of adverse outcomes, including re-victimization, increased prevalence of mental disorders, and risky health behaviors."); Greetje Timmerman, *Adolescents' Psychological Health and Experiences with Unwanted Sexual Behavior at School*, 39 ADOLESCENCE 817, 823 (2004); HILL & KEARL, *supra* note 1, at 22; Kathleen C. Basile, Heather B. Clayton, Whitney L. Rostad & Ruth W. Leemis, *Sexual Violence Victimization of Youth and Health Risk Behaviors*, 58 AM. J. PREVENTIVE MED. 570, 573, 577 (2020); WORLD HEALTH ORG., RESPONDING TO CHILDREN AND ADOLESCENTS WHO HAVE BEEN SEXUALLY ABUSED: WHO CLINICAL GUIDELINES 7 (2017) [hereinafter WHO CLINICAL GUIDELINES], https://www.who.int/publications/i/item/9789241550147 [https://perma.cc/9NEF-JNWG (staff-uploaded archive)].

psychosomatic problems.[104] In the long term, sexual harassment prior to the age of eighteen is predictive of lasting emotional harms, violent behavior, and substance abuse.[105] Further, empirical research shows that individuals under eighteen are more likely to suffer certain harms as a result of sexual harassment than are individuals over the age of eighteen.[106] For example, individuals who experienced sexual harassment prior to the age of eighteen have higher rates of Post-Traumatic Stress Disorder ("PTSD") than survivors who experienced it after the age of eighteen.[107] Sexual harassment of children and adolescents is also associated with higher incidences of eating disorders than is sexual harassment of individuals over the age of eighteen.[108]

Because children and youth who suffer sexual harassment before they reach the age of eighteen also face an increased risk of suffering sexual harassment again after they turn eighteen, they have greater potential for continuing to simultaneously suffer these long-term harms and harms wrought by the later sexual harassment.[109] These effects of later-in-life sexual harassment include depression, increased alcohol use, and impaired job opportunities.[110] While these harms can happen to any person who has endured sexual harassment as an adult, they constitute an additional set of harms for the

104. *See* Timmerman, *supra* note 103, at 823; HILL & KEARL, *supra* note 1, at 22; WHO CLINICAL GUIDELINES, *supra* note 103, at 7. In addition, in the short-term, children who endure sexual harassment have reduced self-esteem and increased psychosomatic health problems, and girls feel these effects even more than boys. *See* Basile et al., *supra* note 103, at 573. Further, approximately one-third of survivors do not want to return to school, and over twenty percent report sleep disturbance. HILL & KEARL, *supra* note 1, at 22. Unsurprisingly, then, these survivors are also more likely to have problems with poor academic performance in the twelve months subsequent to their abuse. Basile et al., *supra* note 103, at 577. Child and adolescent survivors of sexual harassment also are significantly more likely to engage in substance use in the twelve months following their abuse. *See id.* at 573 ("Specifically, [these survivors] were more likely than nonvictims to report currently using alcohol, marijuana, electronic vapor products, and cigarette smoking. Past-year victims were also more likely than nonvictims to report ever using all types of illicit drugs and ever misusing prescription pain medicine.").

105. *See* Debbie Chiodo, David A. Wolfe, Claire Crooks, Ray Hughes & Peter Jaffe, *Impact of Sexual Harassment Victimization by Peers on Subsequent Adolescent Victimization and Adjustment: A Longitudinal Study*, 45 J. ADOLESCENT HEALTH 246, 250 (2009).

106. *See* Saba W. Masho & Gasmelseed Ahmed, *Age at Sexual Assault and Posttraumatic Stress Disorder Among Women: Prevalence, Correlates, and Implications for Prevention*, 16 J. WOMEN'S HEALTH 262, 265 (2007).

107. *Id.* ("The prevalence of PTSD was relatively higher among those assaulted for the first time before the age of 18 (35.3%), followed by those assaulted at the age of 18 (30.2%).").

108. *See* Jennifer L. Peterson & Janet S. Hyde, *Peer Sexual Harassment and Disordered Eating in Early Adolescence*, 49 DEVELOPMENTAL PSYCH. 184, 191 (2013).

109. *See* Rickert et al., *supra* note 1, at 1132; Thompson et al., *supra* note 1, at 283; Castro et al., *supra* note 1, at 2; Lalor et al., *supra* note 1, at 163–64.

110. *See* Jason N. Houle, Jeremy Staff, Jeylan T. Mortimer, Christopher Uggen & Amy Blackstone, *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89, 100 (2011) (recounting first-hand experiences of the effects of later-in-life sexual harassment); Fredrik Bondestam & Maja Lundqvist, *Sexual Harassment in Higher Education – A Systematic Review*, 10 EUR. J. HIGHER EDUC. 397, 405 (2020).

survivors who are already enduring the long-term harms from sexual harassment experienced earlier in life.[111]

B. *How Courts Provide More Protection from Sexual Harassment Under Title IX for Higher Education Students than K–12 Public School Students*

Despite the high rates of sexual harassment in the K–12 public schools—and the severity of its harms—the K–12 public schools have a long history of providing students with little protection from sexual harassment.[112] Reports have recently revealed, for example, that K–12 public school districts of all sizes across the country have failed to address the sexual harassment of thousands of students for years.[113] Given the widespread nature of these failures, it is unsurprising that a scant twelve percent of middle and high school students say that their schools adequately address sexual harassment.[114]

The failure of K–12 public schools to protect students from sexual harassment represents a failure of Title IX and, more specifically, a failure produced by the lower federal courts' evaluations of it.[115] In at least six federal circuits covering more than half of the states, the courts' assessments of K–12 students' Title IX claims demand far less of K–12 public schools than they do

111. *See* Rickert et al., *supra* note 1, at 1132; Thompson et al., *supra* note 1, at 283; Castro et al., *supra* note 1, at 2; Lalor et al., *supra* note 1, at 163–64.

112. *See* Lauren Camera, *Chicago Schools Investigation Prompts News Look at Sex Abuse in K–12 Schools*, U.S. NEWS & WORLD REP. (Sept. 12, 2019), https://www.usnews.com/news/education-news/articles/2019-09-12/chicago-schools-investigation-prompts-news-look-at-sex-abuse-in-k-12-schools [https://perma.cc/T5GA-A662 (staff-uploaded archive)]; J.M. *ex rel.* Morris v. Hilldale Indep. Sch. Dist. No. 1-29, 397 F. App'x 445, 447 (10th Cir. 2010); McCoy v. Bd. of Educ., Columbus City Schs., 515 F. App'x 387, 388 (6th Cir. 2013); Doe v. Pawtucket Sch. Dep't, 969 F.3d 1, 5 (1st Cir. 2020); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 737 (9th Cir. 2000); K.S. v. Nw. Indep. Sch. Dist., 689 F. App'x 780, 781–82 (5th Cir. 2017); Porto v. Town of Tewksbury, 488 F.3d 67, 70–71 (1st Cir. 2007); Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 161–64 (4th Cir. 2015) (per curiam); Stiles *ex rel.* D.S. v. Grainger County, 819 F.3d 834, 840 (6th Cir. 2016); GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 911–13 (11th Cir. 2018) (per curiam); M.J.G. v. Sch. Dist. of Phila., 774 F. App'x 736, 738–40 (3d Cir. 2019); Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1118 (10th Cir. 2008); Saphir v. Broward Cnty. Pub. Schs., 744 F. App'x 634, 636 (11th Cir. 2018).

113. In 2018, for example, an investigation into sexual harassment in the Chicago Public Schools found "widespread failures" to investigate or address nearly 1,000 complaints of sexual harassment dating back two decades. David Jackson, Jennifer S. Richards, Gary Marx & Juan Perez Jr., *Betrayed: Chicago Schools Fail To Protect Students from Sexual Abuse and Assault, Leaving Lasting Damage*, CHI. TRIB. (July 27, 2018), http://graphics.chicagotribune.com/chicago-public-schools-sexual-abuse/ [https://perma.cc/XBG5-ZHRS]; Camera, *supra* note 112, ¶ 1; *see also* Sarah Maslin Nir, *School District Investigates Claims of Longtime Sexual Misconduct by Teachers*, N.Y. TIMES (Dec. 8, 2021), https://www.nytimes.com/2021/12/08/nyregion/babylon-high-school-teachers-allegations.html [https://perma.cc/4WCY-V8J4 (staff-uploaded, dark archive)] (documenting years of sexual harassment in a small village high school on Long Island).

114. HILL & KEARL, *supra* note 1, at 30.

115. *See infra* Sections I.B.1–3.

of colleges and universities.[116] Under courts' assessments, therefore, K–12 public schools do not have to do much to protect students from sexual harassment, particularly as compared to colleges and universities.[117] College and university students thus enjoy stronger protections from sexual harassment under Title IX than do K–12 public school students.[118] To be sure, there is a very plausible argument that these relatively enhanced protections afforded to college and university students do not adequately protect them from sexual harassment.[119] Even still, those arguably inadequate protections exceed the protections available to students in the K–12 public schools.[120]

1. A More Rigorously Articulated Standard

One way the lower federal courts provide more protection from sexual harassment to higher education students as compared to K–12 public school students is through their articulation of the deliberate indifference standard.[121] When students in higher education assert Title IX sexual harassment claims, some courts have demonstrated a willingness to articulate a relatively robust version of the deliberate indifference standard.[122] In K–12 students' claims, however, those very same courts do not articulate the standard so strongly.[123]

In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*,[124] the Supreme Court explained the deliberate indifference standard. It said that

116. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1102 (10th Cir. 2019); Doe v. Univ. of Ky., 959 F.3d 246, 251 (6th Cir. 2020); Wills v. Brown Univ., 184 F.3d 20, 36 (1st Cir. 1999); Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1106 (9th Cir. 2020); Feminist Majority Found. v. Hurley, 911 F.3d 674, 693 (4th Cir. 2018); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1294 (11th Cir. 2007); *see also J.M.*, 397 F. App'x at 452–53 (10th Cir. 2010); *McCoy*, 515 F. App'x at 390; *Porto*, 488 F.3d at 74; *Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 168; *GP*, 737 F. App'x at 915; *Reese*, 208 F.3d at 740.

117. *See infra* Sections I.B.1–3.

118. *See infra* Sections I.B.1–3.

119. *See, e.g.*, WOMEN'S L. PROJECT, ANALYSIS: THE NEW TITLE IX RULES ¶¶ 6, 14 (2020), https://www.womenslawproject.org/wp-content/uploads/2020/05/TitleIX-Final-Rule-Summary-May-2020.pdf [https://perma.cc/6RLK-79LP (staff-uploaded archive)] (identifying deficiencies in the procedural requirements for colleges and universities under new Title IX regulations).

120. *See infra* Sections I.B.1–3.

121. *See Farmer*, 918 F.3d at 1098–99; *Wills*, 184 F.3d at 36; *Karasek*, 956 F.3d at 1105; *see also J.M.*, 397 F. App'x at 453; *McCoy*, 515 F. App'x at 390; Stiles *ex rel.* D.S. v. Grainger County, 819 F.3d 834, 848 (6th Cir. 2016); *Porto*, 488 F.3d at 72.

122. *See Farmer*, 918 F.3d at 1098–99; *Wills*, 184 F.3d at 36; *Karasek*, 956 F.3d at 1105; *see also J.M.*, 397 F. App'x at 453; *McCoy*, 515 F. App'x at 391; *Stiles*, 488 F.2d at 848; *Porto*, 488 F.3d at 72.

123. *See J.M.*, 397 F. App'x at 453; *McCoy*, 515 F. App'x at 390; *Stiles*, 819 F.2d at 848; *Porto*, 488 F.3d at 72. I have argued elsewhere that because the lower courts only selectively follow the Supreme Court's complete guidance in articulating the meaning of the deliberate indifference standard in K–12 students' Title IX claims, they undermine Title IX's power. Suski, *Subverting Title IX*, *supra* note 18, at 2293–94. *But see* Zachary Cormier, *Is Vulnerability Enough?: Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1, 23 (2017); *infra* note 131 and accompanying text.

124. 526 U.S. 629 (1999).

standard requires schools to protect against "at a minimum . . . [making students] liable or vulnerable" to sexual harassment and responding to it in a "not clearly unreasonable" way.[125] In higher education students' Title IX claims, lower federal courts say that schools' blatantly unreasonable responses to student sexual harassment are those responses that cause or make students vulnerable to further sexual harassment.[126] In K–12 public school students' claims, however, the very same courts do not articulate the standard this way.[127] Instead, they focus only on the Court's "not clearly unreasonable" benchmark alone and define it for themselves as any response other than nothing.[128] By holding colleges and universities to a more rigorous articulation of the deliberate indifference standard, these courts provide more protection from sexual harassment to their students.[129]

For example, in *Farmer v. Kansas State University*,[130] a case involving the Title IX claims of two women who attended Kansas State University ("KSU"), the Tenth Circuit embraced the Supreme Court's complete guidance on the deliberate indifference standard and determined that KSU could be found liable under Title IX for leaving those students vulnerable to further sexual harassment.[131] In *Farmer*, the Tenth Circuit considered whether KSU's responses to separate reports by the women of rape at off-campus fraternity houses demonstrated deliberate indifference.[132] In response to reports of these rapes, KSU investigated the fraternities and suspended one fraternity's charter, among other actions taken.[133] Evaluating those responses, the Tenth Circuit explained that schools are deliberately indifferent to student sexual harassment when they have "*either* . . . caused [the students] 'to undergo' harassment *or* 'ma[d]e them liable or vulnerable' to it."[134] With this articulation of the deliberate indifference standard, the court found that the women had

125. *Id.* at 645, 649.

126. *See Farmer*, 918 F.3d at 1102–03; Doe v. Univ. of Ky., 959 F.3d 246, 250–51 (6th Cir. 2020); *Wills*, 184 F.3d at 40; *Karasek*, 956 F.3d at 1105.

127. *See J.M.*, 397 F. App'x at 453; *McCoy*, 515 F. App'x at 391–92; *Porto*, 488 F.3d at 72, 76.

128. *See J.M.*, 397 F. App'x at 453; *McCoy*, 515 F. App'x at 391–92; *Porto*, 488 F.3d at 72, 76.

129. *See Farmer*, 918 F.3d at 1102–03; *Univ. of Ky.*, 959 F.3d at 250–51; *Wills*, 184 F.3d at 40; *Karasek*, 956 F.3d at 1105; *see also J.M.*, 397 F. App'x at 453; *McCoy*, 515 F. App'x at 391–92; *Porto*, 488 F.3d at 72; Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000).

130. 918 F.3d 1094 (10th Cir. 2019).

131. *Id.* at 1102–03.

132. *Id.* at 1099–100.

133. *Id.*

134. *Id.* at 1103 (emphasis in original). This description of the deliberate indifference standard has its critics. One scholar has argued that in prohibiting schools from "caus[ing] . . . or mak[ing students] . . . liable or vulnerable to" sexual harassment, the Supreme Court was merely describing two ways, by action or inaction, that a school could actually cause further sexual harassment to occur. Cormier, *supra* note 123, at 23. The Court did not allow for liability on the basis of vulnerability to further sexual harassment absent further sexual harassment in fact occurring. *Id.*

sufficiently alleged a Title IX violation.[135] It determined that KSU's responses, while both substantive and punitive, still conceivably made the women "vulnerable to harassment by [leaving them in] fear of running into their student-rapists . . . among other things."[136] Even though KSU responded to the students' sexual assaults in some arguably strong ways—including by revoking a fraternity's ability to operate—the court nevertheless found that KSU transgressed its articulation of the deliberate indifference standard by leaving the students vulnerable in other ways, to further harassment.[137]

Yet, when the Tenth Circuit considered the sexual harassment claim of high school student J.M., the court pointedly refused to articulate the deliberate indifference standard so rigorously.[138] Rather, the court disregarded the Supreme Court's vulnerability-based description of deliberate indifference in favor of its own feckless definition of the Court's "not clearly unreasonable" guidance.[139] In that case, *J.M. ex rel. Morris v. Hilldale Independent School District No. 1-29*,[140] student J.M.'s band teacher, Brian Giacomo, "maintained an inappropriate relationship [with J.M.], which included kissing, hugging, petting

135. *Farmer*, 918 F.3d at 1104–05.

136. *Id.*

137. *See id.* In *Doe v. University of Kentucky*, 959 F.3d 246 (6th Cir. 2020), the Sixth Circuit also embraced this concept of vulnerability to further sexual harassment as deliberate indifference in the context of a University of Kentucky student's Title IX sexual harassment claim. *Id.* at 250–51. There, the Sixth Circuit described deliberate indifference as meaning that a "school's response 'must bring about or fail to protect against the further harassment.'" *Id.* at 250. Although it insisted that further sexual harassment occur, it allowed that a school's response could cause such sexual harassment by leaving students "vulnerable to, meaning unprotected from, further harassment." *Id.* at 252 (quoting Kollaritsch v. Mich. St. Univ. Bd. of Trs., 944 F.3d 613, 623 (2019)). While not as rigorous as the Tenth Circuit's description of the standard, in that it requires further harassment to occur, the Sixth Circuit's articulation of deliberate indifference in the context of higher education is still more rigorous in that the Sixth Circuit has applied it to K–12 public school students' Title IX claims. *See, e.g.*, McCoy v. Bd. of Educ., Columbus City Schs., 515 F. App'x 387, 388–92 (6th Cir. 2013). The First Circuit has also defined a different, but still relatively rigorous, version of deliberate indifference in that it said the standard requires measures that are both "timely and reasonable . . . to end the harassment," including revised responses if initial measures "proved inadequate" in the context of a university student's sexual harassment claim against her professor. Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999). The court thus articulated the deliberate indifference standard as requiring both interventions to end the harassment and alterations to those efforts should they prove ineffective. *See id.* The Ninth Circuit in *Karasek v. Regents of the University of California*, 956 F.3d 1106 (9th Cir. 2020), delineated a still different, but also comparatively strong, definition of deliberate indifference when it explained that schools' prejudicial delays in responding to student's sexual harassment complaints as well as official policies that create a "heightened risk of harassment" on campus amount to deliberate indifference. *Id.* at 1113. Neither the First nor Ninth Circuits have articulated the deliberate indifference standard with the same level of rigor, however, in K–12 public school students' cases. *See* Doe v. Pawtucket Sch. Dep't, 969 F.3d 1, 9 (1st Cir. 2020).

138. *See* J.M. *ex rel.* Morris v. Hilldale Indep. Sch. Dist. No. 1-29, 397 F. App'x 445, 450 (10th Cir. 2010). *But see* Doe v. Sch. Dist. No. 1, Denv., 970 F.3d 1300, 1313–14 (10th Cir. 2020) (articulating that a failure to investigate student harassment could be evidence of deliberate indifference).

139. *J.M.*, 397 F. App'x at 454.

140. 397 F. App'x 445 (10th Cir. 2010).

and vaginal and oral sex."[141] In considering J.M.'s Title IX claim, the court articulated the deliberate indifference standard as only requiring that schools respond in a "not clearly unreasonable" way to student sexual harassment.[142] It further said "no particular response is required."[143] Consequently, although the court did find that J.M. alleged facts sufficient to establish a Title IX claim, it only came to this conclusion because the school did nothing at all when it received notice of Giacomo's sexual harassment of J.M.[144] With its expression of the deliberate indifference standard, therefore, the court left wide open the possibility that a K–12 public school that does anything more than nothing to respond to sexual harassment will satisfy the standard, no matter whether that response leaves the student vulnerable to further sexual harassment.[145]

2. A More Rigorously Applied Standard

Other courts take a different route to the same end of providing higher education students more protection from sexual harassment under Title IX.[146] These courts do not articulate the deliberate indifference standard more

141. *Id.* at 447.

142. *Id.* at 453. The court also went on to say that "the school district is not required to eradicate all sexual harassment." *Id.* at 454 (quoting Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 260–61 (6th Cir. 2000)).

143. *Id.*

144. *Id.* Other courts, including the Sixth and First Circuits, have also all but read a "do anything other than nothing" requirement into the deliberate indifference standard in K–12 public school students' Title IX claims to the end of finding no deliberate indifference on the part of K–12 public schools. *See* McCoy v. Bd. of Educ., Columbus City Schs., 515 F. App'x 387, 391 (6th Cir. 2013) ("[F]ailure to take *any* disciplinary action [in a middle schooler's Title IX claim] despite reports of repeated sexual harassment rises to the level of deliberate indifference." (emphasis in original)); Porto v. Town of Tewksbury, 488 F.3d 67, 70–71, 74 (1st Cir. 2007) (concluding that even though a school sometimes did not respond at all to an elementary school student's repeated sexual harassment because the student did not claim that the school "did nothing to address [his] sexual harassment," it did not act with deliberate indifference).

145. *See J.M.*, 397 F. App'x at 454. Although the Ninth Circuit has not outlined such a "do anything other than nothing" deliberate indifference standard, its articulation of deliberate indifference in its K–12 public school student cases still stands as weak in contrast to its college and university cases. In *Reese v. Jefferson School District No. 14J*, 208 F.3d 736 (9th Cir. 2000), the Ninth Circuit made no inquiry into whether a school's policy created a heightened risk of harassment, as it did when considering university students' Title IX claims in *Karasek*. *Compare id.* at 740 (dismissing high school students' Title IX claims of sexual harassment where the school did nothing in response to them because the students were about to graduate by the time the school had notice of the harassment), *with* Karasek v. Univ. of Cal., 956 F.3d 1093, 1106, 1113 (finding that a school's policies violated Title XI even without any ongoing individual harassment).

146. *Compare* Feminist Majority Found. v. Hurley, 911 F.3d 674, 693 (4th Cir. 2018) (college students), *and* Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1288, 1296–97 (11th Cir. 2007) (college students), *with* Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 167 (4th Cir. 2015) (per curiam) (minor students), *and* GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 915 (11th Cir. 2018) (per curiam) (minor students).

stringently in higher education students' claims.[147] They do, though, apply it more rigorously in those claims than in K–12 public school students' cases.[148] In the higher education context, these courts inquire into what more a school could have done in response to student sexual harassment.[149] If they can identify additional measures that a school could have taken to stop repeated sexual harassment, they conclude that the college or university demonstrated deliberate indifference.[150] Yet, these same courts show no such willingness to consider what more a K–12 public school could have done in response to student sexual harassment.[151] Instead, even when K–12 public school students argue that their schools could have done more to address their sexual harassment, these courts refuse to even entertain that argument.[152] They thus find the K–12 public schools' responses, however minimal or ineffective, not deliberately indifferent.[153]

In *Feminist Majority Foundation v. Hurley*,[154] for instance, the Fourth Circuit found that the University of Mary Washington ("UMW") acted with deliberate indifference to student sexual harassment because the court identified additional potential measures the university could have taken in response to the harassment.[155] In that case, female members of Feminists United, a campus student group, endured significant sexual harassment by members of the UMW men's rugby team, among others.[156] Feminists United members suffered "derogatory, sexist, and threatening" criticism over social media and on the school newspaper's website.[157] In addition, the rugby team performed a videotaped "chant that glorified violence against women, including rape and necrophilia."[158] In response to this harassment, UMW held a forum to discuss sexual assault on campus and sent an email to the student body condemning the incidences of harassment.[159] UMW also suspended all rugby activities and

147. *See Feminist Majority Found.*, 911 F.3d at 693; *Williams*, 477 F.3d at 1288, 1296–97. *But see Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 167 (deliberate indifference standard articulated in context of minor children); *GP*, 737 F. App'x at 915 (same).

148. *See Feminist Majority Found.*, 911 F.3d at 693; *Williams*, 477 F.3d at 1288; *Doe v. Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 167; *GP*, 737 F. App'x at 915.

149. *See Feminist Majority Found.*, 911 F.3d at 693; *Williams*, 477 F.3d at 1288.

150. *Feminist Majority Found.*, 911 F.3d at 693.

151. *See Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 167; *GP*, 737 F. App'x at 915.

152. *Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 167–68.

153. *Id.* at 168.

154. 911 F.3d 674 (4th Cir. 2018).

155. *Id.* at 693.

156. *Id.* at 680–81.

157. *Id.* This harassment occurred because of Feminist United's opposition to the authorization of all-male fraternities at UMW. *Id.*

158. *Id.* at 680.

159. *Id.* at 681–82. More specifically, the email called the behavior "repugnant and highly offensive." *Id.* at 681.

required all rugby players to participate in sexual assault prevention training.[160] When Feminists United students filed suit under Title IX alleging deliberate indifference to their harassment, the court said that a school violates that standard "when the institution's response, or lack thereof, to known student-on-student sexual harassment is 'clearly unreasonable.'"[161] Applying that standard, the court inquired into the ways that UMW could have done more to address the students' sexual harassment.[162] The court then identified such measures, including that "UMW could have offered counseling services for those impacted by the [sexual harassment]."[163] The court, therefore, determined that a jury could find UMW acted with deliberate indifference to the harassment.[164]

In contrast, when the Fourth Circuit evaluated the Title IX claim of elementary school student J.D. in *Doe v. Board of Education of Prince George's County*,[165] it refused to interrogate what more J.D.'s school could have done in response to his sexual harassment.[166] J.D., a fourth-grade student, endured months of sexual harassment by fellow student M.O.[167] M.O.'s harassment included instances in which he called J.D. "gay" and exposed his genitals to J.D. in the school library.[168] The school responded in a range of ways, from doing nothing to suspending M.O. after one incident of harassment.[169] These

160. *Id.* at 681–82.

161. *Id.* at 686.

162. *Id.* at 693.

163. *Id.* at 693.

164. *Id.* In doing so, it explained that "a reviewing court should consider whether the institution failed to take other obvious and reasonable steps" in addressing sexual harassment. *Id.* The Eleventh Circuit also is willing to hold colleges and universities accountable when they can identify ways that those institutions could have done more to address sexual harassment. Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1288, 1296–97 (11th Cir. 2007) (finding deliberate indifference when one student raped another at the University of Georgia ("UGA") because, among other things, UGA waited "eight months before conducting a disciplinary hearing to determine whether to sanction the alleged assailants" but the school could have conducted its own disciplinary hearing during that time because "the pending criminal charges did not affect UGA's ability to institute its own procedures"). The Sixth Circuit has recently engaged in something of an internal debate on this point, at first finding ineffective responses to sexual harassment deliberately indifferent and then reversing itself, subject to dissent. *See* Foster v. Bd. of Regents of Univ. of Mich., 952 F.3d 765, 771–72, 787 (6th Cir. 2020), *aff'd on reh'g*, 982 F.3d 960, 965–71 (6th Cir. 2020) (en banc). Both the Sixth and Eleventh Circuits, though, refuse to engage in any analysis of what more a K–12 public school could have done to address sexual harassment when assessing deliberate indifference. *See* GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 915 (11th Cir. 2018) (per curiam); Stiles *ex rel.* D.S. v. Grainger County, 819 F.3d 834, 851 (6th Cir. 2016); *infra* note 174 and accompanying text.

165. 605 F. App'x 159 (4th Cir. 2015).

166. *Id.* at 168.

167. *Id.* at 161–63.

168. *Id.*

169. *Id.* at 161–63, 165. The school also responded in ways that caused J.D. more torment. *Id.* at 163. For example, the school provided him with a student bathroom escort, which only caused "other students [to] 'ma[k]e horrible jokes' about his use of the escort." *Id.*

responses failed to stop the harassment, which escalated, culminating in J.D.'s sexual assault by M.O. in a school bathroom.[170] Considering J.D.'s Title IX claim, the Fourth Circuit said, as it did in *Hurley*, that a school violates the deliberate indifference standard when "its response to known harassment is 'clearly unreasonable.'"[171] Unlike in *Hurley*, though, when J.D. argued that the school should have done more to stop the intensifying sexual harassment, the *Doe* court rejected that argument.[172] Instead, it said courts should "refrain from 'micromanag[ing]'" schools' responses to student sexual harassment.[173] It therefore found no deliberate indifference.[174]

3. An Added Disparity

An additional disparity affects the protections from sexual harassment afforded to students in higher education as compared to K–12 public school students. Laws other than Title IX, most notably the Clery Act, require colleges and universities, but not the K–12 public schools, to provide auxiliary protections to higher education students.[175] The Clery Act requires, among

170. *Id.*

171. *Id.* at 167.

172. *Id.* at 165.

173. *Id.* at 165 n.9.

174. *Id.* at 168. The court said engaging in such a speculative analysis would "substitute a negligence standard for a deliberate indifference standard." *Id.* The Eleventh Circuit has also refused to assess whether a K–12 public school acted with deliberate indifference by considering what more the school could have done in response to student sexual harassment. *See* GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 912, 916 (11th Cir. 2018) (per curiam) (finding no deliberate indifference when a middle school principal responded to student sexual harassment by, among other things, saying, "[b]ut look at how [GP] looks" and "she could provoke him at any moment," and rejecting the argument that the school could have done more in response to the harassment because the school "was not obliged to provide every remedy that [the survivor] requested"). The Sixth Circuit has similarly avoided such an analysis. *See* Stiles *ex rel.* D.S. v. Grainger County, 819 F.3d 834, 851 (6th Cir. 2016) (finding a school's "[o]ne-and-a-half years of similar, but not rote, responses" to a middle school student's repeated sexual harassment did not rise to the level of deliberate indifference without any evaluation of what more the school could have done to stop it); *supra* note 164 and accompanying text.

175. 20 U.S.C. § 1092(f)(8). For example, colleges and universities must report incidences of sex offenses and dating violence. *Id.* In addition, the Clery Act requires colleges and universities, but not K–12 public schools, to develop programs to create awareness of and prevent sexual assault, dating violence, stalking, and domestic violence. *Id.* The Title IX regulations that went into effect in August 2020 also require postsecondary institutions to provide more procedural protections to students than the regulations require of K–12 public schools. Postsecondary institutions, for instance, must provide for a live hearing, including cross-examination and transcripts, as part of their formal Title IX grievance processes, but K–12 public schools need not provide these live hearings. *See* 34 C.F.R. § 106.45(b)(6) (2020). The procedures that Title IX require of colleges and universities have been the subject of debate and controversy, with some scholars insisting they have gone too far, and others arguing they do not do enough. *See, e.g.*, Jacob Gersen & Jeanie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 885 (2016) (arguing that Title IX, the Clery Act, and the Violence Against Women Act regulate what they term "ordinary sex" rather than sexual violence or harassment); Cantalupo, *supra* note 20, at 307–08 (critiquing the proposed, now final, regulation mandating the clear and convincing evidence standard for school Title IX hearings).

other things, colleges and universities to have in place sexual violence prevention programs and to provide fair investigations by trained officials in ways that protects survivors' safety.[176] Because none of these Clery Act requirements apply to K–12 public schools,[177] college and university students have a higher baseline set of protections from sexual harassment than students in the K–12 public schools.[178] Therefore, even when courts articulate and apply the deliberate indifference standard consistently across higher education and K–12 public school students' Title IX claims, students in higher education still receive more protection from sexual harassment than K–12 public school students.[179] More specifically, even courts that uniformly, if problematically, conclude that a bare-minimum response by either colleges and universities or K–12 public schools satisfies the deliberate indifference standard, higher education students still receive more from those bare-minimum responses because laws like the Clery Act require it.[180]

For instance, in *Doe v. Princeton University*,[181] the Third Circuit concluded that Princeton University had not been deliberately indifferent in its response to the sexual assault of student John Doe by fellow student, Student X.[182] The court made this determination based on the coordinated, formal investigative and adjudicatory steps Princeton took in response to the report of the assault.[183] Those steps complied with the procedural requirements in effect for colleges and universities at the time.[184] First, in its investigation, Princeton abided by "Princeton's Rights, Rules, Responsibilities guide [that] proscribes sexual misconduct and sex discrimination, and outlines the procedures for the investigation and discipline for violations."[185] Next, Princeton "assembled a panel of administrators to investigate" Doe's report of assault.[186] Then, "the panel issued a set of charges" against Student X.[187] The panel also met with

176. 20 U.S.C. § 1092(f)(8).

177. *See id.*

178. *See id.*

179. *See* Doe v. Princeton Univ., 790 F. App'x 379, 384 (3d Cir. 2019); Kocsis v. Fla. St. Univ. Bd. of Trs., 788 F. App'x 680, 680 (11th Cir. 2017); Ross v. Univ. of Tulsa, 859 F.3d 1280, 1293 (10th Cir. 2017); M.J.G. v. Sch. Dist. of Phila., 774 F. App'x 736, 738–40 (3d Cir. 2019); Saphir v. Broward Cnty. Pub. Sch. Dist., 744 F. App'x 634, 636 (11th Cir. 2018); Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1114 (10th Cir. 2008); *infra* notes 205–09 and accompanying text.

180. *See* Princeton Univ., 790 F. App'x at 384; *Ross*, 859 F.3d at 1293; *Kocsis*, 788 F. App'x at 680; *M.J.G.*, 774 F. App'x at 738–40; *Rost*, 511 F.3d at 1114; *Saphir*, 744 F. App'x at 636.

181. 790 F. App'x 379 (3d Cir. 2019).

182. *Id.* at 381.

183. *Id.* at 381, 384.

184. *Id.* Some of those requirements have changed with the promulgation of the Title IX regulations in 2020. *See* 34 C.F.R. pt. 106 (2020).

185. *Princeton Univ.*, 790 F. App'x at 382.

186. *Id.*

187. *Id.* at 381.

witnesses as part of its investigation.[188] At the end of its investigation, the panel issued formal findings that Student X was "not responsible" for the charges.[189] Doe then had the opportunity to appeal those findings.[190]

When Doe challenged the investigation in federal court as procedurally flawed and thus deliberately indifferent, the Third Circuit disagreed.[191] In doing so, the court articulated the deliberate indifference standard as requiring an inquiry into whether Princeton acted clearly unreasonably and applied that standard without asking what more Princeton could have done.[192] The court then concluded that Doe could not show that Princeton was deliberately indifferent based on Princeton's investigative or adjudicatory procedures.[193]

That conclusion might be relatively unremarkable were it not for the fact that the Third Circuit came to the same conclusion just six months earlier in the case of a K–12 public school student whose report of sexual harassment was met with almost no investigation by her school and no adjudicatory proceedings at all.[194] In that case, *M.J.G. v. School District of Philadelphia*,[195] high school student M.J.G. reported two incidents of sexual assault by student R.D.[196] In the first incident, R.D. put M.J.G.'s hand on his penis while they were in the library.[197] Then, the following school year while outside at lunch, R.D. "told [M.J.G.] to pull her pants down, and R.D. blew on her stomach and put his penis on her pelvic area."[198] Unlike Princeton University, though, M.J.G.'s high school either had no formal written procedures to follow in response to M.J.G.'s reports of these assaults or, if it did, it did not follow them.[199] That M.J.G.'s high school had no procedure in place of the kind in effect at Princeton University is unsurprising because these procedures were not required of M.J.G.'s school as they were of Princeton under the Clery Act.[200] In response to the first assault, then, the school only held an informal meeting in which M.J.G.'s teacher asserted the reported assault was "completely false."[201] The school did nothing more to investigate M.J.G.'s first sexual assault complaint and merely said it would increase supervision over students.[202] In response to

188. *See id.*
189. *Id.*
190. *Id.* at 382.
191. *Id.* at 384.
192. *Id.*
193. *Id.*
194. M.J.G. v. Sch. Dist. of Phila., 774 F. App'x 736, 738–40 (3d Cir. 2019).
195. 774 F. App'x 736 (3d Cir. 2019).
196. *Id.* at 738–40.
197. *Id.* at 738–39.
198. *See id.* at 739.
199. *Id.*
200. *See id.* at 738–40; Doe v. Princeton Univ., 790 F. App'x 379, 381, 384 (3d Cir. 2019).
201. *M.J.G.*, 774 F. App'x at 739.
202. *Id.*

M.J.G.'s second complaint of sexual assault, the school did do something more to investigate: it took a statement from the perpetrator, R.D.[203] Beyond that, the school did nothing more.[204] It did not take a statement from M.J.G.[205] It also did not hold any proceedings, disciplinary or otherwise, to address R.D.'s alleged behavior in any way.[206]

Despite the informality of and glaring gaps in the school's investigations and overall response to M.J.G.'s report, the Third Circuit found that the school did not act with deliberate indifference.[207] When it came to this conclusion, the court articulated and applied that standard as it had in *Doe v. Princeton*.[208] The court said that "even if other steps could have been taken," the school's failure to do more was not clearly unreasonable and so did not constitute deliberate indifference.[209]

Although the Third Circuit articulated and applied the deliberate indifference standard evenly in both Doe and M.J.G. and only required both Princeton University and M.J.G.'s high school to do something other than nothing in response to the sexual harassment that occurred, that base-level required response involved more for Doe than for M.J.G.[210] It involved more because the Clery Act and other laws require more of colleges and universities.[211] Even articulated and applied consistently, therefore, a response

203. *Id.*

204. *See id.*

205. *Id.*

206. *See id.* at 739–40. The school also developed a safety plan that called for more supervision of M.J.G. and separating M.J.G. from R.D., among other things, but it did not tell M.J.G.'s mother about the safety plan. *Id.* at 740.

207. *Id.* at 743.

208. *Id.*; Doe v. Princeton Univ., 790 F. App'x 379, 384 (3d Cir. 2019).

209. *M.J.G.*, 774 F. App'x at 743. The Third Circuit is not alone in disregarding the differences in procedural protections afforded students in higher education as compared to students in the K–12 public schools when making deliberate indifference determinations. The Tenth and Eleventh Circuits do the same. *See, e.g.*, Ross v. Univ. of Tulsa, 859 F.3d 1280, 1293 (10th Cir. 2017) (finding no deliberate indifference based on nuances of the university's formal evidentiary rules for its adjudicatory hearings, which had formal evidentiary rules). *Compare* Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1117–18 (10th Cir. 2008) (concluding a middle school was not deliberately indifferent to a student's rape even though the school conducted no investigation and did not even speak to the boys who raped her, let alone hold a formal hearing with detailed evidentiary rules), *and* Kocsis v. Fla. St. Univ. Bd. of Trs., 788 F. App'x 680, 682, 685–86 (11th Cir. 2017) (determining Florida State University did not act with deliberate indifference to student sexual harassment when it interviewed students and faculty members and reviewed audio recordings and emails before it found that the faculty member's actions did not amount to sexual harassment), *with* Saphir v. Broward Cnty. Pub. Sch. Dist., 744 F. App'x 634, 636–37, 639 (11th Cir. 2018) (finding after a high school merely "discussed" reported sexual harassment of a student with the perpetrator, the survivor's father, and teachers and administrators that the school's response "may have been imperfect," but this very informal investigation did not show that the school acted with deliberate indifference to that harassment).

210. *See M.J.G.*, 774 F. App'x at 743; *Princeton Univ.*, 790 F. App'x at 384.

211. 20 U.S.C. § 1092(f)(1)(F).

that satisfies the deliberate indifference standard can mean something more in the higher education context than in the K–12 public school context.[212]

C. *Unwarranted Distinctions in Title IX Protections*

The courts have thus effectively established two sets of Title IX protections.[213] The Title IX for K–12 public school students offers less protection against sexual harassment than the Title IX available to higher education students.[214] If distinctions in the student populations of K–12 public schools and colleges and universities supported the establishment of two, unequal sets of Title IX protections, then the courts' actions would be justified. To be sure, such distinctions exist. Some judges, notably Justice Kennedy in his dissent in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, have contended that those distinctions warrant K–12 public school students receiving relatively few protections from sexual harassment under Title IX.[215] Rather than supporting the courts' disparate treatment of students' Title IX claims, however, these differences justify providing students in the K–12 public schools at least as much protection under Title IX as students in higher education.

Children in K–12 public schools are both younger and developmentally less mature than students in higher education.[216] Justice Kennedy noted this point in his dissent in *Davis*, saying that "schools . . . are rife with inappropriate behavior by children who are just learning to interact with their peers."[217] Justice Kennedy consequently argued that too stringent a Title IX standard would "sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life."[218] In addition, these younger children generally have parents available to assist and protect them. Following this logic, parents not only can seemingly supplement any relatively lessened Title IX protections their children might enjoy but arguably also "have a moral and ethical responsibility to help students learn to interact with their peers in an appropriate manner."[219]

212. *See Princeton Univ.*, 790 F. App'x at 379; *Ross*, 859 F.3d at 1280; *Kocsis*, 788 F. App'x at 680. *But see M.J.G.*, 774 F. App'x at 736; *Rost*, 511 F.3d at 1114; *Saphir*, 744 F. App'x at 636.

213. *See supra* Section I.B.

214. *See supra* Section I.B.

215. 526 U.S. 629, 672–73 (1999) (Kennedy, J., dissenting).

216. Among other things, students in the K–12 public schools span vast age and developmental ranges because states require students as young as five and as old as eighteen to attend school. *See Table 5.1. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/statereform/tab5_1.asp [https://perma.cc/H25S-99EG].

217. *Davis*, 526 U.S. at 672.

218. *Id.* at 678.

219. *Id.* at 673.

While Justice Kennedy accurately identified distinct features of the K–12 school population, his predictions about the problems that would result from imposing Title IX liability on K–12 schools were not so accurate. First, the deliberate indifference standard has and continues to run little risk of rendering K–12 schools overly susceptible to liability for students' innocuous misbehavior.[220] Students still have to show that their sexual harassment was severe, pervasive, and objectively offensive.[221] This high bar has not only long insured against the kind of liability Justice Kennedy forecast, but it has also meant that K–12 students do not succeed on their Title IX claims except in the most extreme cases.[222] Second, because empirical research has shown since Justice Kennedy wrote his dissent that school-age students suffer more sexual harassment and more long-lasting harms from it, they need as much protection from it as students in higher education.[223] Third, because students who suffer sexual harassment prior to the age of eighteen have an increased likelihood of suffering it again after the age of eighteen, protecting younger students from sexual harassment can prevent it from happening later in life, including in higher education.[224] In other words, fortifying Title IX protections in the K–12 public schools can prevent some students from needing its protections when they are in higher education.[225]

It might still seem that because K–12 students have parents readily available to protect them from sexual harassment and advocate for them when they do suffer it, they might not need as much protection from sexual harassment as students in higher education, who often live away from their parents.[226] Yet, parents of students in K–12 public schools have little access to

220. *Id.* at 678.

221. *Id.* at 652.

222. *See, e.g.*, Morgan v. Town of Lexington, 823 F.3d 737, 745 (1st Cir. 2016) (finding "the pulling down of the pants by and large seems clearly to be an adjunct to the bullying on the basis of other considerations, and by itself is not portrayed in the complaint as sufficiently 'severe' and/or 'pervasive' to supply a sexual harassment claim under Title IX"); *supra* Section I.B.

223. *See supra* Section I.A.

224. James R.P. Ogloff, Margaret C. Cutajar, Emily Mann & Paul Mullen, *Child Sexual Abuse and Subsequent Offending and Victimisation: A 45 Year Follow-Up Study*, TRENDS & ISSUES CRIME & CRIM. JUST., June 2012, at 1, 5, https://www.aic.gov.au/sites/default/files/2020-05/tandi440.pdf [https://perma.cc/NKB2-2HUY (staff-uploaded archive)].

225. *Id.*

226. In 2018, sixty-two percent of undergraduates lived off campus and not with their parents. EIGEN 10 ADVISORS, LLC, NAT'L MULTIFAMILY HOUS. COUNCIL, EVOLUTION OF THE U.S. STUDENT HOUSING MARKET 11 (Oct. 16, 2019), https://www.nmhc.org/globalassets/meetings/2019-meetings/2019-nmhc-student-housing-conference--expo/presentation-materials/wed-1000-1115am_nmhc-research_paige-mueller_chicago-d.pdf [https://perma.cc/734J-6XB7]; *see also* KRISTIN BLAGG & VICTORIA ROSENBOOM, URB. INST., WHO LIVES OFF CAMPUS?: AN ANALYSIS OF LIVING EXPENSES AMONG OFF-CAMPUS UNDERGRADUATES 10 (2017), https://www.urban.org/sites/default/files/publication/94016/who-lives-off-campus.pdf [https://perma.cc/NTF3-8R9A] (finding twenty-two percent of college students living off-campus lived with their parents).

their children during the school day and so can do little to protect them from sexual harassment they suffer there.[227] Further, Title IX's purpose and very existence show that this notion that parents have the capacity to protect their children from sexual harassment while they are in school is specious at best. Congress enacted Title IX to protect students from and "prohibit sex discrimination at all levels of education."[228] If parents were fully able to protect their children from sexual harassment and govern their behavior in the public schools, then Title IX would not be needed. Instead, "Title IX is the embodiment of the idea that parents alone cannot protect their children."[229]

II. TITLE IX'S RACE DISPARITIES

The lower federal courts' assessments of Title IX do not just offer more robust protection from sexual harassment to students in higher education than to K–12 public school students.[230] The courts' evaluations produce a further disparity in that they create a race disparity in Title IX protections.[231] This race disparity operates on both an institutional and an individual level.[232] First, by requiring colleges and universities to provide comparatively more protection from sexual harassment under Title IX, the courts demand that predominantly white institutions provide more protection from sexual harassment than institutions that enroll more, sometimes significantly more, Black and Latinx students.[233] Second, by allowing K–12 public schools to provide less protection from sexual harassment, the courts afford fewer protections to the individual Black and Latina girls who are often the most likely to experience sexual

227. *E.g.*, Morrow v. Balaski, 719 F.3d 160, 190 (2013) (Fuentes, J., dissenting) ("[A] parent's immediate ability to protect his child is significantly curtailed during the time the child is in the physical custody of school officials. During that time, the State may well be the *only* caregiver to which children may turn to for help." (emphasis in original)).

228. 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh).

229. Emily Suski, *The School Civil Rights Vacuum*, 66 UCLA L. REV. 720, 743 (2019).

230. *See supra* Section I.B.

231. *See infra* Sections II.A–B.

232. *See infra* Sections II.A–B.

233. *See infra* Section II.A.1.

harassment.[234] The courts thus perpetuate the long history of obscuring the experiences of girls and women of color as survivors of sexual harassment.[235]

That Black and Latinx students disproportionately attend high-poverty K–12 public schools and disproportionately live in poverty exacerbates these disparities.[236] These income disparities mean that the schools and families of the students most likely to experience sexual harassment often lack the resources to prevent and address the effects of their sexual harassment.[237] Title IX could help ensure resources are available to all if it operated consistently with its broad protective mandate.[238] It could do so by prompting K–12 public school reforms and providing damages to K–12 public school students.[239] But because the courts interpret and apply the deliberate indifference standard with little rigor in their Title IX claims, K–12 students' Title IX claims regularly fail.[240] Under the courts' evaluations, then, Title IX does the least for the students who need it most.[241]

A. Title IX's Institutional Race Problem

Although overall enrollment statistics at colleges and universities paint a fairly diverse picture of the higher education student population,[242] selective

234. *See infra* Section II.B. In this way, Title IX, which should be a remedy for the intersectionality problems identified by Kimberlé Crenshaw three decades ago, reinforces them. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 [hereinafter Crenshaw, *Demarginalizing*] ("[D]ominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group."); *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241 (1991).

235. *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105, 110 (2018); Crenshaw, *Demarginalizing*, *supra* note 234, at 141–49; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599–600 (1990).

236. *Children in Poverty by Race and Ethnicity in the United States*, ANNIE E. CASEY FOUND., https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/10,11,9,12,1,185,13/324,323 [https://perma.cc/5ZSW-NFC2] [hereinafter *Children in Poverty*]; MARTIN CARNOY & EMMA GARCÍA, ECON. POL'Y INST., FIVE KEY TRENDS IN U.S. STUDENT PERFORMANCE 16–17 (2017), https://files.epi.org/pdf/113217.pdf [https://perma.cc/4VPN-6GTL].

237. *See Children in Poverty*, *supra* note 236; CARNOY & GARCÍA, *supra* note 236, at 16–17.

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

239. *See infra* Section II.C.2.

240. *See supra* Section I.B.1.

241. *See supra* Section I.B; *infra* Sections II.B–C.

242. For example, the overall enrollment of Black students in higher education is

> slightly above their estimated 12.7-percent representation in the U.S. population. Blacks were overrepresented in certain categories in addition to the expected one of historically black colleges and universities: Among the other categories are two-year and four-year for-profit

four-year institutions—that is, institutions that have admissions criteria and do not accept all applicants—increasingly and overwhelmingly enroll white students.[243] At the same time, white enrollment rates in the K–12 public schools has decreased for decades, and the enrollment rates of nonwhite students has risen.[244] Significantly, a relationship exists between these enrollment trends and the relative degree of protection from sexual harassment afforded by the courts under Title IX.[245] The courts' evaluations of the deliberate indifference standard effectively demand that the selective four-year colleges and universities that predominantly enroll white students provide more protection from sexual harassment than the K–12 public schools that enroll a far more diverse set of students.[246]

1. Title IX's Sexual Harassment Protections Are Strongest at Predominantly White Colleges and Universities

White students make up the vast majority of the students enrolled in selective colleges and universities,[247] and these schools are also the institutions that most typically have to respond to sexual harassment under Title IX.[248] When the courts demand more of colleges and universities under Title IX, therefore, they demand more of institutions attended by mostly white students.[249] Although enrollment at community colleges and other nonselective

institutions, two-year private nonprofit institutions, and colleges where more than half of students were enrolled exclusively in distance education.

African-American Representation in Enrollment and Earned Degrees, by Institution Type, 2017, CHRON. HIGHER EDUC. (Aug. 18, 2019), https://www.chronicle.com/article/african-american-representation-in-enrollment-and-earned-degrees-by-institution-type-2017/?bc_nonce=k924sas9zsrr4v9pb3tqyj&cid=reg_wall_signup [https://perma.cc/UU3A-3Y97 (dark archive)] [hereinafter *African-American Representation*].

243. ANTHONY P. CARNEVALE & JEFF STROHL, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 8 (2013) (noting in higher education, "between 1995 and 2009, more than 8 in 10 of net new white [college] students have gone to the 468 most selective colleges and more than 7 in 10 of net new African-American and Hispanic [college] students have gone to the 3,250 open-access, two- and four-year colleges").

244. GARY ORFIELD & DANIELLE JARVIE, BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY 5 (2020) (explaining how these enrollment trends "make widespread [public school] desegregation more difficult").

245. *See infra* Sections II.A.1–2.

246. *See supra* Section I.B; *infra* Sections II.A.1–2.

247. CARNEVALE & STROHL, *supra* note 243, apps. A–B at 45–53.

248. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999); Anderson, *supra* note 15.

249. *See supra* Section I.B; CARNEVALE & STROHL, *supra* note 243, at 10; Anderson, *supra* note 15.

colleges is much more racially diverse,[250] they have less responsibility for responding to sexual harassment under Title IX because of limits on Title IX's applicability and particular characteristics of their campus and student populations.[251] Title IX, therefore, has far less applicability or force in these nonselective institutions.[252]

Because Title IX proscribes sex discrimination in public education, it does not demand that public schools respond to all sexual harassment that students endure, no matter where it occurs.[253] Rather, Title IX only requires that public schools respond to student sexual harassment that happens in situations over which the schools have control.[254] Schools, therefore, generally have to respond to student sexual harassment that occurs on campus, at campus-related events, or by way of campus technological resources, but not to sexual harassment that occurs at off-campus settings and events unrelated to campus.[255] In addition, schools must have some authority, particularly disciplinary authority, over the perpetrator of the harassment to have any obligation to respond to it.[256]

Given these limitations, most of the sexual harassment that colleges and universities must respond to under Title IX occurs at selective four-year colleges and universities.[257] At selective four-year colleges and universities,

250. *See, e.g.*, AM. ASS'N OF CMTY. COLLS., FAST FACTS 2022 (2022), https://www.aacc.nche.edu/wp-content/uploads/2022/05/AACC_2022_Fact_Sheet-Rev-5-11-22.pdf [https://perma.cc/9GVZ-ZG8Y] (reporting on 2021 enrollment statistics at community colleges); *see also Davis*, 526 U.S. at 644–45; Anderson, *supra* note 15.

251. *See Davis*, 526 U.S. at 644–45; Anderson, *supra* note 15.

252. *See supra* Section I.B.

253. *See Davis*, 526 U.S. at 644–45.

254. *Id.* In holding that public schools could be liable for peer sexual harassment based on deliberate indifference, the Supreme Court was explicit on the need for such control. *Id.* It said "[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action." *Id.* at 644. Schools' liability for peer sexual harassment is limited, therefore, to sexual harassment that occurs when the school "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 645. Contrary to the subsequent interpretations of *Davis*, though, the Court suggested that colleges and universities might be less likely than K–12 public schools to be liable under Title IX for peer sexual harassment because it noted that a "university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy." *Id.* at 649.

255. *See, e.g.*, Feminist Majority Found. v. Hurley, 911 F.3d 674, 688 (4th Cir. 2018) (concluding that UMW has sufficient control over the context of the online harassment of certain UMW students by fellow students because it controlled the wireless network over which the harassment occurred).

256. *See, e.g.*, *id.* (further concluding that UMW had disciplinary control over the students committing online sexual harassment of other students because the university "had the ability to punish those students who posted sexually harassing and threatening messages online" and observing that "[i]ndeed . . . [it] had previously disciplined students—members of the men's rugby team—for derogatory off-campus speech").

257. Community colleges are two-year, nonselective, or open-access, institutions from which students can transition to four-year colleges and universities. *What Is Community College?*, U.S. DEP'T

students are more likely to experience sexual harassment on campus or at campus-related events,[258] and the perpetrators are more likely to be other students.[259] These institutions, therefore, are more likely to have control over the situations in which the harassment occurs and disciplinary authority over the perpetrators of it.[260]

These selective colleges and universities, which are the most likely to have to respond to student sexual harassment under Title IX, also enroll a majority of white students.[261] More precisely, they enroll almost exclusively white students.[262] A recent study shows that the white enrollment share at the top 468 selective colleges and universities across the country was a staggering 75%, and

HOMELAND SEC. (Mar. 13, 2012), https://studyinthestates.dhs.gov/2012/03/what-community-college [https://perma.cc/42PC-Q2MS]; *Community College*, EDUCATIONUSA, https://educationusa.state.gov/your-5-steps-us-study/research-your-options/community-college [https://perma.cc/4X5N-DNDJ]. In 2020, the U.S. Department of Education had 300 open Title IX investigations involving higher education institutions. Anderson, *supra* note 15. Of those, only eleven arose out of complaints at community colleges. *Id.*

258. Many such activities occur at these institutions. *See, e.g.*, *Campus Life & Extracurricular Activities*, UNIV. MICH., https://parents.umich.edu/page/campus-life-extracurricular-activities [https://perma.cc/J4NR-5XQQ] (noting over 1,400 on-campus student activities and organizations at the University of Michigan); *Campus Activities*, CORNELL UNIV., https://scl.cornell.edu/get-involved/campus-activities [https://perma.cc/C4HJ-L7UJ] (referencing over 1,000 on-campus student activities at Cornell University).

259. *See* CANTOR ET AL., *supra* note 1, at 13; Anderson, *supra* note 15.

260. *See* Anderson, *supra* note 15.

261. *See* CARNEVALE & STROHL, *supra* note 243, at 10; *see also* AM. ASS'N OF CMTY. COLLS., *supra* note 250; *infra* note 268 and accompanying text.

262. *See* CARNEVALE & STROHL, *supra* note 243, at 10. A recent Georgetown University study highlights the racial gap in higher education more generally. *Id.* at 7–14. That study explains that

> [r]acial stratification permeates the two- and four-year college and university system among the more than 4,400 institutions analyzed in this study. Even more striking is the growing polarization of the most selective institutions and the least selective open-access schools. White students are increasingly concentrated today, relative to population share, in the nation's 468 most well-funded, selective four-year colleges and universities while African-American and Hispanic students are more and more concentrated in the 3,250 least well-funded, open-access, two- and four-year colleges.

Id. at 7. An even more recent study from The Education Trust found Black and Latinx students are "severely" underrepresented in selective colleges and universities, with "Black student access . . . regressing." ANDREW HOWARD NICHOLS, THE EDUC. TR., 'SEGREGATION FOREVER'?: THE CONTINUED UNDERREPRESENTATION OF BLACK AND LATINO UNDERGRADUATES AT THE NATION'S 101 MOST SELECTIVE PUBLIC COLLEGES AND UNIVERSITIES 9 (2014), https://edtrust.org/wp-content/uploads/2014/09/Segregation-Forever-The-Continued-Underrepresentation-of-Black-and-Latino-Undergraduates-at-the-Nations-101-Most-Selective-Public-Colleges-and-Universities-July-21-2020.pdf [https://perma.cc/77L4-CPJ7]. Further, the study found that six in ten public selective universities saw decreases in their percentage of Black students on campus. *Id.*; *see also* TOMAS MONARREZ & KELIA WASHINGTON, URB. INST., RACIAL AND ETHNIC REPRESENTATION IN POSTSECONDARY EDUCATION vii (2020), https://www.urban.org/sites/default/files/publication/102375/racial-and-ethnic-representation-in-postsecondary-education_1.pdf [https://perma.cc/8WA5-L9SM] ("Black and Hispanic students are underrepresented at more selective universities, by 6 and 9 percentage points, respectively.").

that vastly disproportionate enrollment share has been increasing for years.[263] Meanwhile, Black and Latinx student enrollment, combined, at the same colleges and universities was only 15%.[264] Further, some selective universities have even larger race disparities than do selective colleges and universities overall.[265] For instance, at the University of Maryland College Park in 2018, only 7% of enrolled students were Black.[266] Maryland is not alone among flagship state universities in its abysmally low enrollment of Black and Latinx students.[267] The problem is widespread among flagship universities.[268]

While enrollment at community colleges and other nonselective institutions is significantly more diverse, Title IX is less operative there.[269] This

263. CARNEVALE & STROHL, *supra* note 243, at 10. This number also reflects a "13 percentage point advantage of enrollment over population share." *Id.* To put a finer point on these statistics, in 2018, "African American students made up only 12% of the student population at 4-year public institutions [and] 13% of the student population at 4-year private nonprofit institutions." *Black Students in Higher Education*, POSTSECONDARY NAT'L POL'Y INST. (Feb. 1, 2022), https://pnpi.org/african-american-students/ [https://perma.cc/K65B-L3VX].

264. CARNEVALE & STROHL, *supra* note 243, at 10. Further, the gap in the enrollment shares of Black and Latinx students as compared to their representation in the state's population was 24%. *Id.* In contrast to the white student enrollment-to-population share advantage, Black and Latinx students have an "18 percentage point deficit of enrollment versus population share." *Id.*

265. Lauren Lumpkin, Meredith Kolodner & Nick Anderson, *Flagship Universities Say Diversity Is a Priority. But Black Enrollment in Many States Continues To Lag.*, WASH. POST (Apr. 18, 2021, 7:00 AM), https://www.washingtonpost.com/education/2021/04/18/flagship-universities-black-enrollment/ [https://perma.cc/G4LQ-ZW6Z (dark archive)].

266. *Id.*

267. *See id.* Maryland's eighteen point gap in Black and Latinx enrollment as compared to the Black and Latinx college age population share was not even the worst in the country. *Id.* It was the sixth worst. *Id.*

268. For example, Virginia has the same racial gap in enrollment in its selective public universities. At the University of Virginia, only 13% of students are Black or Latinx, which is 60% lower than the population share of Black and Latinx college age students in that state. MICHAEL DANNENBERG, JAMES MURPHY & KATLYN RIGGINS, EDUC. REFORM NOW, SCRATCHING *THE* SURFACE: *DE FACTO* RACIAL & ECONOMIC SEGREGATION IN VIRGINIA HIGHER EDUCATION 5 (2021), http://edreformnow.org/wp-content/uploads/2021/04/VA-Issue-Brief-Final.pdf [https://perma.cc/F2C4-JLVA]; *Report Finds De Facto Racial Segregation in Virginia's Public Universities*, J. BLACKS HIGHER EDUC. (Apr. 19, 2021), https://www.jbhe.com/2021/04/report-finds-de-facto-racial-segregation-in-virginias-public-universities/ [https://perma.cc/75BA-4KAG] [hereinafter *Report Finds De Facto Racial Segregation*]. At Virginia Polytechnic Institute and State University (or Virginia Tech), only 4.5% of the students are Black, and at the College of William and Mary only 7% of students are Black. DANNENBERG ET AL., *supra*, at 5; *Report Finds De Facto Racial Segregation*, *supra*. Similarly, at James Madison University, only 5% of students are Black. DANNENBERG ET AL., *supra*, at 5; *Report Finds De Facto Racial Segregation*, *supra*.

269. Community colleges in particular enroll disproportionately high numbers of Black and Latinx students. *See* AM. ASS'N OF CMTY. COLLS., *supra* note 250; CARNEVALE & STROHL, *supra* note 243, at 10. In 2021, Black and Latinx students comprised 30% of overall community college enrollment. AM. ASS'N OF CMTY. COLLS., *supra* note 250. These disparities in enrollment to population share in community colleges are increasing, particularly for Latinx students. AM. ASS'N OF CMTY. COLLS., COMMUNITY COLLEGE ENROLLMENT CRISIS?: HISTORICAL TRENDS IN COMMUNITY COLLEGE ENROLLMENT 8 (2019), https://www.aacc.nche.edu/wp-content/uploads/2019/08/Crisis-in-

occurrence is in part because community colleges and other nonselective institutions have less control over much of the sexual harassment their students suffer.[270] Community colleges have less such control, in part, because nearly two-thirds of the students enrolled attend part-time[271] and very few students live on campus.[272] Fewer students, therefore, are regularly on community college campuses and far fewer students participate in on-campus activities.[273] Thus, when community college students experience harassment, it is less likely to happen on campus or at campus-related events where their colleges would have control over the harassment and be obligated to respond to it under Title IX.[274] The Title IX protections the courts demand of these more racially diverse

Enrollment-2019.pdf [https://perma.cc/M3QA-9XDJ] ("The most striking trend is the steady increase in the percent of Hispanic students enrolled in community colleges. In 2001, Hispanic students were 13.9% of community college students, and by 2017, they made up nearly a quarter (24.9%) of community college enrollments. In terms of raw numbers, Hispanic student enrollment nearly doubled, increasing by 98% between 2001 and 2017, and despite the overall decline in enrollments at community colleges between 2010 and 2017, Hispanic enrollments increased each year across that timeframe."). Further, a review of trends in enrollment over seventeen years shows the number of white students enrolled in community colleges is shrinking. *Id.* ("In reviewing the 17-year trends, one of the most notable trends is the steady decline of White students as a percentage of students enrolled in community colleges. The percentage of the community college enrollment that is White dropped from a high of 60% in 2001 to 46.2% in 2017."). In contrast, white students only make up 44% of community college enrollment nationwide. AM. ASS'N OF CMTY. COLLS., *supra* note 250.

270. *Id.*; *supra* note 269 and accompanying text.

271. AM. ASS'N OF CMTY. COLLS., *supra* note 250. In 2021, only 35% of community college students, or 2.4 million, attended full time. *Id.* In addition, far fewer students enrolled at community college than in four-year institutions. In 2020, total undergraduate enrollment in all higher education institutions was 15.9 million. NAT'L CTR. FOR EDUC. STATS., *Characteristics of Postsecondary Students*, *in* THE CONDITION OF EDUCATION 2022, at 1 (2022) [hereinafter NAT'L CTR. FOR EDUC. STATS., *Characteristics of Postsecondary Students*], https://nces.ed.gov/programs/coe/pdf/2022/csb_508.pdf [https://perma.cc/79VS-83DW]. Of those students, 10.9 million, or 65%, attended four-year institutions. *Id.* The other 31%, or 4.9 million students, attended two-year institutions, or community colleges. *Id.*

272. Only about one quarter of all community colleges even offer on-campus housing. AM. ASS'N OF CMTY. COLLS., *supra* note 250 (reporting that in 2021, only 28% of community colleges offered on-campus housing).

273. Alexandra Pannoni, *4 Ways Community College Life Differs from the 4-Year College Experience*, U.S. NEWS & WORLD REP. (Aug. 26, 2015), https://www.usnews.com/education/community-colleges/articles/2015/08/26/4-ways-community-college-life-differs-from-the-4-year-college-experience [https://perma.cc/PR8H-K7CC (staff-uploaded archive)].

274. AM. ASS'N OF CMTY. COLLS., *supra* note 250. As one study noted, "[B]ecause many sexual violence incidents reported to community colleges occur off campus and involve nonstudents, such as family members or intimate partners, the institution can only play a 'limited role of providing support by connecting the victimized to local community resources and/or enforcing civil orders of protection on campus.'" Rebecca M. Howard, Sharyn J. Potter, Céline E. Guedj & Mary M. Moynihan, *Sexual Violence Victimization Among Community College Students*, 67 J. AM. COLL. HEALTH 674, 675 (2019) (citation omitted). Only about 7.5% of all campus sexual assaults occurred on community college campuses, or 713 out of a total of 9,373 such assaults. NAT'L CTR. FOR EDUC. STATS., *Characteristics of Postsecondary Students*, *supra* note 271. Unsurprisingly, then, in 2020, fewer than four percent of open Title IX investigations in higher education involved community colleges. Anderson, *supra* note 15.

schools have less force because these institutions do not generally have as much reason to respond to student sexual harassment.[275]

Without question, historically Black colleges and universities ("HBCUs") represent an exception to these enrollment statistics and Title IX obligations.[276] Campus and campus-related sexual harassment occurs with alarming regularity at these selective, four-year institutions.[277] A 2019 study found that twenty percent of students at HBCUs experience sexual harassment.[278] Further, as high as these rates of sexual harassment are, they likely represent underreporting.[279] Survivors of sexual harassment at HBCUs may be particularly unlikely to report their harassment for multiple reasons, including a desire to protect Black male perpetrators from a racist criminal justice system and Black women's fears of being "cast as hypersexualized" and thus blamed for their own sexual harassment.[280] Although sexual harassment is a prevalent problem on HBCU campuses, HBCUs still comprise a very small percentage of the overall enrollment in higher education.[281] So, while HBCUs, like other selective colleges and universities, have to comply with the enhanced Title IX protections required by courts in the higher education context, that fact does not mitigate the overall point that these enhanced protections still primarily apply in the colleges and universities that overwhelmingly enroll white students.[282]

275. *See* Anderson, *supra* note 15.

276. In 2017, seventy-seven percent of students enrolled at HBCUs were Black. *African-American Representation*, *supra* note 242.

277. *See* Deshawn Collington, Markea Carter, Aliyah Tolliver & Jocelyn Turner-Musa, *Sexual Assault Among College Students Attending a Historically Black College/University*, 15 AM. J. UNDERGRADUATE RSCH. 37, 42 (2019).

278. *Id.* at 37, 42.

279. *See* Shaquita Tillman, Thema Bryant-Davis, Kimberly Smith & Alison Marks, *Shattering Silence: Exploring Barriers to Disclosure for African American Sexual Assault Survivors*, 11 TRAUMA, VIOLENCE, & ABUSE 59, 65 (2010); Anderson, *supra* note 15.

280. Tillman et al., *supra* note 279, at 65.

281. Only 97 out of 3,992 colleges and universities in the country (including two-year community colleges), or less than 2.5%, are HBCUs. *African-American Representation*, *supra* note 242. Only three percent of total college students enrolled attend HBCUs. *Id.* Further, the number of HBCUs and enrollment at HBCUs are both decreasing. Monica Anderson, *A Look at Historically Black Colleges and Universities as Howard Turns 150*, PEW RSCH. CTR. (Feb. 28, 2017), https://www.pewresearch.org/fact-tank/2017/02/28/a-look-at-historically-black-colleges-and-universities-as-howard-turns-150/ [https://perma.cc/EV57-ENQN].

282. *See, e.g.*, Doe 1 v. Howard Univ., 396 F. Supp. 3d 126, 135 (D.D.C. 2019) ("This court agrees with the Tenth Circuit's conclusion [in *Farmer v. Kansas State University*] that *Davis* 'clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively *either* that [a school's] deliberate indifference to their reports of rape caused Plaintiffs "to undergo" harassment *or* "ma[d]e them liable or vulnerable" to it.'" (emphasis in original) (quoting Farmer v. Kan. State Univ., 918 F.3d 1094, 1103 (10th Cir. 2019))); *see supra* Section I.B.

2. Title IX's Sexual Harassment Protections Are Weaker in Increasingly Racially Diverse K–12 Public Schools

Although white students make up a large percentage of the students enrolled at selective four-year colleges and universities, they comprise a consistently decreasing proportion of the population of students enrolled in the K–12 public schools.[283] White student attendance in K–12 public schools has been falling for the last quarter century.[284] At the same time, Black and Latinx student enrollment has remained fairly stable or increased, respectively, in these schools.[285] When the courts' evaluations of K–12 public school students' Title IX claims demand comparatively less of K–12 public schools in response to sexual harassment, they require less of schools attended increasingly, and in some cases predominantly, by Black and Latinx students.[286]

White student enrollment in the K–12 public schools has steadily declined for years across all regions in the country.[287] In certain regions, white enrollment is down substantially.[288] In the South, for example, from 2000 to 2018, white student enrollment in K–12 public schools decreased by forty percent.[289] White student enrollment also fell substantially in the West, where by 2018, only thirty-seven percent of students were white.[290] Even in the Midwest, which has the "largest proportion of White students, [white enrollment] is in decline."[291]

Meanwhile, Black and Latinx students both comprise a larger proportion of students in K–12 public schools than their overall share of the population and, in combination, now comprise a majority of the overall public school population in large areas of the country as well as in some of the most populous states in the country.[292] In the South and West, nonwhite students comprise a

283. ORFIELD & JARVIE, *supra* note 244, at 18.

284. *Id.*

285. *See id.* at 20.

286. *See supra* Section I.B; ORFIELD & JARVIE, *supra* note 244, at 19–21.

287. A study published in December 2020 by the UCLA Civil Rights Project found that "there were substantial declines in the percent of White enrollment in all regions [of the country] from 2000–2018." ORFIELD & JARVIE, *supra* note 244, at 20.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* The substantial decline in white enrollment in public schools across the country has occurred not because these students have moved to private schools, "which have a declining share of total enrollment and have themselves become somewhat more diverse. [Instead, t]he White decline reflects historically low birth rates and immigration patterns that are overwhelmingly non-White." *Id.* at 5.

292. In 2020, Black and Latinx students comprised 15% and 28%, respectively, of students enrolled in the K–12 public schools. NAT'L CTR. FOR EDUC. STATS., *Racial/Ethnic Enrollment in Public Schools*, *in* THE CONDITION OF EDUCATION (2022), at 1 (2022), https://nces.ed.gov/programs/coe/pdf/2022/cge_508.pdf [https://perma.cc/MX8R-LLQ2]. In 2015, the percentage of Black and Latinx school-age children was 14% and 25%, respectively. LAUREN MUSU-

majority of K–12 public school enrollment.[293] In the South, nearly a quarter of enrolled students are Black, and over a quarter are Latinx.[294] Although the West has far fewer Black students enrolled in the public schools, in large part due to historic migration patterns, it has the largest proportion—forty-three percent—of Latinx students enrolled in the public schools of any region in the country.[295] The large number of Latinx students enrolled in public schools in the West, in concert with the enrollment of Black, Asian, and Native American students, make the public school enrollment in the West majority nonwhite.[296] Additionally, in fourteen states, including the nation's four most populated states, the majority of students in public schools are nonwhite.[297] The lower federal courts' evaluations of the deliberate indifference standard, then, require that schools that are increasingly or predominantly populated by Black and Latinx students provide less protection from sexual harassment than predominantly white higher education institutions.[298]

GILLETTE, CRISTOBAL DE BREY, JOEL MCFARLAND, WILLIAM HUSSAR, WILLIAM SONNENBERG & SIDNEY WILKINSON-FLICKER, NAT'L CTR. FOR EDUC. STATS., AM. INSTS. FOR RSCH., NCES 2017-051, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2017, at iii (2017), https://nces.ed.gov/pubs2017/2017051.pdf [https://perma.cc/VT7J-XTZ4].

293. ORFIELD & JARVIE, *supra* note 244, at 19–20. These regions also "have the most growth of student enrollment. Over the last two decades, enrollment in the South grew to a third (33.8%) of national enrollment, and the West has gone from about a fifth (20%) to nearly a fourth (23.7%) of national enrollment." *Id.* at 19.

294. *Id.* at 20. As the UCLA Civil Rights Project reports, in "the South, the historic homeland of the majority of the nation's Black population, Latinx enrollment has surpassed Black enrollment in the last decade, making the region a truly three-race region with a declining White minority." *Id.*

295. *Id.* In "[t]he West, . . . Black migration was relatively small and . . . [so] has . . . the smallest share of Black students (4.8%)." *Id.*

296. *See id.* Notably, because of these changes, "Black students are less likely to be in all Black settings, and more likely to be in communities and schools with significant Latinx enrollments and higher shares of students in poverty." *Id.* at 22. Thus, segregation has only worsened since the civil rights era. Within these majority minority states and regions as elsewhere, school districts themselves are very much segregated. *See* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2423–24 (2020) ("There are nearly fourteen thousand school districts across the country. In [nearly] one thousand of [those] districts, the district boundary lines serve as de facto racial borders, separating predominately affluent and white students from predominately low-income students and students of color."). This segregation harms all students in critical ways. *See id.* at 2405 ("For white students, being situated in predominately white schools with better resources and facilities may allow notions of white superiority . . . . It may also make them more susceptible to internalizing false stereotypes about communities of color, seeing whiteness as the normative baseline of humanity, and having difficulty engaging in healthy and productive interracial relationships.").

297. Those states are California, Texas, Florida, and New York. ORFIELD & JARVIE, *supra* note 244, at 24 ("Fifty-seven percent of underrepresented minority students (URM=Black+Latino+American Indian) and 40% of Latinos go to school in these [fourteen] heavily non-White states. Blacks make up 16% of the total enrollment of these states, compared to 40% for Latinos.").

298. *See supra* Section I.B; ORFIELD & JARVIE, *supra* note 244, at 19–21.

B. Title IX's Individual Race Problem

These racial disparities in Title IX protections do not just operate on an institutional level.[299] They function on an individual student level as well.[300] While students in K–12 public schools generally suffer more sexual harassment than students in higher education, Black and Latina girls suffer from it especially.[301] Black and Latina girls in K–12 public schools endure more sexual harassment than do other individuals of any age or race.[302] The courts' assessments of the deliberate indifference standard, therefore, provide less protection to the individual students—Black and Latina girls—who are most vulnerable to sexual harassment.[303] Further, by providing these students lessened protections from sexual harassment, the courts perpetuate the historic marginalization of their experiences of sexual harassment.[304]

Empirical research shows that Black and Latina girls suffer more types of the sexual harassment in the public schools than other students.[305] Black girls in public school experience more sexual assault, physical sexual harassment, and written sexual messages.[306] Latina girls in public school experience more incidences of being kissed or touched without consent.[307] The students who

299. *Supra* Section II.A.

300. *See* Espelage et al., *supra* note 3, at 180.

301. *See* HILL & KEARL, *supra* note 1, at 2; CANTOR ET AL., *supra* note 1, at xiii, 47; *supra* Section I.A.1; *see also* Espelage et al., *supra* note 3, at 180; Tillman, *supra* note 279, at 65 (explaining that African American women are less likely to disclose sexual abuse than white women); PATRICK & CHAUDHRY, *supra* note 3, at 3.

302. *See, e.g.*, Espelage et al., *supra* note 3, at 180; Tillman, *supra* note 279, at 65; PATRICK & CHAUDHRY, *supra* note 3, at 3.

303. *See, e.g.*, Espelage et al., *supra* note 3, at 180; NEENA CHAUDHRY & JASMINE TUCKER, NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT 8 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_OverviewKeyFindings.pdf [https://perma.cc/3GP2-CXTF].

304. Scholars have long called out the failure of courts and social movements to recognize and acknowledge the intersectional experiences of harassment. *E.g.*, Onwuachi-Willig, *supra* note 235, at 118 ("[T]he failure to recognize the harassment of Jones and Hill[, two Black women attacked in media with racist language,] as gendered reveals how the unique form of racialized sexism that women of color face routinely gets marked as outside of the female experience.").

305. *See* CHAUDHRY & TUCKER, *supra* note 303, at 8.

306. Espelage et al., *supra* note 3, at 180. Black girls experienced more sexual harassment in five of the fifteen categories examined, whereas white girls only experienced more sexual harassment in two of those categories. *Id.* at 177; *see also* KANN ET AL., *supra* note 3, at 20 (finding that among high school students more Black than white or Latina girls experienced rape, or "forced sexual intercourse," in the previous twelve months, or 11.7% of Black girls as compared to 11.2% of both Latina and white girls).

307. PATRICK & CHAUDHRY, *supra* note 3, at 2–3 (noting "24 percent of Latina Girls, 23 percent of Native American girls, and 22 percent of Black girls reported being kissed or touched without their consent"). *But see* Brittany Z. Crowley & Dewey Cornell, *Associations of Bullying and Sexual Harassment with Student Well-Being Indicators*, 10 PSYCH. VIOLENCE 615, 621 (2020) (finding "that African American students were less likely than White students to be bullied or harassed"). That finding may in part be explained by the lack of specificity in the tool, which reduced the number of sexual

need Title IX's protections most because they experience the most sexual harassment, therefore, are not just students generally in K–12 public schools, but they are also particularly the Black and Latina girls in those schools who suffer disproportionate amounts of sexual harassment.[308] Yet these students receive the least such protection under the courts' assessments of Title IX.[309]

By affording K–12 public school students relatively reduced protection under Title IX, the courts also continue the long-standing marginalization of the experiences of girls and women of color with sexual harassment.[310] As Angela Harris, Kimberlé Crenshaw, and others, have explained, sex discrimination has long been understood primarily through and as an experience of white women.[311] Decades ago, Crenshaw pointed out that "discrimination against a white female is . . . the standard sex discrimination claim" and explained that, therefore, there exists a "continued insistence that Black women's demands and needs be filtered through categorical analyses that completely obscure their experiences[, which] guarantees that their needs will seldom be addressed."[312] Harris also described how "the experience of rape for black women includes not only a vulnerability to rape [but also] a lack of legal protection radically different from that experienced by white women."[313] By failing to protect Black and Latina girls and the educational spaces they occupy from sexual harassment to the same extent that courts protect white students, and particularly older white students, from sexual harassment, the courts thus

harassment items examined to four. When researchers disaggregate sexual harassment by race and gender and further by more categories of sexual assault and harassment, they find that Black students experience more sexual harassment in more, but not all, such categories. *See* Espelage et al., *supra* note 3, at 180; *supra* note 302 and accompanying text. Significantly, both of these studies developed their tools from the same source, the American Association of University Women's sexual harassment survey. Crowley & Cornell, *supra*, at 618; Espelage et al., *supra* note 3, at 176–77.

308. *See* PATRICK & CHAUDHRY, *supra* note 3, at 2–3.

309. *See supra* Section I.B.

310. *See* Onwuachi-Willig, *supra* note 235, at 110. *See generally* Crenshaw, *Demarginalizing*, *supra* note 234 (explaining how contemporary feminist and antiracist discourses have failed to consider intersectional identities such as women of color); Harris, *supra* note 236 (discussing how gender essentialism, which involves treating women's experiences independently of race, class, sexual orientation, and other realities of experiences, silences the voices of women of color).

311. Crenshaw, *Demarginalizing*, *supra* note 234, at 144; Harris, *supra* note 235, at 603; *see also* Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2201 (2019).

312. Crenshaw, *Demarginalizing*, *supra* note 234, at 145, 149–50.

313. Carbado & Harris, *supra* note 311, at 2203 ("[T]he effect of white women's representational hegemony in feminism is the marginalization of Black women's identities and experiences."); *id.* (describing how Harris and Crenshaw "both suggest that white feminist theorizing and politics are often one-dimensionally oriented" and "both argue that white women too often stand in for women in white feminist theorizing").

maintain the history of treating the sexual harassment of girls of color as less legitimate or worthy of protection.[314]

C. *The Poverty Overlay*

These institutional and individual level race disparities in the lower federal courts' assessments of Title IX have exacerbated poverty disparities.[315] The Black and Latinx K–12 students who suffer more sexual harassment and have fewer protections from Title IX under the courts' evaluations of this law also disproportionately attend high-poverty schools and disproportionately live in poverty.[316] Their low-income status aggravates the harms they suffer from sexual harassment and makes finding redress for those harms more difficult for these students.[317] If these students could prevail on their Title IX claims, the resulting damages awards could address some of these disparities. Because K–12 students' claims so frequently fail, these kinds of reforms and remedies rarely come to pass.[318]

314. Angela Onwuachi-Willig has argued how workplace sex discrimination has and continues to erase Black women's experiences as well as other intersectional experiences of such discrimination. Onwuachi-Willig, *supra* note 235, at 110 ("[T]he law ignores the complexities of how gender and racial subordination, stereotype, and bias can shape a victim's vulnerability to harassment, her credibility in the eyes of factfinders, and others' perceptions about whether she is harmed by the undesired conduct. It also disregards how a complainant's own understanding of others' perceptions about her group or groups, whether based on race, sex, or other identity factors like religion and age, can shape her own response to the harassment she is enduring.").

315. *Children in Poverty*, *supra* note 236; Yiyu Chen & Dana Thomson, *Child Poverty Increased Nationally During COVID, Especially Among Latino and Black Children*, CHILDTRENDS (June 3, 2021), https://www.childtrends.org/publications/child-poverty-increased-nationally-during-covid-especially-among-latino-and-black-children [https://perma.cc/Y8EN-XPPN].

316. ORFIELD & JARVIE, *supra* note 244, at 25–26. A study by the Economic Policy Institute demonstrates both that by 2013 "students eligible for [free and reduced-price lunch] represented 52.0 percent of all public school students, up from 38.3 percent in 2000," and "as the overall proportion of poor students in schools increased from 2003 to 2013, the percentage of both black and Hispanic students in high-poverty schools rose substantially." CARNOY & GARCÍA, *supra* note 236, at 10, 13. In addition, "the numbers of low-income students attending public schools in the South and in the West are extraordinarily high. Thirteen of the 21 states with a majority of low-income students in 2013 were located in the South, and six of the other 21 states were in the West." S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS NOW A MAJORITY IN THE NATION'S PUBLIC SCHOOLS 2 (2015), https://southerneducation.org/wp-content/uploads/documents/new-majority-update-bulletin.pdf [https://perma.cc/L55X-A9CM]. These are also the regions in which the public schools predominantly enroll students of color. ORFIELD & JARVIE, *supra* note 244, at 17.

317. *See* HILL & KEARL, *supra* note 1, at 23–24; CARNOY & GARCÍA, *supra* note 236, at 13; ORFIELD & JARVIE, *supra* note 244, at 25–26.

318. *See supra* Sections I.B.1–3; McCoy v. Bd. of Educ., Columbus City Schs., 515 F. App'x 387, 388 (6th Cir. 2013); Porto v. Town of Tewksbury, 488 F.3d 67, 70 (1st Cir. 2007); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000); Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 159 (4th Cir. 2015) (per curiam); GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 915 (11th Cir. 2018) (per curiam); M.J.G. v. Sch. Dist. of Phila., 774 F. App'x 736, 736 (3d Cir. 2019); Saphir v. Broward Cnty. Pub. Sch. Dist., 744 F. App'x 634, 634 (11th Cir. 2018); Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1114 (10th Cir. 2008).

1. Poverty Exacerbates the Harms of Sexual Harassment and Renders Remedies Out of Reach

Poverty intensifies the harms of sexual harassment and makes remedies for its harms virtually unobtainable.[319] Students from low-income families who suffer sexual harassment in school report experiencing more of the emotional as well as physical harms of sexual harassment.[320] For example, 38% of students from families with incomes under $60,000 per year did not want to return to school following their sexual harassment.[321] In comparison, 27% of students from families with incomes over $60,000 expressed the same feelings following their sexual harassment.[322] Similarly, 22% of students from low-income families reported sleep disturbance because of their sexual harassment, whereas 15% from higher income families reported such problems after suffering sexual harassment.[323] Because Black and Latinx students disproportionately live in poverty, they are therefore more likely to suffer these intensified harms from sexual harassment.[324]

The harms of sexual harassment can be alleviated or overcome.[325] Studies show that mental health therapy, for example, works to ameliorate the harms of sexual harassment.[326] Further, the longer children or adolescents receive mental health therapy, the more likely such therapy is to relieve harms associated with sexual harassment.[327]

Yet, because Black and Latinx students disproportionately attend high-poverty schools and disproportionately live in poverty, they are less likely to

319. HILL & KEARL, *supra* note 1, at 23–24 ("In nearly every category, students from moderate- or low-income homes were significantly more likely to say sexual harassment had a negative impact on them than were students from homes in which income was $60,000 and higher.").

320. *Id.*

321. *Id.* at 24.

322. *Id.*

323. *Id.* Likewise, thirty-four percent of students with families making less than $60,000 per year reported stomach pains after enduring sexual harassment as compared to twenty-seven percent of students from families making more than $60,000 per year. *Id.*

324. ORFIELD & JARVIE, *supra* note 244, at 17–18. "Black families are consistently the poorest, though, of course . . . the majority of Blacks are not poor. Poverty is definitely related to race, but poverty and race are not the same." *Id.*

325. *See, e.g.*, Rochelle F. Hanson & Elizabeth Wallis, *Treating Victims of Child Sexual Abuse*, 175 AM. J. PSYCHIATRY 1064, 1067 (2018); *infra* notes 326–27 and accompanying text; Emily V. Trask, Kate Walsh & David DiLillo, *Treatment Effects for Common Outcomes of Child Sexual Abuse: A Current Meta-Analysis*, 16 AGGRESSION & VIOLENT BEHAV. 1, 14 (2011).

326. Hanson & Wallis, *supra* note 325, at 1067 ("[T]he majority of trauma-focused treatments that have empirical support for children and adolescents [who have suffered sexual harassment or other sexual abuse] are cognitive-behavioral therapies, with several common cross-cutting elements."); Trask et al., *supra* note 325, at 14.

327. Trask et al., *supra* note 325, at 14–15 (finding that therapeutic "treatment was effective in reducing many negative outcomes" of child sexual harassment and abuse and noting that "there was a positive effect of treatment duration such that longer duration was associated with larger treatment effects").

have access to such help.[328] First, Black and Latinx students of all income spheres are "much more likely to attend a school with a high percentage [of poverty]."[329] More precisely, over half of low-income Black students and over half of low-income Latinx students have attended a high-poverty school.[330] These high-poverty schools frequently lack the educational, social, and financial capital to do the job of teaching basic academics to students, let alone to devote additional resources for providing mental health therapy or to otherwise respond to student sexual harassment in ways that could alleviate its effects.[331]

Second, mental health therapy remains out of reach for many survivors of sexual harassment because of its extraordinarily high cost, particularly for students from low-income families.[332] Although Medicaid covers mental health

328. *See* Kelsey S. Dickson, Nicole A. Stadnick, Teresa Lind & Emily V. Trask, *Defining and Predicting High Cost Utilization in Children's Outpatient Mental Health Services*, 47 ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVS. 655, 661 (2020).

329. CARNOY & GARCÍA, *supra* note 236, at 10, 13; ORFIELD & JARVIE, *supra* note 244, at 25–26. One report found that school districts in which white students comprised seventy-five percent of the enrolled students received $23 billion per year more than school districts in which seventy-five percent of the enrolled students were nonwhite. EDBUILD, $23 BILLION, at 2 (2019), https://edbuild.org/content/23-billion/full-report.pdf [https://perma.cc/G94K-WLFZ]; Kevin Carey, *Rich Schools, Poor Schools and a Biden Plan*, N.Y. TIMES (June 9, 2021), https://www.nytimes.com/2021/06/09/upshot/biden-school-funding.html [https://perma.cc/M8R9-MDA7 (dark archive)]. That report further found that poor, predominantly white school districts receive $150 per student less than the national average for per-pupil spending, and poor nonwhite school districts receive $1,500 less per pupil than the national average. EDBUILD, *supra*, at 5.

330. CARNOY & GARCÍA, *supra* note 236, at 17. Even relatively economically advantaged Black and Latinx students attended high poverty schools much more than white students. *Id.* Those Black students "were more than six times as likely to attend a high-poverty school as non-poor whites." *Id.* Similarly, approximately one-third of those nonpoor Latinx students attended high poverty schools, making them "10 times as likely as whites to attend high-poverty schools." *Id.*

331. When school districts face financial strains, they cut staffing. *See* Chad Aldeman, *During the Pandemic, 'Lost' Education Jobs Aren't What They Seem*, BROOKINGS (Mar. 2, 2021), https://www.brookings.edu/blog/brown-center-chalkboard/2021/03/02/during-the-pandemic-lost-education-jobs-arent-what-they-seem/ [https://perma.cc/E6FX-BUZ8] (noting that in the COVID-19 pandemic, "[s]tate and local governments implemented formal or informal hiring freezes last year that meant they were no longer growing their payrolls organically or replacing the employees who left"); Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 905 (2011) (explaining that following the Great Recession, "at least two-thirds of school districts laid-off teachers and staff for the 2009–2010 school year"). Because schools have no obligation to respond at all to student sexual harassment absent actual notice to certain school staff, reductions in staff equate to reductions in people who can receive this notice and trigger a school's duty to respond to student sexual harassment. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

332. In 2019, 31% of Black children and 23% of Latinx children lived in poverty, even though Black children comprised only 14% and Latinx comprised 25% of the overall child population. *Children in Poverty*, *supra* note 236; *Child Population by Race and Ethnicity in the United States*, ANNIE E. CASEY FOUND., https://datacenter.kidscount.org/data/tables/103-child-population-by-race-and-ethnicity#detailed/1/any/false/1729/67,12,70,66,71,72/423,424 [https://perma.cc/3RVR-KWBG]. In addition, Black and Latinx child poverty increased more than white childhood poverty during the COVID-19 pandemic. Chen & Thomson, *supra* note 315; *see also* CARNOY & GARCÍA, *supra* note 236, at 16.

treatment,[333] there is a substantial dearth of Medicaid mental health providers.[334] Low-income students who want to seek mental therapy on their own to address the harms of their sexual harassment, therefore, typically cannot do so without paying the likely unfeasible out-of-pocket costs of mental health therapy.[335] Just as Black and Latinx students' disproportionate poverty makes them more susceptible to the harms of sexual harassment, it also makes them less likely to be able to access help for those harms.[336]

2. How Title IX Could Work To Address These Harms

If courts more frequently held schools accountable under Title IX for failing to protect K–12 public school students from sexual harassment, they could both provide individual students' needed resources to address the harmful effects of the harassment and prompt school reforms.[337] If courts evaluated K–12 students' Title IX claims with at least as much rigor as they do certain higher education students' claims, then schools would face the likelihood of increased liability.[338] Such liability would allow K–12 public school students to recover in damages when their schools fail to adequately respond to their sexual

333. SHEILA SMITH, MARIBEL GRANJA, MERCEDES EKONO, TAYLOR ROBBINS & MAHATHI NAGARUR, USING MEDICAID TO HELP YOUNG CHILDREN AND PARENTS ACCESS MENTAL HEALTH SERVICES: RESULTS OF A 50-STATE SURVEY 10 (2017), https://www.nccp.org/wp-content/uploads/2017/03/text_1164.pdf [https://perma.cc/9ZHM-SQWN] (finding that in 2017 "45 states (92 percent) reported that Medicaid pays for a mental health clinician to address a child's mental health needs in a pediatric or family medicine setting; 4 states (8 percent) reported that they do not cover this service").

334. *Workforce Issues*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Apr. 2019), https://www.aacap.org/aacap/resources_for_primary_care/workforce_issues.aspx [https://perma.cc/A9U7-X92X]; *see also* David Murphey, Brigitte Vaughn & Megan Barry, *Access to Mental Health Care*, CHILDTRENDS, Jan. 2013, at 1, https://www.childtrends.org/wp-content/uploads/2013/04/Child_Trends-2013_01_01_AHH_MHAccessl.pdf [https://perma.cc/S6X4-UDJX]; Dickson et al., *supra* note 328, at 661.

335. *Workforce Issues*, *supra* note 334; *see also* Murphey et al., *supra* note 334, at 3–4; Dickson et al., *supra* note 328, at 661. Many mental health providers do not accept health insurance at all, let alone Medicaid. Only a little more than half of mental health providers take any insurance. Tara F. Bishop, Matthew J. Press, Salomeh Keyhani & Harold Alan Pincus, *Acceptance of Insurance by Psychiatrists and the Implications for Access to Mental Health Care*, 71 JAMA PSYCHIATRY 176, 177–79 (2014). Just under half accept Medicaid. *Id.* at 178. Paying out of pocket for such treatment is prohibitively expensive. *Id.* A 2020 study reported that the mean total and average cost of mental health treatment from start to finish for children with mental health problems such as Post-Traumatic Stress Disorder and anxiety was $2,673 and $1,079, respectively. *Id.*

336. *See* ORFIELD & JARVIE, *supra* note 244.

337. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1081 (2010); *supra* note 318 and accompanying text; Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 862–63 (2001).

338. In those higher education cases where courts apply more rigorous standards, the students' claims succeed. *See, e.g.*, Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1282 (11th Cir. 2007); Feminist Majority Found. v. Hurley, 911 F.3d 674, 688 (4th Cir. 2018).

harassment.[339] Those resources could go a long way toward paying for services such as private mental health therapy to address the effects of sexual harassment.[340]

Further, scholars have shown how such potential liability can, in certain circumstances, motivate institutions to address the internal causes of the liability in order to avoid it in the future.[341] Joanna Schwartz has demonstrated that, in the context of police liability suits, "more [plaintiffs'] victories and larger awards will not likely change police department behavior—except to the extent they create external pressures to review incidents or policies."[342] Those external pressures can come from sufficient information about the incidents underlying the liability and pressure from the public notoriety associated with the claim.[343]

Because such information is available to school districts and such pressures can affect them, increasing school districts' potential liability under Title IX holds the promise of prompting them to better address student sexual harassment.[344] School districts have the autonomy to disseminate and apply the information from students' sexual harassment claims in ways that would allow

339. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992); *supra* note 303 and accompanying text; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 304 (1998). In his dissent, Justice Stevens said,

> [T]he Court acknowledges, however, the two principal purposes that motivated the enactment of Title IX were: (1) "to avoid the use of federal resources to support discriminatory practices"; and (2) "to provide individual citizens effective protection against those practices." It seems quite obvious that both of those purposes would be served—not frustrated—by providing a damages remedy in a case of this kind [where the school did not have actual notice].

Gebser, 524 U.S. at 301 (Stevens, J., dissenting) (citation omitted).

340. Absent such awards, "[a]dolescents who lack health insurance are less likely to use mental health services than are those who have coverage." Murphey et al., *supra* note 334, at 2. With such awards, students could, among other things, pay out of pocket for therapy and therefore not be restricted to the very limited number of providers who take insurance. *See* Dickson et al., *supra* note 328, at 661.

341. *See* Schwartz, *supra* note 337, at 1081; *supra* notes 309–10 and accompanying text; Gilles, *supra* note 337, at 862.

342. Schwartz, *supra* note 337, at 1081 (examining the circumstances under which police department liability motivates internal reforms and finding that police departments often do not have information on the particulars of lawsuits that could form the basis of such reforms).

343. *See id.*; Gilles, *supra* note 337, at 861 (explaining that "publicity—more than anything else— . . . induces municipal policymakers to take remedial actions").

344. *See* Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999) (dismissing Title IX claims against individual defendants because "[t]he fact that Title IX was enacted pursuant to Congress's spending power is evidence that it prohibits discriminatory acts only by grant recipients" (internal quotations omitted) (quoting Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1012 (5th Cir.), *cert. denied*, 519 U.S. 861 (1996))).

them to implement corrective measures.[345] They also suffer from and react to negative publicity.[346] Subjecting public school districts to potentially increased liability, therefore, can prompt reform measures that could benefit all students, not just those immediately injured by sexual harassment.[347] It could induce school districts to improve procedures designed to prevent and respond to sexual harassment to avoid liability.[348]

Yet, the lower federal courts' anemic assessments of K–12 public students' Title IX claims mean that these claims rarely succeed.[349] Consequently, Title IX currently does little to induce the K–12 public schools to reform their responses to student sexual harassment or to provide students with the resources to address the effects of that harassment themselves.[350] Because Black and Latina girls in the K–12 public schools disproportionately suffer sexual harassment and live in poverty, these Title IX failures disproportionately affect these students.[351]

345. *See* Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1442 (2014) ("[S]chool districts are afforded broad fiscal and political autonomy. Though the amount of fiscal and political autonomy afforded school districts varies from state to state, school districts and their governing bodies, school boards, for the most part have broad authority to raise and spend revenue for the benefit of their students, assign students to schools, and make education related policy decisions.").

346. When the *Chicago Tribune* published its 2018 investigative report on the extensive sexual harassment in the Chicago Public Schools, the negative publicity "prompted the inspector general's office to take over the district's investigations of such allegations, rather than referring them back to a principal or other school official, as had been the standard operating procedure, and also hire a global law firm to review two decades worth of old cases." *See* Camera, *supra* note 112; Jackson et al., *supra* note 113.

347. *See, e.g.*, *id.*; *supra* note 308 and accompanying text. One could reasonably question, though, whether the high poverty schools Black and Latinx students disproportionately attend can manage to implement these reforms. To the extent these schools exist within school districts that do not suffer from high poverty rates generally, then the fact that liability inures to the district, not the school, means the incentives to reform the school processes would go to the district to reform the school. *See* Schwartz, *supra* note 337, at 1034; Gilles, *supra* note 337, at 862–63; Wilson, *supra* note 345, at 1442. Certainly, such school districts exist. *See* GARY ORFIELD & JONGYEON EE, C.R. PROJECT, OUR SEGREGATED CAPITAL: AN INCREASINGLY DIVERSE CITY WITH RACIALLY POLARIZED SCHOOLS 13 (2017), https://www.civilrightsproject.ucla.edu/research/K–12-education/integration-and-diversity/our-segregated-capital-an-increasingly-diverse-city-with-racially-polarized-schools/POSTVERSION_DC_020117.pdf [https://perma.cc/KY3Q-7KHC] (explaining the double segregation within the District of Columbia Public Schools, where Black and poor students, often one and the same, attend schools with predominantly other poor students of color).

348. *See* Schwartz, *supra* note 337, at 1081; Gilles, *supra* note 337, at 862.

349. *See supra* Section I.B; McCoy v. Bd. of Educ., Columbus City Schs., 515 F. App'x 387, 388 (6th Cir. 2013); Porto v. Town of Tewksbury, 488 F.3d 67, 70 (1st Cir. 2007); Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 159 (4th Cir. 2015) (per curiam); GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 915 (11th Cir. 2018) (per curiam); M.J.G. v. Sch. Dist. of Phila., 774 F. App'x 736, 736 (3d Cir. 2019); Saphir v. Broward Cnty. Pub. Sch. Dist., 744 F. App'x 634, 636 (11th Cir. 2018); Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1114 (10th Cir. 2008).

350. *Id.*

351. *See supra* Sections II.B, II.C.1.

III. UNDOING TITLE IX'S INEQUALITIES

Currently, Title IX's unqualified proscription on sex discrimination and its broadly protective purpose ring largely hollow in K–12 public schools.[352] Courts' assessments of Title IX's deliberate indifference standard provide students in higher education more protections from sexual harassment than K–12 public school students.[353] In doing so, courts afford more such protection to older, white students than to younger, particularly younger Black and Latinx, students.[354] The lower courts' evaluations of students' Title IX sexual harassment claims have, therefore, transformed a law that demands equality into one that breeds layers of inequality.[355]

Title IX need not generate such inequality.[356] Unravelling the court-developed disparities in students' Title IX claims requires both individual and structural changes. First, courts need to change their evaluations of individual student Title IX claims. Now, half the federal circuits either articulate or apply the deliberate indifference standard more rigorously in higher education students' claims than in K–12 public school students' claims.[357] To ensure all students receive the same protections under Title IX, all courts should both articulate and apply that standard with the same high level of rigor in all students' Title IX claims.[358] More specifically, in evaluating deliberate indifference, courts need to universally articulate the standard as requiring schools to protect students against sexual harassment or their vulnerability to it.[359] In addition, courts need to apply that standard such that they all consistently ask what more schools could have done to that end.[360]

352. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998); *supra* note 70 and accompanying text.

353. *See supra* Section I.B.

354. *See supra* Sections II.A–B.

355. *See supra* Sections I.B, II.A–B.

356. *See* 20 U.S.C. § 1681(a).

357. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1102–03 (10th Cir. 2019); Doe v. Univ. of Ky., 959 F.3d 246, 251 (6th Cir. 2020); Wills v. Brown Univ., 184 F.3d 20, 41 (1st Cir. 1999); Karasek v. Univ. of Cal., 956 F.3d 1093, 1106 (9th Cir. 2020); Feminist Majority Found. v. Hurley, 911 F.3d 674, 693 (4th Cir. 2018); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1295–99 (11th Cir. 2007); *cf.* J.M. *ex rel.* Morris v. Hilldale Indep. Sch. Dist. No. 1-29, 397 F. App'x 445, 453–54 (10th Cir. 2010); McCoy v. Bd. of Educ., Columbus City Schs., 515 F. App'x 387, 391 (6th Cir. 2013); Porto v. Town of Tewksbury, 488 F.3d 67, 70 (1st Cir. 2007); Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 167–170 (4th Cir. 2015) (per curiam); GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 915 (11th Cir. 2018) (per curiam); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000) (comparing how the courts have applied or articulated the "deliberate indifference" standard).

358. *See supra* Section I.B.

359. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999); *infra* Section III.A; Suski, *Subverting Title IX*, *supra* note 18, at 2261–62; *infra* note 385 and accompanying text.

360. *See infra* Sections III.A, III.B.1.

Strengthening the evaluation of student Title IX sexual harassment claims in these ways will work to better protect students by demanding more of schools. Further, when schools fail to satisfy this more robust deliberate indifference standard, they will more likely be held accountable.[361] This in turn can better motivate school reforms and ensure damages awards, which students can use to remedy the effects of school sexual harassment.[362]

This part offers a framework for assessing the question of what more schools could have done to protect students against sexual harassment. Although this framework can and should apply in both K–12 and higher education students' Title IX claims, this part concentrates on how the framework should work in K–12 public school students' cases.[363] It does so in no small part because, up to now, courts have only engaged in this "what more" inquiry in higher education students' claims.[364] Courts have wholly failed to examine this question in K–12 public school students' claims.[365]

Importantly, this framework recognizes that strengthening survivors' protections under Title IX could have perverse effects. It could cause students of color to be disproportionately subjected to harsh discipline, including school exclusion or criminal penalties.[366] Taking this risk into account, this framework demands both that courts abandon their long-held assumption that discipline is the only response to sexual harassment and interrogate whether schools have considered the effects of race in their responses to it.[367]

Second, this part proposes structural changes in the form of amendments to the ESSA and the Clery Act.[368] Because satisfying the requirements of this revised deliberate indifference paradigm will likely involve costly investments, including staff training,[369] this proposed model could thus easily exacerbate the funding disparities that already afflict low-income school districts.[370] The ESSA, however, offers resources that currently could, but presently do not have to, be used to fund the kinds of services called for here.[371] The ESSA should,

361. *See* Schwartz, *supra* note 337, at 1081; Gilles, *supra* note 337, at 862; *supra* notes 339–41 and accompanying text.

362. *See supra* Sections II.C.2, III.B.2.

363. *See infra* Section III.B.1.

364. *See supra* Section I.B.2.

365. *See supra* Section I.B.2.

366. *See infra* Section III.A.

367. *See infra* Section III.B.2.

368. 20 U.S.C. §§ 7111–7122; 20 U.S.C. § 1092(f).

369. *See* Rebecca L. Butcher, M. Kay Jankowski & Eric D. Spade, *The Costs of Implementing and Sustaining a Trauma and Mental Health Screening Tool in a State Child Welfare System*, 114 CHILD. & YOUTH SERVS. REV. 1, 1 (2020), https://www.sciencedirect.com/science/article/abs/pii/S0190740919315142 [https://perma.cc/EG7Y-ZT2T].

370. *See, e.g.*, CARNOY & GARCÍA, *supra* note 236, at 16; *supra* note 324 and accompanying text.

371. *See* 20 U.S.C. §§ 7111–7122.

therefore, be revised such that it designates funds for services that could ensure low-income school districts have money to devote to providing these trauma-informed services.[372] Given that the ESSA requires reauthorization this year, it is primed for such revisions.[373] In addition, because the Clery Act provides many of the context-specific protections against sexual harassment afforded students in higher education, it should also be revised to extend some of its most important protections extend to K–12 public schools and their students.[374]

Of course, any proposal that advocates changes to the standard for assessing a federal civil rights law and its application is susceptible to critique. A proposal that also calls for the incorporation of specific factors focused on race into its assessment and that further suggests ways to amend a separate, massive federal education law is even more vulnerable to critique. The final subsection of this part identifies and answers those critiques.

A. *One Consistently Articulated Standard & One Central Application Question*

The disparities in students' protections from sexual harassment under Title IX find their roots in the courts' uneven assessments of Title IX claims.[375] Undoing those disparities, therefore, requires that courts abandon their use of such unequal evaluations.[376] Instead of only articulating the deliberate indifference standard strongly in some higher education students' claims, courts should articulate that standard with equal rigor in all students' Title IX sexual harassment claims.[377] In addition, courts should apply that standard robustly in all students' Title IX cases.[378]

Articulating the deliberate indifference standard with uniform strength in all Title IX claims requires that courts routinely state the standard as proscribing schools from either causing or even merely making students vulnerable to sexual harassment in all students' Title IX claims.[379] Because the Supreme Court requires that public schools have actual knowledge of student

372. *Id.*

373. *See* Every Student Succeeds Act, Pub. L. No. 114-95, § 1002, 129 Stat. 1802, 1814–15 (codified at 20 U.S.C. § 6302 (2015)); EVERY STUDENT SUCCEEDS ACT (ESSA): A COMPREHENSIVE GUIDE, https://www.everystudentsucceedsact.org [https://perma.cc/5L6P-C9DU].

374. 20 U.S.C. § 1092(f).

375. *See supra* Section I.B.

376. *See supra* Section I.B.

377. *See supra* Section I.B.1.

378. *See, e.g.*, Farmer v. Kan. State Univ., 918 F.3d 1094, 1102 (10th Cir. 2019); Karasek v. Univ. of Cal., 956 F.3d 1093, 1106 (9th Cir. 2020).

379. *See Farmer*, 918 F.3d at 1098–1100. The deliberate indifference standard has been justly criticized as generally too vapid even in higher education cases to provide adequate protections against sexual harassment. *E.g.*, MacKinnon, *supra* note 19, at 2091–92. However, such critiques do not account for the more recent cases in which courts—at least in higher education students' claims—have been willing to inquire whether schools have left students vulnerable to further sexual harassment. *See, e.g.*, *Farmer*, 918 F.3d at 1102; *Karasek*, 956 F.3d at 1106.

sexual harassment before they act in response to it, schools' obligation to protect against sexual harassment in this way is triggered once they know something has occurred.[380] The protection required here, then, is protection against further such harassment or the vulnerability to it.[381] This articulation of the standard thus requires courts to determine whether schools have provided protection against further sexual harassment or even just the risk of it.[382]

Even more importantly, courts also need to deploy the same central question in applying this version of the deliberate indifference standard in all students' Title IX claims.[383] That is, courts need to ask what more schools could have done to protect students from further sexual harassment and what they could have done to address its effects in all students' Title IX sexual harassment cases.[384] Consistently asking this question will ensure that Title IX demands equally rigorous responses to student sexual harassment by all schools, no matter the educational level or racial makeup of the school.[385]

Still, invigorating the deliberate indifference standard risks potentially perverse effects. It could lead schools to disproportionately penalize, or even criminalize, the acts of Black youth. Black youth are already disproportionately penalized in school, and strengthening the deliberate indifference standard could only exacerbate that problem, particularly given the already-existing racial differences in the treatment of male sexual behavior.[386] Discussing the

380. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). Catharine MacKinnon, among others, has also critiqued the courts' application of the actual notice standard. MacKinnon, *supra* note 19, at 2078; *see also* Suski, *Title IX Paradox*, *supra* note 18, at 1150. That standard is highly problematic but is evaluated separately from deliberate indifference. *See id.*

381. *See Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290. Again, that actual notice standard and its application are rife with problems. Resolutions have been proposed and can work alongside the proposals made here. *See* MacKinnon, *supra* note 19, at 2091–92; Suski, *Title IX Paradox*, *supra* note 18, at 1189–95.

382. *See* Suski, *Subverting Title IX*, *supra* note 18, at 2293.

383. *See supra* Section I.B.2.

384. *See, e.g.*, Feminist Majority Found. v. Hurley, 911 F.3d 674, 693 (4th Cir. 2018); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1297 (11th Cir. 2007); *supra* note 150 and accompanying text. Elsewhere, I have argued that a full reading of the Supreme Court's explanation of the deliberate indifference standard in Title IX sexual harassment claims can require schools to affirmatively protect students from sexual harassment. *See* Suski, *Subverting Title IX*, *supra* note 18, at 2293; *infra* note 385 and accompanying text.

385. *See supra* Sections I.B.1–2, II.A–B. This proposal thus operates in conjunction with and refines my previous proposal calling for the deliberate indifference standard to be evaluated such that it requires responses reasonably designed to uncover and address the source of sexual harassment. This question takes that assessment further by asking what more schools could have done to prevent it other than disciplining perpetrators and what more they could have done to address it by considering the impacts of race and racist ideas in doing so. *See* Suski, *Subverting Title IX*, *supra* note 18, at 2310–12.

386. Dorothy E. Hines, Robb King, Jr. & Donna Y. Ford, *Black Students in Handcuffs: Addressing Racial Disproportionality in School Discipline for Students with Dis/Abilities*, 120 TCHRS. COLL. REC. 1, 13 (2018) ("Black male and female students experienced a larger representation in this [in school

criminalization of Black adolescent male sexuality, Kristin Henning explains that "[s]ociety teaches White boys that even predatory sex is acceptable. It teaches Black boys that normal sexual behavior is criminal."[387] Consequently, the infamous school-to-prison pipeline often is a school-to-prison pipeline for Black youth.[388] To avoid enhancing sex discrimination protections at the expense of perpetrating race discrimination necessarily means considering race in the assessment of deliberate indifference.[389]

B. *"What More": An Application Framework*

Evaluating whether schools could have done more to protect students from further sexual harassment while avoiding the commission of this race discrimination requires that courts ask two questions. First, to determine what more schools could have done to protect students from sexual harassment, courts need to inquire into whether they could have done more to prevent its recurrence once they know about it. In making this assessment, courts should interrogate what schools could have done to address the source of the harassment: the perpetrator's behavior.[390] At the same time, courts must avoid assuming that discipline is the primary or only response to student perpetrators

suspension] discipline category compared with their representation in the overall student population. However, Black males still experienced greater rates of overrepresentation in [out of school suspension] compared with Black females.")

387. KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 94 (2021).

388. *E.g.*, Nance, *supra* note 61, at 331–36; HENNING, *supra* note 387, at 99 ("Research confirms that race has a significant impact on our perceptions of adolescent culpability and assessment of punishment for youth who commit serious crimes."); David S. Yaeger, Valerie Purdie-Vaughns, Sophia Yang Hooper & Geoffrey L. Cohen, *Loss of Institutional Trust Among Racial and Ethnic Minority Adolescents: A Consequence of Procedural Injustice and a Cause of Life-Span Outcomes*, 88 CHILD DEV. 658, 666 (2017) (showing Black students "received significantly more discipline throughout middle school. This was true at every grade level"); *see also* Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias*, 116 PNAS 8255, 8255 (2019) ("[B]lack American students are far more likely to be suspended or expelled . . . and, conditional on an office referral, more likely to receive stiffer punishments . . . .").

389. This "what more" application question may be criticized as transforming Title IX claims into a source of ordinary negligence claim. *See, e.g.*, Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 168 (4th Cir. 2015) (per curiam). At first blush, inquiring into what schools could have done to protect against student sexual harassment does sound remarkably like asking whether a defendant should have done more in negligence claims. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 159 (2d. ed. 2011). Unlike in tort, however, in the Title IX context a school's deliberate indifference is predicated on the school first having actual notice of prior sexual harassment. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292–93 (1998); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646–47 (1999). Schools, therefore, need not predict abstract risk and what they should do in light of such abstraction, as they would do in tort claims. *See* DOBBS ET AL., *supra*, § 159. Under Title IX, schools need only respond to the specific risk of further sexual harassment following an incidence of it. *See Gebser*, 524 U.S. at 292; *Davis*, 526 U.S. at 646–47.

390. *See infra* Section III.B.1.

of sexual harassment because such responses are often ineffective and even counterproductive, particularly in K–12 public schools.[391] Second, courts should inquire into what more schools of all levels could have done to consider and contend with the effects of race and racism in their responses to the harassment.

1. Interrogating What More Schools Could Have Done To Prevent Sexual Harassment: A Differentiated, Trauma-Informed Assessment

To determine what more schools could have done to prevent sexual harassment, courts need to assess what more schools could have done to prevent student perpetrators from committing or recommitting sexual harassment once the schools know about the harassment.[392] Absent such an inquiry, schools cannot meaningfully protect against recurring sexual harassment and fulfill Title IX's protective purpose.[393] Until now, though, courts have long assumed that discipline—at best a limited intervention—is the only available response to sexual harassment, especially in K–12 public schools.[394] Courts have thus abstained from asking whether schools can do anything beyond disciplining perpetrators to address the source of the harassment.[395] To rectify this dearth of adequate responses to student sexual harassment, this part proffers a three-step assessment that requires courts to abandon their discipline-centric assumptions. First, it insists that courts inquire into whether schools applied differentiated responses to perpetrators of student sexual harassment. Second, this assessment asks whether schools used trauma-informed approaches in those responses. Third, courts need to evaluate whether evidence exists to show that schools' differentiated and trauma-informed approaches were evidence-based, effective approaches.

Starting with the Supreme Court in *Davis*, the case in which the Court concluded that public schools could be liable under Title IX for peer sexual harassment, courts have treated suspensions and expulsions, particularly in K–12 public schools, as the obvious, or only, response to sexual harassment in

391. *See infra* Section III.B.1.

392. Although Title IX proscribes sexual harassment committed both by students and teachers, the majority of the sexual harassment in schools occurs between students. MacKinnon, *supra* note 19, at 2047 ("Nationwide, most educational sexual harassment is by other students."); *see also* Ateret Gewirtz-Meydan & David Finkelhor, *Sexual Abuse and Assault in a Large National Sample of Children and Adolescents*, 25 CHILD MALTREATMENT 203, 209 (2020) (finding in a study of 13,000 children and youth "that the majority of [sexual abuse and harassment] offenses are at the hands of other juveniles (76.7% for males and 70.1% for females)").

393. *See infra* Section III.B.1.

394. *See Davis*, 526 U.S. at 646–47; *infra* note 396 and accompanying text; *see also Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 165.

395. *See, e.g.*, *Davis*, 526 U.S. at 646–47.

schools.[396] In some ways, this assumption makes sense. Removing the perpetrator from the school environment can eliminate one source of sexual harassment in school at least for some time. Such interventions, however, are limited in their effectiveness at best and counterproductive at worst.[397] Even expulsions do not last forever, and expelled students return to school.[398] Further, expulsions do not address the underlying causes of the harassment.[399] To truly work to prevent sexual harassment, therefore, courts need to jettison this assumption that discipline is the only response to student sexual harassment.[400]

To that end, courts first need to require schools to implement a differentiated set of responses to address perpetrators' behavior. Such an evaluation will involve assessing whether those schools considered the age of the perpetrators and the severity of the harassment and then differentiated their responses to sexual harassment on those bases.[401] Because of the significant differences in the ages and developmental abilities of the student perpetrators

396. The *Davis* Court assumed discipline of some sort, as opposed to a therapeutic or other sort of intervention, would be the response to student sexual harassment. *See Davis*, 526 U.S. at 648 (noting that contrary to the dissent's contention, imposing liability on schools for peer sexual harassment did not require schools to "second-guess[] the disciplinary decisions made by school administrators," but still assuming the decisions would be disciplinary); *see also* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 120 F.3d 1390, 1402 (11th Cir. 1997) ("[I]n practical terms, to avoid the threat of Title IX liability under appellant's theory of the case, a school must immediately suspend or expel a student accused of sexual harassment."), *rev'd*, 526 U.S. 629 (1999); *Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 165 (approving of the lower court assessment that questioning schools' responses to sexual harassment would mean that "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages").

397. *See* Ruth W. Leemis, Dorothy L. Espelage, Kathleen C. Basile, Laura M. Mercer Kollar & Jordan P. Davis, *Traditional and Cyber Bullying and Sexual Harassment: A Longitudinal Assessment of Risk and Protective Factors*, 45 AGGRESSIVE BEHAV. 181, 190 (2019) (finding that programs "addressing anger, conceptions of masculinity, pornography consumption, social support, school belonging, and parental monitoring in middle school may be particularly relevant" to preventing bullying and harassment); *supra* note 394 and accompanying text. These punitive responses to any student disciplinary issue have multiple negative externalities, including the school-to-prison pipeline that disproportionately affects students of color. *See, e.g.*, Nance, *supra* note 61, at 315–19; POWER IN PARTNERSHIPS, *supra* note 61, at 2–3.

398. In Illinois, for example, an expulsion cannot exceed two years. 105 ILL. COMP. STAT. 5/10-22.6 (2022). What is more, sexual harassment can and does continue online. *See, e.g.*, Leemis et al., *supra* note 397, at 181.

399. *See* Kim et al., *supra* note 61, at 114–15; *see, e.g.*, Elizabeth J. Letourneau & Charles Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 ETHICS & BEHAV. 286, 298–99 (2008).

400. *See Davis*, 526 U.S. at 647–48; *supra* notes 392–95 and accompanying text.

401. *See, e.g.*, Eric Hazen, Steven Schlozman & Eugene Beresin, *Adolescent Psychological Development: A Review*, 29 PEDIATRICS REV. 161, 165 (2008); Laurence Steinberg, Sandra Graham, Lia O'Brien, Jennifer Woolard, Elizabeth Cauffman & Marie Banich, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35 (2009).

in K–12 public schools, this approach is especially necessary there.[402] The unique role of K–12 public schools in students' lives, one that in many ways is akin to a custodial role, further justifies it.[403] In making this determination, courts might easily find that older students who commit less severe sexual harassment and do so infrequently may require less significant interventions, such as social skills training.[404] Evidence shows that such social skills training can improve this kind of less severe behavior, as well as the school climate more generally.[405] Conversely, younger students who commit even relatively less severe sexual harassment and students of any age who engage in more serious sexual

402. Children's abilities to reason, evaluate risk, and regulate emotions continues throughout adolescence because their brains continue to mature and change during this time. Thus, they need interventions that consider these changes and differences. *See* Hazen et al., *supra* note 401, at 165 ("Imaging studies suggesting that [the prefrontal cortex] area is one of the last brain regions to mature is consistent with observations from behavioral studies involving activities such as gambling, in which adolescents are substantially more likely to take greater risks than are adults. Thus, the seemingly reckless adolescent is less able to marshal the regions of the brain best equipped to assess risk and benefits. Similarly, maturation of other regions of the prefrontal cortex during adolescence may explain observed gains in working memory, emotion regulation, and the capacity for long-term planning."); Steinberg et al., *supra* note 401, at 35 (finding that younger children's brain development leaves them with difficulties doing things like planning ahead and anticipating future consequences).

403. As the Supreme Court has recognized, the nature of the K–12 schools' role involves more than merely ensuring they meet certain academic milestones. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995); *Davis*, 526 U.S. at 647–48; Morse v. Frederick, 551 U.S. 393, 396–97 (2007). It also involves close supervision and protection akin to a custodial role. *Vernonia Sch. Dist.*, 515 U.S. at 655 ("[T]he nature of [a public school's] power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. '[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 339 (1985))); *Morse*, 551 U.S. at 408 (describing the work of the schools to "protect those entrusted to their care" from, in that case, "the dangers of drug abuse").

404. KAREN STROBEL, JOHN W. GARDNER CTR. FOR YOUTH & THEIR CMTYS., PRACTICES THAT PROMOTE MIDDLE SCHOOL STUDENTS' MOTIVATION AND ACHIEVEMENT 5 (2010), https://gardnercenter.stanford.edu/sites/g/files/sbiybj11216/f/Practices%20that%20Promote%20Motivation%20Issue%20Brief.pdf [https://perma.cc/BWL2-TCBT]; SAFE PLACE TO LEARN, LEADING A SAFE PLACE TO LEARN 15 (2016), https://safesupportivelearning.ed.gov/sites/default/files/SP2L2_E2-I-IV_LeadingGuide.pdf [https://perma.cc/P24N-3XA2].

405. STROBEL, *supra* note 404, at 5. Stanford University's Gardner Center for Youth and Their Communities has also found that stronger peer relationships improve academic outcomes. *Id.*; *see also* SAFE & SUPPORTIVE SCHS., ENHANCING PEER-TO-PEER RELATIONSHIPS TO STRENGTHEN SCHOOL CLIMATE 19–22 (2012), https://safesupportivelearning.ed.gov/sites/default/files/sssta/20120330_PeerRelWebinarFINAL32912ppt.pdf [https://perma.cc/6UYA-YGXM]; Jeong Jin Yu, Karen Hoffman Tepper & Stephen T. Russell, *Peer Relationships and Friendship in Adolescence*, SIGHT INTO MY BRAIN (Nov. 2, 2010), https://napoleonwrasse.wordpress.com/2010/11/02/peer-relationships-and-friendship-in-adolescence/ [https://perma.cc/ZT47-2HBZ].

harassment likely need more significant, sustained responses to prevent any recurring behavior.[406]

Second, courts need to evaluate the extent to which schools have implemented trauma-informed responses when working with perpetrators of sexual harassment.[407] Trauma-informed responses recognize the possibility that student perpetrators of harassment, among others, may have suffered trauma themselves.[408] These responses work to understand what trauma a child has experienced and how it has affected them.[409] These understandings drive the interventions that focus on recovery from the trauma to end its effects, including the further perpetration of sexual harassment.[410] In K–12 public schools, for example, young perpetrators of sexual harassment and students of any age who engage in severe sexual harassment are likely to have suffered trauma themselves.[411] They, therefore, need help, potentially including mental health therapy, to end their harassing behavior.[412] Courts thus need to assess whether schools should have offered such help as a means of protecting against further sexual harassment.[413]

Finally, in inquiring into schools' use of both differentiated and trauma-informed responses to perpetrators of sexual harassment, courts must assess whether schools have implemented methods with proven effectiveness.[414] Certain types of mental health treatment have been shown to prevent students who sexually harass others from continuing to do so.[415] Courts, rarely, if ever,

406. Studies have found certain interventions, including cognitive behavioral therapy and multisystemic therapy, work to prevent youths from committing further acts of sexual harassment and have more substantial effects on adolescents than adults, underscoring the importance of their use in children and adolescents. Kim et al., *supra* note 61, at 114 ("Based on the results, sex offender treatments for adolescents compared to adults have a larger effect in reducing recidivism.").

407. *See* CHARLES WILSON, DONNA M. PENCE & LISA CONRADI, TRAUMA-INFORMED CARE 1–8 (2013), https://oxfordre.com/socialwork/display/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e-1063?print=pdf [https://perma.cc/PP4D-WB6F]; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP'T OF HEALTH & HUM. SERVS., SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 8–10 (2014) [hereinafter TRAUMA & GUIDANCE], https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf [https://perma.cc/K5WG-A73G].

408. *See* WILSON ET AL., *supra* note 407, at 3–4 (noting that, among youth who have been involved in the juvenile justice system, "virtually all have suffered major trauma").

409. *Id.* at 5–8; *see also* TRAUMA & GUIDANCE, *supra* note 407, at 3.

410. WILSON ET AL., *supra* note 407, at 2, 6–7 (writing that one goal of trauma-informed care is to "promote recovery from trauma"); *see also* TRAUMA & GUIDANCE, *supra* note 407, at 4–5.

411. One study found that children who have suffered sexual abuse are "7.6 times more likely to [later] be charged with sexual offences than the general population." Ogloff et al., *supra* note 224, at 5.

412. *See* Letourneau & Borduin, *supra* note 399, at 298–99; *supra* note 397 and accompanying text.

413. *See* Letourneau & Borduin, *supra* note 399, at 298–99; *supra* note 397 and accompanying text.

414. *See* WILSON ET AL., *supra* note 407, at 8–17 (outlining methods for caring for clients who have experienced trauma); *see also* TRAUMA & GUIDANCE, *supra* note 407, at 9–13.

415. *See* Kim et al., *supra* note 61, at 114–15; *see, e.g.*, Letourneau & Borduin, *supra* note 399, at 298–99.

examine whether schools have done anything to offer such treatment.[416] Given the effectiveness of these methods at preventing further sexual harassment, particularly in children under eighteen, the need to start this inquiry in K–12 public school student sexual harassment cases is particularly urgent.[417]

All this is not to say that differentiated, trauma-informed responses to sexual harassment and mental health therapy should not be used in higher education settings. It is to say, however, that use of these methods is exceptionally important for students under eighteen. Such approaches operate to prevent those students from continuing to sexually harass others, including when they reach higher education.[418]

If schools can show that they provided differentiated and trauma-informed responses with student perpetrators, then they will have shown they acted sufficiently to prevent sexual harassment.[419] That is, schools will have done enough to avoid a finding that they could have done more to prevent sexual harassment and were deliberately indifferent on this basis. Still, such proof should not end the deliberate indifference inquiry.[420]

2. Interrogating What More Schools Could Have Done To Address Sexual Harassment: Considering the Effects of Race and Racism

To fully establish K–12 schools' lack of deliberate indifference, courts also need to evaluate what more schools could have done to address sexual harassment by demanding that schools show that they considered the effects of race and racist ideas in their efforts to address sexual harassment. Race and racist ideas can make the experience of sexual harassment more egregious.[421] For

416. *See supra* Section I.B.2; Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 165 (4th Cir. 2015) (per curiam); Stiles *ex rel.* D.S. v. Grainger County, 819 F.3d 834, 849–50 (6th Cir. 2016); GP *ex rel.* JP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 915–16 (11th Cir. 2018) (per curiam).

417. *See, e.g.*, Kim et al., *supra* note 61, at 114–15; *see* also Letourneau & Borduin, *supra* note 399, at 298–99; Lorraine R. Reitzel & Joyce L. Carbonell, *The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta-Analysis*, 18 SEX ABUSE 401, 401 (2006).

418. *See, e.g.*, Kim et al., *supra* note 61, at 114–15; *see also* Letourneau & Borduin, *supra* note 399, at 298–99; Reitzel & Carbonell, *supra* note 417, at 401.

419. *See, e.g.*, Kim et al., *supra* note 61, at 114–15; *supra* note 411 and accompanying text; *see also* Letourneau & Borduin, *supra* note 399, at 298–99; *supra* note 397 and accompanying text.

420. *See infra* Section III.B.2.

421. Kimberlé Crenshaw explained, "When Black women were raped by white males, they were being raped not as women generally, but as Black women specifically: Their femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection." Crenshaw, *Demarginalizing*, *supra* note 234, at 158–59. To put a finer point on Black girls' experience of sexual harassment, a report from the National Women's Law Center explains that

> the cultural expectation to be a "strong Black woman" . . . means that Black girls may not get the help they need processing trauma from sexual violence. As a result, they can experience

example, Black girls and women are less likely to be believed when they report sexual harassment or when they minimize that harassment.[422] Racist tropes that regard Black girls and women as hypersexual can contribute to this disbelief and minimization when they report sexual harassment.[423] As a report from Georgetown University Law Center notes, "The commonly held stereotype of Black girls as hypersexualized is defined by society's attribution of sex as part of the 'natural' role of Black women and girls."[424] Such disbelief and minimization can exacerbate, among other things, the harms of sexual harassment.[425] Because these ideas are so pervasive, courts should demand that all schools, no matter their level, consider their impact on student sexual harassment.[426]

Significantly, under this proposed paradigm, a school cannot be deemed deliberately indifferent simply for identifying such ideas. To the contrary, identifying racist ideas should be the point. So, too, is addressing them in ways that attempt to correct them. Thus, if schools have identified ways race or racist ideas affected their responses to student sexual harassment, courts need to then determine whether the schools also took reasonable steps to correct those problems. For example, if a school district identifies that an administrator responded to a Black girl's sexual harassment in ways that suggest that the harassment is an inevitable part of her experience as a Black girl, the school

> toxic stress—the frequent and prolonged activation of the body's stress system that can cause a child to be in a constant state of emergency.

PATRICK & CHAUDHRY, *supra* note 3, at 4.

422. Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non [https://perma.cc/P3HW-V5FH]; REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 5 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf [https://perma.cc/QK3R-9ZD8].

423. EPSTEIN ET AL., *supra* note 422, at 6.

424. *Id.* at 6. In addition, racist ideas regard Black girls as adults, almost no matter how young they are. *Id.* at 4 ("Black girls, too, are subject to adultification. . . . [O]ur society 'regularly respond[s] to Black girls as if they are fully developed adults.'" (quoting MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 34 (2016))).

425. *See generally* Emily Suski, *Institutional Betrayals as Sex Discrimination*, 107 IOWA L. REV. 1685 (2022) (describing how when schools and other institutions fail to help survivors of sexual harassment the failures worsen existing harms and cause new harms).

426. *See id.*; IBRAM X. KENDI, HOW TO BE AN ANTI-RACIST 23 (2019); THE CTR. FOR RACIAL JUST. INNOVATION, RACIAL EQUITY IMPACT ASSESSMENT 1 (2009), https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf [https://perma.cc/YY5Z-G2XU] (proposing the use of a tool very much along these lines called a Racial Equity Impact Assessment ("REIA") for organizations to use to show "how different racial and ethnic groups will likely be affected by a proposed action or decision"). The "use of REIAs in the U.S. is relatively new and still somewhat limited, but . . . [t]he United Kingdom has been using them with success for nearly a decade." *Id.*

district needs to take steps to address the racist ideas inherent in that administrator's response.[427] The school district could, for example, begin discussions with and training for the administrator to surface and undermine the racist ideas that infected the administrator's response to sexual harassment. If schools can demonstrate they took such steps, they will not be deliberately indifferent for failing to address the effects of race and racist ideas on their responses to sexual harassment. On the other hand, if a student survivor of sexual harassment shows ways racist ideas infected their school's response to sexual harassment, and the school cannot show that they identified that racism or did anything to address it, the school will be deliberately indifferent.

Delving into these questions will of course not correct all the racist ideas that permeate schools or their responses to sexual harassment.[428] Those racist ideas are too endemic in the culture.[429] Asking these questions, though, represents a significant first place to start, particularly in the evaluation of Title IX claims where race has yet to be considered.[430]

C. *Structural Reforms: The Every Student Succeeds Act and the Clery Act*

Complying with the demands of the differentiated, trauma-informed approach to deliberate indifference called for here will inevitably require an investment of resources for many K–12 public schools.[431] The ESSA could, if amended, provide such resources.[432] Even compliance with this amended version of deliberate indifference and such resources, though, cannot fully address the context-specific disparities created by laws that provide protections only for students in higher education. Because the Clery Act offers the vast majority of those protections, it needs to be revised to include protections for K–12 public schools and their students.

427. *See* EPSTEIN ET AL., *supra* note 422, at 4, 6.

428. KENDI, *supra* note 426, at 22 ("We are surrounded by racial inequity, as visible as the law, as hidden as our private thoughts.").

429. *Id.* at 235 ("Racist ideas have defined our society since its beginning and can feel so natural and obvious as to be banal . . . .")

430. Even when students suffer both racial and sexual harassment, courts do not consider the impact of race on school's responses to sexual harassment and those responses are not deliberately indifferent. *See, e.g.*, N.K. v. St. Mary's Springs Acad. of Fond du Lac Wis., Inc., 965 F. Supp. 2d 1025, 1035 (E.D. Wis. 2013) (noting even when students suffer both racial and sexual harassment, courts do not consider the impact of race on school's responses to sexual harassment and those responses not deliberately indifferent).

431. *See* Carmela J. DeCandia & Kathleen Guarino, *Trauma-Informed Care: An Ecological Response*, 25 J. CHILD & YOUTH CARE WORK 7, 16 (2015); *supra* note 347 and accompanying text; Butcher et al., *supra* note 369, at 1; *infra* note 433 and accompanying text.

432. 20 U.S.C. §§ 7001–7122.

1. How an Overlooked Piece of the ESSA Can Help Low-Income School Districts

To comply with the demands of the revised deliberate indifference standard proposed here, public schools will need to invest in trauma-informed training, social skills training, and mental health services.[433] Providing for such training and services will come at a substantial cost. If all schools were to train at least one staff member in trauma-informed responses, it could cost over $100 million.[434] While it might be possible for higher income school districts to bear such expenses, lower-income school districts are much less likely to be able to shoulder them.[435] Their inability to do so could, therefore, quite easily leave these school districts susceptible to always being found deliberately indifferent to student sexual harassment because they could never support the costs of doing otherwise under this proposed regime.[436] However, an overlooked part of the ESSA can help. Title IV of the ESSA devotes funding to schools specifically for the kinds of services schools need to prevent and address sexual harassment.[437]

Title IV of the ESSA now provides over a billion dollars annually for local school districts to implement programs to promote safe and healthy schools.[438] States apply for this funding by submitting plans to the U.S. Department of Education that outline how the funds will be used to implement programs that "foster safe, healthy, supportive, and drug-free environments that support student academic achievement."[439] Among other things, these plans can include funds to "expand access to or coordinate resources for school-based counseling and mental health programs."[440]

As promising as funding for these potential programs may sound, though, Title IV of the ESSA in its present form is no panacea. That schools now could use the funding available under Title IV of the ESSA for services to prevent

433. *Supra* Section III.B.1.

434. One study estimates that the cost of training one staff member could be $1,213. *See* Butcher et al., *supra* note 369, at 1. As of 2017, assuming one person in each of the 98,158 public schools receives that training, the total cost amounts to over $119 million. *Id.* That said, as one study put it, "[T]rauma-informed care represents a relatively low-cost and high-yield investment to address the high rates of trauma for children, youth, and families. The primary investment in staff training and workforce development ensures all those working with children and families have knowledge of trauma." *Id.* at 16.

435. *See* Aldeman, *supra* note 331; CARNOY & GARCÍA, *supra* note 236, at 1–2; *supra* notes 328–29 and accompanying text.

436. *See* Aldeman, *supra* note 331; CARNOY & GARCÍA, *supra* note 236, at 1–2; *supra* notes 328–29 and accompanying text.

437. 20 U.S.C. §§ 7001–7122.

438. 20 U.S.C. § 7122(a). The ESSA calls for $1.6 billion in funding for such programs each year from 2018–2020. *Id.*

439. 20 U.S.C. § 7114(b)(3)(B).

440. 20 U.S.C. § 7114(b)(3)(B)(ii)(II).

and address sexual harassment does not mean they have to or do.[441] Significantly, many schools do not now do so.[442] Further, the funding scheme under Title IV of the ESSA can be criticized just as the funding scheme under Title I of the ESSA has been compellingly criticized for requiring too little oversight of how states and local school districts spend its funds.[443] For example, although fifty-three percent of schools did report using Title IV funds for social emotional learning, those schools provided no information on what those learning programs involved or whom they helped.[444] Also problematically, the ESSA does not require equity in the allocation of Title IV funds.[445]

The ESSA, though, just expired last year.[446] While stop-gap funds have been provided,[447] the law is ripe for reauthorization and potential revisions.[448] Congress should revise Title IV of the ESSA to require schools to provide trauma-informed training for school staff and make available mental health therapy to address student trauma, including the trauma that is both the cause and effect of sexual harassment in K–12 public schools.[449] This funding should be equitably distributed so that it goes to schools that lack the capacity to provide this kind of training and these services.[450] That is, all school districts should be required to develop plans for providing trauma-informed training and services in all schools, but the funds to support those efforts should go to school districts and schools that cannot afford to do so on their own. To make this equitable allocation, schools should follow the formula proposed by Derek Black for "weigh[ing] their [Title I ESSA] funding formulas to meet the needs of

441. 20 U.S.C. § 7118(5)(C)(iii)–(iv) (allowing for Title IV money to be used to prevent bullying and harassment and to "improve safety through the recognition and prevention of coercion, violence, or abuse, including teen and dating violence, stalking, domestic abuse, and sexual violence and harassment").

442. *See* NOELLE ELLERSON NG & DAVID DESCHRYVER, THE SCH. SUPERINTENDENTS ASS'N, NAT'L ASS'N OF FED. EDUC. PROGRAM ADM'RS & WHITEBOARD ADVISORS, BRINGING ESSA TITLE IVA TO LIFE: HOW SCHOOL DISTRICTS ARE INVESTING STUDENT SUPPORT & ACADEMIC ENRICHMENT FUNDING: MEMO OF PRELIMINARY FINDINGS 3–4 (2018), https://aasa.org/uploadedFiles/Policy_and_Advocacy/files/AASA%20NAFEPA%20WBA%20ESSA%20Title%20IV%20Survey%20FINAL%20061818.pdf [https://perma.cc/F7RW-VNAH].

443. Black, *supra* note 66, at 1341–42 (explaining that the ESSA "moves the Elementary and Secondary Education Act backward, transforming more of the existing funds into block grants. As a result, states have more freedom to use federal funds to pursue their own agendas, [which] might be defensible if the federal tradeoff was a demand for more equity in the areas states chose to spend the money. But the ESSA does not include safeguards to ensure the basic principle of equal resources for low-income students and schools").

444. *See* NG & DESCHRYVER, *supra* note 442, at 3–4.

445. *See* Black, *supra* note 66, at 1341–42.

446. 20 U.S.C. § 7122(a).

447. § 7122(b).

448. *See* Carey, *supra* note 329 (describing how the Biden administration has begun to turn its attention to educational funding and equity in that funding).

449. *See* 20 U.S.C. § 7114.

450. *See* Black, *supra* note 66, at 1365.

disadvantaged students."[451] In this way, the ESSA can ensure that schools will have the resources to better address the causes and ameliorate the effects of sexual harassment.

2. Revising the Clery Act To Include K–12 Public Schools

Structural reforms through revisions to the Clery Act can also provide more rigorous protections against sexual harassment in K–12 public schools. Presently, the Clery Act requires that higher education institutions not only report to the Secretary of Education certain incidences of sexual violence, but it also calls for those schools to develop sexual violence prevention programs.[452] It requires, however, nothing of K–12 public schools.[453] Its failure to do so contributes in significant ways to context-specific disparities in the protections against sexual harassment in K–12 public schools as compared to colleges and universities.[454]

Resolving such disparities means revising the Clery Act. First, the Clery Act should more comprehensively define sexual violence to include sexual harassment and all forms of sexual violence. Right now, it only includes domestic violence, dating violence, sexual assault, and stalking.[455] It should also require reporting on all incidences of sexual violence in K–12 public schools as well as in higher education. Finally, it should require that K–12 public schools, not just colleges and universities, develop programs to prevent sexual violence in all its many forms.[456]

D. *Four Critiques*

Although these recommendations seek to strengthen and better facilitate Title IX's equality mandate and protective purpose, they are, of course, vulnerable to critique. First, skeptics could argue that the race disparities in Title IX's protections derive not from the courts' assessment of it but from problems in the ways states and localities draw school district boundaries.[457] Second, and relatedly, one could contend that Title IX is not the vehicle for addressing any such race disparities.[458] Other statutes, such as Title VI, which

451. *Id.*

452. *See* 20 U.S.C. §§ 1092(f)(1)(F), 1092(f)(8)(A).

453. *See* § 1092(f).

454. *See supra* Section I.B.3.

455. *See* 20 U.S.C. § 1092(f)(8)(A).

456. *See id.*

457. *See, e.g.*, Wilson, *supra* note 345, at 1422 (explaining that "school districts in more affluent, typically predominately white localities have more resources and can offer educational inputs that significantly enhance the quality of education students receive").

458. For example, drawing on Erika Wilson's argument that regionalism, rather than localism, could help resolve racial and economic inequities between school districts, one could argue that such

prohibits race discrimination in public education, arguably are the more appropriate vehicle for addressing race disparities in public schools.[459] Third, critics could take issue with the framework proposed here for courts to assess schools' responses to sexual harassment. Critics could argue that it requires courts to meddle too much in the work of the schools.[460] Finally, the proposal to use the ESSA funds to provide mental health and other nonacademic services can be criticized as diverting funds from more necessary academic initiatives.[461] All of these critiques are serious and merit answers.

With respect to the first critique, school district boundaries unquestionably contribute substantially to race disparities in public education.[462] Even were these boundary-based disparities resolved, however, the public schools in many states and regions would still be increasingly, and in some cases predominantly, populated by students of color.[463] The colleges and universities that have the most responsibility for implementing Title IX's protections would still be overwhelmingly white.[464] Resolving the problem of interdistrict race disparities, therefore, would not resolve the problem of the courts' providing more protection from sexual harassment under Title IX to these predominantly white colleges and universities and less overall to the increasingly diverse K–12 public schools.[465]

The second critique suggests that Title IX does not constitute the proper mechanism for remedying the race disparities in its application. Instead, this critique goes, other laws, such as Title VI, would more properly achieve this goal.[466] While Title VI prohibits discrimination on the basis of race in public education, it focuses on what schools have done to create such disparities.[467] Given that the courts' assessments of Title IX create the particular race

remedies would resolve race disparities more generally in public education, including in the application of Title IX protections. *See id.* at 1424, 1454–59.

459. 42 U.S.C. § 4000(d).

460. This concern cropped up in the Supreme Court's decision in *Davis*. The Court admonished that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

461. The dissent in *Davis* expressed this concern. Justice Kennedy warned against school liability for peer sexual harassment because the liability in damages would drain "[t]he limited resources of our schools [that] must be conserved for basic educational services." *Id.* at 666 (Kennedy, J., dissenting).

462. Consequently, more than fifty years ago advocates started challenging school district boundary lines because of the race disparities inherent in them. *See* Milliken v. Bradley, 418 U.S. 717, 721–36 (1974); Wilson, *supra* note 345, at 1442.

463. *See* ORFIELD & JARVIE, *supra* note 244, at 20.

464. *See* CARNEVALE & STROHL, *supra* note 243, at 10; *supra* note 261 and accompanying text.

465. *See supra* Section II.A.

466. 42 U.S.C. § 2000(d) (prohibiting programs receiving federal funds from discriminating on the basis of race).

467. *See id.* § 2000(d).

disparities in the Title IX protections afforded to public school students, the courts are the best means of resolving it.[468]

The third critique—that changes to Title IX's assessment would require the courts to unduly involve themselves in the work of the public schools—is half correct. Undeniably, these recommendations would require courts to engage in fact specific inquiries regarding how schools respond to student sexual harassment.[469] Courts have long worried that such assessments are outside their ken.[470] The courts, though, need not make these assessments unaided. They can and should take evidence on questions, including what trauma-informed programs, social-skills training, and mental health therapy the schools have implemented and whether empirical evidence supports their use.[471] Certainly vast amounts of evidence on these topics exist.[472] Likewise, the question of whether schools have examined their responses to student sexual harassment for racist ideas is one of fact on which courts can hear evidence on. Taking evidence on such factual matters falls well within the purview of the courts' role and abilities.[473] These proposals, thus, do involve the courts in the examining the work of the schools but not unduly so in ways beyond the ordinary work of the courts.

Lastly, any proposal to increase federal funding for public education can be criticized as expanding the federal role in a local function, and this one can particularly be criticized as doing so in ways that divert schools from their core academic mission.[474] Taking this second point first, addressing student trauma is necessary to student learning.[475] Requiring schools to take on these tasks therefore furthers, rather than distracts from, their academic purpose.[476] So, although the ESSA funding revision proposed here unquestionably expands the

468. *See supra* Sections I.B., II.A–B.

469. *See supra* Section III.B.

470. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 666 (1999); *supra* note 460 and accompanying text.

471. *See* Hanson & Wallis, *supra* note 325, at 1067; Trask et al., *supra* note 325, at 12; *supra* notes 325–27 and accompanying text; STROBEL, *supra* note 404, at 1067.

472. For example, the federal Substance Abuse and Mental Health Services Administration has an interagency task force devoted just to trauma-informed responses. *Interagency Task Force on Trauma-Informed Care*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/trauma-informed-care [https://perma.cc/5279-GN5B].

473. *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1265 (2012) (noting that adjudicative facts, or facts that relate to the actions or activities of the litigants, are determined at the trial court level).

474. *See, e.g.*, Black, *supra* note 66, at 1363–64 (confronting this concern in his proposal for more funding and a more equitable funding formula for Title IX of the ESSA).

475. *See* Susan Shonk & Daniel Cicchetti, *Maltreatment, Competency Deficits, and Risk for Academic and Behavioral Maladjustment*, 37 DEVELOPMENTAL PSYCH. 3, 13 (2001); PATRICK & CHAUDHRY, *supra* note 3, at 7 (explaining that children who experience trauma are 32.6 times more likely to have behavioral and learning problems than children who are not exposed to trauma).

476. *See id.*; PATRICK & CHAUDHRY, *supra* note 3, at 7.

federal role in public schools, without it, public schools cannot do the work that is essential to completing their academic mission.[477]

CONCLUSION

Title IX mandates equality but, under lower federal courts' assessments of it, generates inequality. The Supreme Court established deliberate indifference as the one standard for evaluating all Title IX sexual harassment claims. Yet, the lower federal courts' evaluations of students' Title IX sexual harassment claims unjustifiably provide more protection from sexual harassment under that standard to higher education students than to K–12 public school students. The courts have thus effectively created two Title IXs.

Further, these court-developed disparities in Title IX protections extend to race. The courts' assessments afford more protections from sexual harassment in the higher education institutions that overwhelmingly enroll white students and fewer in the K–12 public schools that increasingly, sometimes predominantly, enroll students of color. The courts affect these disparities even though younger Black and Latina girls suffer more sexual harassment than white girls or older students of any race. The courts' evaluations of Title IX thus provide the least protection from sexual harassment to the Black and Latinx students who most need it.

To remedy these disparities, this Article proposes changes to the evaluation of individual student Title IX claims. It also calls for structural changes in the form of amendments to both the Every Student Succeeds Act and the Clery Act. These reforms will help ensure that all public schools better prevent and address sexual harassment and better achieve Title IX's purpose of eliminating inequality and protecting students from sexual harassment.

477. *See* Shonk & Cicchetti, *supra* note 475, at 13.