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No One Is an Inappropriate Person: The Mistaken Application of *Gebser's* "Appropriate Person" Test to Title IX Peer-Harassment Cases

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Introduction

Abigail Ross, a sophomore at Tulsa University, reported to school officials in 2014 that Patrick Swilling Jr., one of the school's basketball

players, raped her.[1] In the course of the school's investigation of her complaint, Ross learned that years earlier, Tulsa University Campus Police ("TUCP") officers fielded a pair of complaints that Swilling had raped another student.[2] The earlier victim maintained that she told the officers that she had been raped, but the director of the police department, later claiming that she denied ever being raped, chose not to document the report or alert the administration.[3]

During Swilling's disciplinary hearing, the school refused to allow Ms. Ross to make any mention of the earlier rape report—or the two rape reports that surfaced during the investigation—and applied "strained reasoning" to conclude that Swilling had probably not raped Ross.[4] Ross dropped out of classes in the spring semester and never returned to Tulsa University after the school issued its report.[5]

Ross filed a complaint alleging that the university had violated Title IX of the Education Amendments of 1972[6] through its deliberate indifference to the 2012 rape report and her report.[7] The U.S. District Court for the Northern District of Oklahoma granted the university's motion for summary judgment on those claims,[8] and the Tenth Circuit affirmed, holding that the school could not be held liable because no one had notified an "appropriate person," i.e., an official "with authority to take corrective action,"[9] that Swilling's presence posed a risk to the campus community.[10]

While the District Court had found three different bases for concluding that the campus security officers who fielded the 2012 report were appropriate persons,[11] the Tenth Circuit disagreed, holding that none of those reasons were adequate: First, although TUCP was supposed to initiate the school's "corrective action" process when it received a report of sexual assault, the Tenth Circuit said this was

1. Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 954 (N.D. Okla. 2016), *aff'd,* 859 F.3d 1280 (10th Cir. 2017), *petition for cert. filed*, No. 17-969, 2018 WL 333856 (U.S. Jan. 4, 2018).

2. *Id.* at 957–59.

3. *Id.* at 958.

4. *Id.* at 961, 973.

5. *Id.* at 963.

6. 20 U.S.C. §§ 1681–1688 (2012).

7. Complaint and Jury Demand at ¶ 44, Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951 (No. 4:14–cv–00484-TCK-PJC), 2014 WL 4087919.

8. *Ross*, 180 F. Supp. 3d at 978.

9. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

10. *Ross*, 859 F.3d at 1288–92.

11. *Ross*, 180 F. Supp. 3d at 966.

inadequate because the officers were required to pass the report on to someone who could take corrective action—not to take corrective action themselves;[12] Second, although TUCP consists of officers from the Tulsa Police Department and its own armed[13] investigators with arrest authority,[14] the Tenth Circuit concluded that "[i]t is not clear" how a police investigation into rape allegations could constitute corrective action, stating that "[p]erhaps investigation is a form of corrective action; perhaps not. The answer is not self-evident . . . .";[15] Finally, the District Court concluded that letting the university tell students that TUCP would institute corrective action and then letting TUCP neglect that obligation would allow the university to "effectively shield itself from Title IX civil liability."[16] The Tenth Circuit rejected this rationale, as well; even if university policy tasked TUCP with beginning corrective measures, it had not "expressly" labeled TUCP or its director as an "appropriate person[]."[17]

The court held that employees who are merely cogs in the wheel of the Title IX reporting process, who "cannot themselves take corrective action" cannot be deemed appropriate persons.[18] It did not say what kinds of corrective action must be within an appropriate person's power, but one hypothetical implied that the power would lie with "a Dean of Students who is tasked with adjudicating student-conduct complaints."[19]

Ross's petition for certiorari is now pending before the U.S. Supreme Court.[20] The petition echoes the District Court's opinion, providing that the Tenth Circuit's holding "effectively creates a framework for schools and universities to insulate themselves from Title IX liability"[21] and asking the Court to review the Tenth Circuit's

12. *Ross*, 859 F.3d at 1289–90.

13. *Campus Security*, UNIV. TULSA, https://utulsa.edu/offices/campus-security/ [https://perma.cc/LAN6-A4MT] (last visited Feb. 25, 2018).

14. *Campus Safety Measures*, UNIV. TULSA, https://utulsa.edu/offices/campus-security/campus-safety-measures/ [https://perma.cc/HC2F-LJG2] (last visited Feb. 13, 2018).

15. *Ross*, 859 F.3d at 1291.

16. *Ross*, 180 F. Supp. 3d at 967.

17. *Ross*, 859 F.3d at 1291–92.

18. *Id.* at 1290.

19. *Id.*

20. Petition for Writ of Certiorari, Ross v. Univ. of Tulsa, No. 17-969, 2018 WL 333856 (U.S. Jan. 4, 2018).

21. *Id.* at 12.

application of the "appropriate person" test first announced in *Gebser v. Lago Vista Independent School District*.[22]

The Court should grant the petition, but not on the questions presented. This Comment argues instead that both the District Court and the Tenth Circuit erred in applying the appropriate-person test at all.

Part I analyzes *Gebser* and *Davis v. Monroe County Board of Education*,[23] the landmark cases giving rise to the private cause of action under Title IX for sexual harassment, and the differing approaches the Court took in laying out the elements of those claims in cases involving teacher-harassers and student-harassers.

Part II discusses the development of the case law in the circuit courts since *Davis* and the extent to which courts have treated *Davis* either as a mere extension of *Gebser* or as establishing an independent test for liability in peer-harassment cases.

Part III argues that the Supreme Court should intervene to clarify the law in this area. Such a decision would at once resolve the split among circuits, bolster the public policy embodied in Title IX, and address the inequitable consequences for students who attend schools that lure them into reliance on a robust Title IX process that, in fact, does not exist.

Part IV lays out the problems with applying the appropriate-person test to peer-harassment cases, using a collegiate athletic coach as a case study.

Finally, Part V proposes that the Court clarify the proper approach for peer-harassment cases either by explicitly disclaiming the applicability of the appropriate-person test or by establishing a presumption that school employees are appropriate persons.

I. *GEBSER* AND *DAVIS*

The "appropriate person" requirement was born as part of the Supreme Court's actual-notice test in *Gebser*. In that case, a mother brought a Title IX hostile-environment claim against the school district after discovering that her daughter was involved in a sexual relationship with one of her teachers.[24] A district court granted summary judgment for the school district, and the Supreme Court affirmed, holding that agency principles were not appropriate for determining whether an

22. 524 U.S. 274 (1998); *see* Petition for Writ of Certiorari, *supra* note 20, at i (citing *Gebser*, 524 U.S. 274 (1998)).

23. 526 U.S. 629 (1999).

24. *Gebser*, 524 U.S. at 278–79.

employee's harassment of a student should subject a school to a private cause of action for monetary damages under Title IX.[25]

The school district received reports that the teacher had made sex jokes in class, but the Court held that that was insufficient to put it on notice that the teacher was also having sex with a student.[26] Instead, holding a district liable would require proof that an appropriate person—"an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf"—knew of the threat to students and responded with deliberate indifference that effectively permitted the harassment to continue and deprive the plaintiff of the benefit of her education.[27] Because the report of sex jokes said nothing about the possibility of a sexual relationship, the Court affirmed summary judgment, but it left unaddressed the question of whether the school principal who took those reports was an appropriate person.

Less than a year later, the Court in *Davis* said that harassment by a student, rather than a teacher, could also give rise to the implied private cause of action permitted in *Gebser*.[28] *Davis* involved a student whose classmate was permitted to continue groping her and harassing other students despite their repeated complaints to teachers and the principal. A district court dismissed the case, saying that peer harassment could not support a Title IX claim, but the Supreme Court re-versed, holding that deliberate indifference to harassment by peers could just as well support a Title IX claim.[29]

But its decision made no mention of the "appropriate person" test. Had it intended to apply that test to such cases, the circumstances of the case suggest that it would have done so; the omission came despite the fact that the lower courts had never applied the test or offered even a conclusory statement that an appropriate person knew of the harassment, despite the fact that the highest-ranking employee with notice was again a school principal, whose appropriateness the Court

25. *Id.* at 283, 292; *see also Davis*, 526 U.S. at 643 (citing *Gebser*, 524 U.S. at 283) ("[I]n *Gebser* we expressly rejected the use of agency principles in the Title IX context . . . .").

26. *Gebser*, 524 U.S. at 291.

27. *Id.* at 290.

28. *Davis*, 526 U.S. at 643.

29. *Id.* ("We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that . . . it does.").

had not directly addressed in *Gebser*, and despite the fact that at least one amicus had raised the issue.[30]

Instead, the *Davis* Court's discussion of the *Gebser* framework repeatedly emphasized that the appropriate-person analysis was a test to be applied to cases of misconduct by employees:

> "[W]e rejected the use of agency principles to impute liability to the district for the *misconduct of its teachers*."[31]

> "[T]he district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to *acts of teacher-student harassment* . . . ."[32]

> "The high standard imposed in *Gebser* sought to eliminate any 'risk that the recipient would be liable in damages not for its own official decision but instead *for its employees' independent actions*.'"[33]

> "*Gebser* thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known *acts of teacher-student discrimination*."[34]

> "The fact that it was a teacher who engaged in harassment in . . . *Gebser* is relevant."[35]

The Court reiterated *Gebser*'s rejection of agency principles and its requirement of actual notice, but it saw no need to trifle over the precise scope of authority conferred on whomever a student reports peer harassment to. Instead, it recognized schools' broad authority to regulate the conduct of their students—established through common law and Court precedent—as the basis for a different standard in cases of student-on-student harassment.[36] In those cases, it said, schools can

30. Brief of Amici Curiae National School Boards Association et al. in Support of Respondent, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (No. 97-843), 1998 WL 847120, at *19.

31. *Davis*, 526 U.S. at 642 (emphasis added) (citing *Gebser*, 524 U.S. at 283).

32. *Id.* (emphasis added) (citing *Gebser*, 524 U.S. at 290).

33. *Id.* at 643 (emphasis added) (quoting *Gebser*, 524 U.S. at 290–91).

34. *Id.* (emphasis added).

35. *Id.* at 653.

36. *Id.* at 646 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969); New Jersey v. T.L.O., 469 U.S. 325, 342 n.9 (1985); Davis

be held liable for subjecting students to harassment "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."[37] The Court did not explicitly hold that the appropriate-person test does not apply to student-on-student harassment cases, but its approach effectively acknowledged that when the offending party is a student, virtually any employee can be presumed to have authority to take some corrective action.

The Court made no mention of an appropriate-person requirement in its only subsequent student-on-student harassment case.[38]

II. POST-*DAVIS* CASE LAW

For the most part, the circuit courts have followed the Court's lead. Of the thirteen circuit courts, only two—the Tenth and the Eleventh—have ever applied the appropriate-person test to a case of peer harassment, whether in the Title IX context or in Title VI or Rehabilitation Act cases, which often follow a parallel analysis.[39] The distinction between the *Gebser* and *Davis* tests is plain enough that the courts have rarely even remarked on it, let alone struggled to apply it.

A. The Majority Rule: Appropriate-Person Analysis Is Inapplicable to Peer-Harassment Claims

The experience in the Sixth Circuit is generally representative of those in other circuits. The court has never imposed an appropriate-person requirement in any of its student-on-student harassment cases. It did briefly acknowledge, in *Vance v. Spencer Community Public School District*,[40] a difference between the tests for cases of harassment by teachers and by students, but it did not go so far as to explicitly delineate those differences. In *Vance*, a student won a jury verdict in a Title IX claim alleging that teachers and principals ignored her complaints about harassment from other students over the course of several

v. Monroe Cty. Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996); RESTATEMENT (SECOND) OF TORTS § 152 (AM. LAW INST. 1965)).

37. *Davis,* 526 U.S. at 647.

38. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

39. *Davis*, 526 U.S. at 643; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998). The author's review of peer-harassment cases published on Westlaw that cite *Davis* and include the phrase "appropriate person" revealed no cases published in the remaining eleven circuit courts.

40. Vance v. Spencer Cty. Pub. Sch. Dist., 231 F.3d 253, 264 (6th Cir. 2000) ("We find that the slight nuances between the *Davis* standard and the jury instructions [including the appropriate-person test] were neither confusing, misleading, nor prejudicial.").

years.[41] The court of appeals affirmed the judgment, holding that *Davis* required evidence of only three facts, all of which Vance had satisfied: (1) harassment so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school; (2) actual knowledge of the harassment; and (3) deliberate indifference to the harassment. The court said the actual-knowledge requirement had been satisfied by com-plaints to a teacher and principal, without any inquiry into what authority either person possessed to take corrective measures to end the discrimination.[42]

The Sixth Circuit acknowledged a wrinkle in the District Court's jury instructions, which had told jurors that before they could find deliberate indifference on the part of the school district, "the plaintiff must prove that . . . the appropriate person decided to act or not to act in spite of that knowledge [of danger to the plaintiff]."[43] While the Sixth Circuit said such instructions "differ from the standard the Supreme Court announced in *Davis*," the school district had not disputed its knowledge of the harassment, and the court found that the instructions "were neither confusing, misleading, nor prejudicial."[44] The court did not explicitly disclaim the appropriate-person test, but it has never applied it in any of the dozen peer-harassment cases it has decided since *Davis*.[45]

Because there is little explanation from these decisions as to why they are spending so little time—if any at all—on a question that frequently disposes of cases involving employee harassers, we can infer that they are making the distinction between the two types of cases.

41. *Id.* at 256.

42. *Id.* at 259 ("In this case, it is undisputed that Spencer had actual knowledge. Both Alma and her mother made repeated reports to Spencer. Alma informed both her teachers and principals.").

43. *Id.* at 263–64.

44. *Id.* at 264.

45. M.D. *ex rel.* Deweese v. Bowling Green Indep. Sch. Dist., No. 17-5248, 2017 WL 4461055 (6th Cir. Oct. 6, 2017); Tumminello v. Father Ryan High Sch., Inc., 678 F. App'x 281 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 121 (2017); Stiles *ex rel.* D.S. v. Grainger Cty., Tenn., 819 F.3d 834, 848 (6th Cir. 2016); Shively v. Green Local Sch. Dist. Bd. of Educ., 579 F. App'x 348 (6th Cir. 2014) (mentioning the "authority to take corrective action" requirement without actually applying it); Pahssen v. Merrill Cmty. Sch. Dist., 668 F.3d 356 (6th Cir. 2012); Williams v. Port Huron Sch. Dist., 455 F. App'x 612 (6th Cir. 2012); Patterson v. Hudson Area Sch., 551 F.3d 438 (6th Cir. 2009); S.S. v. E. Ky. Univ., 532 F.3d 445 (6th Cir. 2008); Winzer v. Sch. Dist. for City of Pontiac, 105 F. App'x 679 (6th Cir. 2004); Wayne v. Shadowen, 15 F. App'x. 271 (6th Cir. 2001); *Vance*, 231 F.3d at 264; Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999).

Among the lower courts, though, there appears to be more confusion. In the Northern and Southern Districts of Ohio, for instance, there has been an "appropriate person" inquiry in a few peer-harassment cases.[46] In none of those cases, though, was the test a substantial barrier; the court either gave the question no real treatment, or it deemed actual knowledge of teachers and principals sufficient to move the case forward. Several other courts around the Sixth Circuit have gone deeper into the appropriate-person analysis in peer-harassment cases, with mixed results.[47]

46. Fulton v. W. Brown Local Sch. Dist. Bd. of Educ., No. 1:15-CV-53, 2016 WL 6893845, at *1, *7 (S.D. Ohio Nov. 23, 2016) (applying the appropriate-person test in a Title VI context); Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ., No. 1:11-CV-850, 2012 WL 5268946, at *1, *8–9 (S.D. Ohio Oct. 23, 2012) (mentioning but not applying the appropriate-person requirement); Logan v. Sycamore Cmty. Sch. Bd. of Educ., No. 1:09-CV-00885, 2012 WL 2011037, at *1, *5 (S.D. Ohio June 5, 2012) (finding material factual dispute as to whether principal and teacher were appropriate persons); Evans v. Bd. of Educ. Sw. City Sch. Dist., No. 2:08-CV-794, 2010 WL 2889100, at *1, *8 (S.D. Ohio July 20, 2010), *aff'd in part*, 425 F. App'x 432, 439 (6th Cir. 2011) (mentioning but not applying the appropriate-person test); Schroeder *ex rel.* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 880 (N.D. Ohio 2003) ("Title IX imposes liability when 'an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to respond.'") (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 276 (1998)). *But see* Vidovic v. Mentor City Sch. Dist., 921 F. Supp. 2d 775 (N.D. Ohio 2013) (failing to inquire whether a guidance counselor was appropriate person); Shively v. Green Local Sch. Dist. Bd. of Educ., No. 5:11CV2398, 2013 WL 774643 (N.D. Ohio Feb. 28, 2013), *aff'd in part, rev'd in part and remanded*, 579 F. App'x 348 (6th Cir. 2014) (making no inquiry into who received the complaints).

47. *See, e.g.*, M.D. v. Bowling Green Indep. Sch. Dist., No. 1:15-CV-00014-GNS-HBB, 2017 WL 390280, at *6 n.2 (W.D. Ky. Jan. 27, 2017), *aff'd sub nom.* M.D. *ex rel.* Deweese v. Bowling Green Indep. Sch. Dist., 709 Fed. Appx. 775, 779 (6th Cir. 2017) (finding that a principal is an appropriate person); Hill v. Blount Cty. Bd. of Educ., 203 F. Supp. 3d 871, 883 (E.D. Tenn. 2016) (assuming that an assistant principal is an appropriate person); Patterson v. Hudson Area Sch., No. 05-74439, 2007 WL 4201137, *6 (E.D. Mich. Nov. 27, 2007) *rev'd and remanded,* 551 F.3d 438 (6th Cir. 2009) (imposing the appropriate-person requirement but not applying it); Lopez v. Metro. Gov't of Nashville & Davidson Cty., 646 F. Supp. 2d 891, 916 (M.D. Tenn. 2009) (finding bus drivers, teachers, and custodians are not appropriate persons); Staehling v. Metro. Gov't of Nashville & Davidson Cty., No. 3:07-0797, 2008 WL 4279839, *10 (M.D. Tenn. Sept. 12, 2008) (finding that a bus driver is not an appropriate person); Peer *ex rel.* Doe v. Porterfield, No. 1:05-CV-769, 2007 WL 9655728, *9 n.5 (W.D. Mich. Jan. 8, 2007) (finding a school secretary is not an appropriate person).

These circumstances are mimicked throughout most of the country. In the First,[48] Second,[49] Third,[50] Fourth,[51] Fifth,[52] Seventh,[53] Eighth[54] and Ninth[55] Circuits, none of the peer-harassment cases citing *Davis* have ever required a plaintiff to prove actual notice by an appropriate

48. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165 (1st Cir. 2007), *rev'd and remanded*, 555 U.S. 246 (2009); Porto v. Town of Tewksbury, 488 F.3d 67 (1st Cir. 2007).

49. KF *ex rel.* CF v. Monroe Woodbury Cent. Sch. Dist., 531 F. App'x 132 (2d Cir. 2013); Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655 (2d Cir. 2012); DiStiso v. Cook, 691 F.3d 226 (2d Cir. 2012); R.S. v. Bd. of Educ. of Hastings-On-Hudson Union Free Sch. Dist., 371 F. App'x 231 (2d Cir. 2010); DT v. Somers Cent. Sch. Dist., 348 F. App'x 697 (2d Cir. 2009); Doe v. E. Haven Bd. of Educ., 200 F. App'x 46 (2d Cir. 2006); Gant *ex rel.* Gant v. Wallingford Bd. of Educ., 195 F.3d 134 (2d Cir. 1999).

50. L. L. v. Evesham Twp. Bd. of Educ., 710 F App'x 545 (3d Cir. 2017); Yan Yan v. Penn State Univ., 529 F. App'x 167 (3d Cir. 2013); Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517 (3d Cir. 2011); DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008); Doe v. Bellefonte Area Sch. Dist., 106 F. App'x 798 (3d Cir. 2004); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).

51. S.B. *ex rel.* A.L. v. Bd. of Educ. of Harford Cty., 819 F.3d 69 (4th Cir. 2016); Doe v. Bd. of Educ. of Prince George's Cty., 605 F. App'x 159 (4th Cir. 2015); M.D. v. Sch. Bd. of City of Richmond, 560 F. App'x 199 (4th Cir. 2014); Rouse v. Duke Univ., 535 F. App'x 289 (4th Cir. 2013); Stevenson *ex rel.* Stevenson v. Martin Cty. Bd. of Educ., 3 F. App'x 25 (4th Cir. 2001).

52. Plummer v. Univ. of Houston, 860 F.3d 767 (5th Cir. June 23, 2017, revised June 26, 2017); K. S. v. Nw. Indep. Sch. Dist., 689 F. App'x 780 (5th Cir. 2017); Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398 (5th Cir. 2015); Kelly v. Allen Indep. Sch. Dist., 602 F. App'x 949 (5th Cir. 2015); Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014); Carmichael v. Galbraith, 574 F. App'x 286 (5th Cir. 2014); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011); Watkins v. La Marque Indep. Sch. Dist., 308 F. App'x 781 (5th Cir. 2009); Bruce v. Wigley, 273 F.3d 393 (5th Cir. 2001).

53. Doe v. Galster, 768 F.3d 611 (7th Cir. 2014); Davis v. Carmel Clay Sch., 570 F. App'x 602 (7th Cir. 2014); Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163, 315 F.3d 817 (7th Cir. 2003); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002); Adusumilli v. Ill. Inst. of Tech., 191 F.3d 455 (7th Cir. 1999).

54. Estate of Barnwell v. Watson, 880 F.3d 998 (8th Cir. 2018); K.T. v. Culver-Stockton Coll., 865 F.3d 1054 (8th Cir. 2017); Roe v. St. Louis Univ., 746 F.3d 874 (8th Cir. 2014); Wolfe v. Fayetteville, Arkansas Sch. Dist., 648 F.3d 860 (8th Cir. 2011); Ostrander v. Duggan, 341 F.3d 745 (8th Cir. 2003).

55. Al-Rifai v. Willows Unified Sch. Dist., 469 F. App'x 647 (9th Cir. 2012); Doe v. Univ. of Pac., 467 F. App'x 685 (9th Cir. 2012); M.L. v. Fed. Way Sch. Dist., 394 F.3d 634 (9th Cir. 2005); Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736 (9th Cir. 2000).

person, though some lower courts have spontaneously grafted that requirement into their peer-harassment analyses.[56]

B. The Minority Rule: Liability for Peer Harassment Requires Notice to an Appropriate Person

The situation is different in the Tenth and Eleventh Circuits. Neither one uniformly conducts an appropriate-person analysis, but both have applied it in some cases, including a few where it has barred recovery. In addition to the *Ross* decision discussed above, the Tenth Circuit reversed a decision holding that a victim of peer harassment

56. E.M. *ex rel.* J.M. v. Austin Indep. Sch. Dist., No. A-17-CA-387 LY, 2018 WL 627391, at *7 (W.D. Tex. Jan. 30, 2018) ("[A] counselor is not an 'appropriate person' for notice purposes under Title IX."); D.V. *ex rel.* B.V. v. Pennsauken Sch. Dist., 247 F. Supp. 3d 464, 475 (D.N.J. 2017) ("Nor is there evidence that the psychiatrist supervised or disciplined school personnel such that she was an 'appropriate person' who could subject the District to liability."); Bittenbender *ex rel.* S.B. v. Bangor Area Sch. Dist., No. CV 15-6465, 2017 WL 1150642, at *4 (E.D. Pa. Mar. 28, 2017) ("[T]he plaintiff has sufficiently pleaded that an appropriate person was informed of the sexual harassment."); Doe 1 v. Baylor Univ., 240 F. Supp. 3d 646, 659 (W.D. Tex. 2017), *motion to certify appeal denied*, No. 6:16-CV-173-RP, 2017 WL 1628994 (W.D. Tex. May 1, 2017) ("[T]he Court finds it plausible that personnel at [the campus police department and counseling center] . . . were 'appropriate persons' pursuant to Title IX."); Krebs v. New Kensington-Arnold Sch. Dist., No. CV 16-610, 2016 WL 6820402, at *3 (W.D. Pa. Nov. 17, 2016) ("The Krebs must plead . . . that [Plaintiffs] provided actual notice to "an appropriate person" who had authority to take corrective measures."); Swanger v. Warrior Run Sch. Dist., 137 F.Supp. 3d 737, 751 (M.D. Pa. 2015), *vacated and remanded*, 659 F. App'x 120 (3d Cir. 2016) ("[A] plaintiff seeking recovery for a Title IX violation predicated on student-on-student sexual harassment must establish . . . [that] an 'appropriate person' had actual knowledge of the alleged discrimination or harassment."); Tyrrell v. Seaford Union Free Sch. Dist., No. CV-08-4811(SJF)(MLO), 2010 WL 1257793, at *9 (E.D.N.Y. Feb. 9, 2010), *report and recommendation adopted*, No. CV-08-4811(SJF)(MLO), 2010 WL 1198055 (E.D.N.Y. Mar. 25, 2010) ("[To establish] a violation of Title IX based on student-on-student harassment . . . an 'appropriate person' must have 'actual knowledge' of the alleged discrimination or harassment."); McGrath v. Dominican Coll. of Blauvelt, N.Y., 672 F.Supp. 2d 477, 486 (S.D.N.Y. 2009) ("[P]laintiff may recover for student on student harassment, if the plaintiff can demonstrate four elements . . . an appropriate person has actual knowledge of the discrimination or harassment."); T.Z. v. City of New York, 634 F. Supp. 2d 263, 268 (E.D.N.Y. 2009) ("[A]n appropriate person must have 'actual knowledge' of the alleged discrimination or harassment."); Herndon v. Coll. of Mainland, No. G-06-0286, 2009 WL 367500, at *14 (S.D. Tex. Feb. 13, 2009) ("To recover damages for an instructor's sexual harassment of a student or for a student's sexual harassment of another student, the plaintiff must show that 1) an 'appropriate person,' i.e., an official or employee of the funding recipient with authority to take corrective action to end the discrimination; 2) had actual notice.").

had failed to state a claim for relief, noting that it was bound to accept as true the complaint's allegations that teachers had "the authority to halt Mr. Doe's known sexually assaultive behavior" and were therefore appropriate persons to receive a report.[57] But that court has also decided several other peer-harassment cases in which it never inquired in-to whether an appropriate person was aware of harassment.[58]

There is a similar split in authority in the Eleventh Circuit, which became the first to explicitly acknowledge the possible tension between the *Davis* and *Gebser* standards, noting that *Davis* "did not directly address who must have notice."[59] The court stated:

> With respect to harassment by teachers or staff, application of the Supreme Court's requirement of actual notice to an official with authority to address the discrimination and to institute corrective measures results in a limited and readily identifiable number of school administrators. However, a much broader number of administrators and employees could conceivably exercise at least some control over student behavior.[60]

Because the parties had not fully briefed the issue, the court instead rested the case on its finding that the harassment in question "was not *so* severe, pervasive, and objectively offensive that it had the systemic effect of denying the girls equal access to education."[61] While the court indicated it was saving the "appropriate person" question for another day, it has never revisited it, nor has any other circuit. Since then, the

57. Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1248 (10th Cir. 1999).

58. Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007); Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cty., OK, 334 F.3d 928 (10th Cir. 2003).

59. Hawkins v. Sarasota Cty. Sch. Bd., 322 F.3d 1279, 1287 (11th Cir. 2003).

60. *Id.*

61. *Id.* at 1288.

court has simply assumed—without explaining why—either that a peer-harassment case requires proof of such notice[62] or that it does not.[63]

Neither the D.C. Circuit nor the Federal Circuit has applied *Gebser* or *Davis* to a case of peer harassment.

III. The Shortcomings of Current Title IX Interpretations

Most obvious among the reasons for the Court to grant certiorari in *Ross* is the circuit split that it crystallized. If it was not previously clear whether or how the Tenth Circuit intended to apply *Gebser* to cases of peer harassment, *Ross* makes plain that the Tenth Circuit is now willing to bar claims on a basis that only one other circuit has endorsed. Since before the court was constituted, resolving such geography-based discrepancies in how the courts treat otherwise similarly situated plaintiffs has been recognized as one of the primary justifications for a supreme court.[64] Beyond the consequences for national unity and uniformity, circuit splits such as this one impose additional hardships on the legal system by encouraging additional litigation, in-creasing compliance costs for entities operating in multiple jurisdictions, and undermining the perceived legitimacy of the law and judiciary.[65]

62. Doe v. Bibb Cty. Sch. Dist., 688 F. App'x 791, 795 (11th Cir. 2017) ("[T]he plaintiff must establish four elements: (1) the defendant is a Title IX funding recipient; (2) an 'appropriate person' had actual knowledge of the discrimination . . . ."); Hill v. Cundiff, 797 F.3d 948, 970 (11th Cir. 2015) ("The second element requires Doe to prove an 'appropriate person' capable of putting the Board on notice had 'actual knowledge' of CJC's sexual harassment and discrimination."); Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1294 (11th Cir. 2007) ("In the absence of any allegations that an appropriate person with the Board of Regents had actual knowledge of the acts that Williams alleges constitute discrimination, Williams's Title IX claim against the Board of Regents cannot survive a 12(b)(6) motion to dismiss.").

63. Porter v. Duval Cty. Sch. Bd., 406 F. App'x 460 (11th Cir. 2010); Shotz v. City of Plantation, Fla., 344 F.3d 1161 (11th Cir. 2003).

64. The Federalist No. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1966) ("Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.").

65. *See generally* Deborah Beim and Kelly Rader, *Evolution of Conflict in the Courts of Appeals* (May 12, 2015), https://cpb-us-west-2-juc1ugur1qwqqqo4.stackpathdns.com/campuspress.vale.edu/dist/6/356/files/2011/10/Beim_Rader_Conflicts-xxkfk0.pdf [https://perma.cc/WM6U-3BKU] (exploring the "life cycle" of an intercircuit split by analyzing an original dataset that

In this last respect the problem may be the most significant. The fact that cases are turning on whether women have successfully divined the "appropriate person" to whom they should report being raped, attacked, or harassed, rather than whether that person took appropriate measures to remedy the situation, suggests that the system is not working as Congress intended when it enacted Title IX in recognition that sexual harassment "is reprehensible and undermines the basic purposes of the educational system."[66] If one accepts the Court's conclusion that Congress was contemplating an implied cause of action,[67] it is hard to imagine that such an action was supposed to be available only to those who could navigate educational institutions' often-byzantine hierarchies to determine which person, or group of persons, had adequate authority "to address the alleged discrimination and to institute corrective measures . . . ."[68]

A. Title IX Is Not Achieving Its Goals Under the Court's Current Interpretations

The inadequacy of an interpretation that imposes such requirements only becomes clearer in light of the recent explosion of empirical and anecdotal evidence that sexual harassment is far more pervasive than generally acknowledged, and that it remains obscured in large part because of the often-insurmountable practical barriers to reporting it in a way that that will actually lead to meaningful changes.

Thanks in large part to the #MeToo movement, the public and press are growing more attuned to the problem, as well as to the failures to seriously address it, especially in cases where harassers have some level of prestige at the institutions where they prey on their victims. The case of Larry Nassar—a member of Michigan State University's medical faculty who sexually assaulted students and other girls numbering in the hundreds—has led to the resignation of the school's president[69] and athletic director,[70] as well as the entire board of the

comprises a sample of conflicts between Courts of Appeals that existed between 2005 and 2013).

66. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998).

67. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) ("Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present.").

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

69. Julie Mack, *Michigan State President Lou Anna Simon Resigns*, MLIVE (Jan. 24, 2018), http://www.mlive.com/news/index.ssf/2018/01/lou_anna_k_simon_michigan_stat.html [https://perma.cc/9YA7-93X7].

70. Kyle Austin, *Michigan State Athletic Director Mark Hollis Resigns Amid Larry Nassar Fallout*, MLIVE (Jan. 26, 2018), http://www.mlive.com/

national gymnastics governing board.[71] At the University of Arizona, a track and field coach was fired after police picked him up on charges of assaulting and stalking one of his players after she accused him of attacking her with a box cutter in his office.[72] Most infamously, the scandal at Penn State ended the careers of the university's president, vice president, athletic director and football coach, all of whom participated in the cover-up of dozens of rapes perpetrated by assistant coach Jerry Sandusky.[73]

Given the abuse of trust involved, these stories of faculty and staff members preying on students are often more shocking, but they can obscure the more common problem of sexual harassment and assault perpetrated against students by their fellow students. Research on the problem consistently shows that huge numbers of students are the victims of sexual harassment and assault, and that students are far more likely than faculty or staff to be the aggressor. The best available data suggests that roughly 20 percent[74] to 30 percent[75] of women are sexually assaulted during their time in college. The share of women who report being sexually harassed at school jumps to about two-thirds in

spartans/index.ssf/2018/01/michigan_state_athletic_direct_12.html [https://perma.cc/6Z8J-5DZX].

71. Matt Stevens, *Remaining Members of U.S.A. Gymnastics Board to Resign After Nassar Scandal*, N.Y. TIMES (Jan. 26, 2018), https://www.nytimes.com/2018/01/26/sports/usa-gymnastics-board-nassar.html [https://perma.cc/N6MG-Y7EW].

72. Caitlin Schmidt, *'20/20' to Air Special Tonight on Arizona Wildcats Coach Accused of Assault*, ARIZ. DAILY STAR (Nov. 10, 2017), http://tucson.com/news/local/to-air-special-tonight-on-arizona-wildcats-coach-accused-of/article_7b567f6c-c624-11e7-b873-23887ccd16bd.html [https://perma.cc/N9AU-NJCU].

73. Carter Walker, *Jurors Deadlocked in Spanier Trial; Deliberations Continue Friday*, MORNING CALL (Mar. 23, 2017, 10:06 PM), http://www.mcall.com/news/breaking/mc-penn-state-abuse-trial-defense-0323-20170323-story.html [https://perma.cc/9ZR7-KMZN].

74. Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/ [https://perma.cc/Y8QE-32MG]; CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY 5-2 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [https://perma.cc/AQJ5-L2EF].

75. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 148 (2015), http://www.upenn.edu/ir/surveys/AAU/Report%20and%20Tables%20on%20AAU%20Campus%20Climate%20Survey.pdf [https://perma.cc/6HGN-YGZM].

college,[76] and 56 percent in grades 7–12.[77] As frequent as harassment is, though, it is almost exclusively perpetrated by peers, rather than school employees. Research on college harassment found that only 7 percent of harassed students were targeted by a professor, with an additional "small number" targeted by some other school employee.[78] In grades 7–12, the number of harassed students targeted by teachers or other employees drops to less than 1 percent.[79]

As common as this problem is, it is obvious that there remain major barriers to eliminating it. Even with substantial majorities of women acknowledging in confidential surveys that they have been victims, numbers from individual schools suggest that sexual harassment and assault only happens somewhere else. While about one in four women reports being sexually assaulted in college, 91 percent of colleges reported that there were zero rape reports—substantiated or otherwise—anywhere on their campuses in 2014.[80] The numbers are not much better in lower grades: with half of all students in grades 7–12 reporting that they have personally been victims of sexual harassment, more than two-thirds of public school systems reported that they fielded exactly zero reports of sexual harassment or bullying in 2014.[81]

Some portion of that discrepancy is undoubtedly attributable to incidents that go unreported, but with research indicating that about 7 percent of harassed college students[82] and 9 percent of harassed

76. CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 18 (2005), https://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf [https://perma.cc/BXC2-FPVC]; *Harassment on College Campuses*, HOLLABACK, https://www.ihollaback.org/harassment-on-college-campuses/ [https://perma.cc/8JD5-FFGJ] (last visited March 28, 2018).

77. CATHERINE HILL & HOLLY KEARL, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 11 (2011), https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf [https://perma.cc/Q7ZX-WKGX].

78. HILL & SILVA, *supra* note 76, at 21.

79. POOM NUKULKIJ, KNOWLEDGE NETWORKS PROJECT REPORT 37 (2011), https://www.aauw.org/files/2013/02/crossing-the-line-harassment-at-school-survey-methodology.pdf [https://perma.cc/3KEX-BCQE].

80. Amy Becker, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, AAUW (Nov. 23, 2015), https://www.aauw.org/article/clery-act-data-analysis/ [https://perma.cc/LWC3-KFSG].

81. Erin Prangley, *Two-Thirds of Public Schools Reported Zero Incidents of Sexual Harassment in 2013–14*, AAUW (July 12, 2016), https://www.aauw.org/article/schools-report-zero-sexual-harassment/ [https://perma.cc/4Y7M-4QRB].

82. HILL & SILVA, *supra* note 76, at 32.

students in grades 7–12[83] do tell some school employee, the schools them-selves apparently are not reporting all the incidents that their students report to them. Less clear is how much of that gap is due to failures in recordkeeping and how much is due to a deliberate effort to paint a rosier picture of campus life.

In either case, victims can hardly be blamed for being less than enthusiastic about reporting. When recovering from often-humiliating psychological and physical attacks, it seems unlikely that anyone would be in any rush to enlist the aid of a bureaucracy that is either unable or unwilling to both admit and address the problem. The research bears this out, with harassed students saying that they do not report harassment to their schools because they believe that their reports are not serious enough for the school to take action, that reporting will not change anything, and that staff members may react negatively toward them.[84] A separate review of records from the Department of Education's Office of Civil Rights, which is responsible for enforcing Title IX, reached similar conclusions, finding that actual and perceived failures to take sexual harassment seriously were a recurring theme among noncompliant schools, with schools tacitly and sometimes explicitly discouraging victims from triggering investigations.[85]

Title IX and its accompanying regulations were supposed to address this problem, in part by requiring schools to "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint . . . alleging any actions which would be prohibited by this part."[86] Even though schools are required to "notify all [their] students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph,"[87] this information is not getting through to the students who are being harassed. Nearly half of all college students surveyed did not know whether their schools had any such person, and nearly three-quarters of college students who filed harassment reports could not say whether the person they talked to was their school's Title IX coordinator.[88]

83. HILL & KEALE, *supra* note 77, at 2.

84. *Id.* at 27; HILL & SILVA, *supra* note 76, at 33.

85. Lenore Schaffer nee Malone, Understanding Noncompliance: A Qualitative Content Analysis of Title IX Sexual Misconduct Violations Using the Office for Civil Rights Investigative Findings 92–104 (May 2017) (unpublished Ph.D. dissertation, University of Southern Mississippi), http://aquila.usm.edu/cgi/viewcontent.cgi?article=2414&context=dissertations [https://perma.cc/8G9R-DVQ6].

86. 34 C.F.R. § 106.8(a).

87. *Id.*

88. HILL & SILVA, *supra* note 76, at 35.

Facing these numbers, it is hard to see how the Tenth Circuit, or any other court can purport to advance the purposes of Title IX by imposing highly technical requirements on students who have been thrust into an already-complex and often overtly hostile system at the most vulnerable time in their lives. The Supreme Court needs to step in to correct this error.

B. The Inequitable Results of the Appropriate-Person Test

Even if the Court were to impose an appropriate-person requirement in peer-harassment cases, it should—at a bare minimum—hold that a school has actual notice when a student reports harassment to someone the school itself has assured students will take corrective action.

In a footnote to *Massey v. Akron City Board of Education*,[89] one judge remarked that besides actual notice to an appropriate person, the *Gebser* standard is also satisfied "when notice is given to any employee whom the school has designated to respond to harassment complaints." [90] Although that conclusion may seem at first blush inconsistent with *Gebser*, it has slowly spread across the country, with courts recognizing the inequity inherent in the alternative, which would permit schools to shield themselves from liability by holding out the promise of corrective action without ever actually following through on those promises.[91]

This was the basic premise of the District Court's appropriate-person analysis in *Ross*, which the Tenth Circuit reversed without addressing, and it has been picked up in a variety of other decisions, as well. Most recent was *Wilborn v. South Union State Community College*,[92] where the only woman at a truck-driving school brought a Title IX claim based on her experience in a program that initially rejected her because she belonged "at home making babies instead of trying to drive a truck."[93] She reported discrimination and harassment to the program manager in accordance with the school's grievance policy; the program manager was in turn required to pass on the report to someone who could initiate corrective measures. Despite the school's claims that the director had no actual authority to discipline the

89. 82 F. Supp. 2d 735 (N.D. Ohio 2000).

90. *Massey*, 82 F. Supp. 2d at 744 n.7.

91. Yog v. Tex. S. Univ., No. H-08-3034, 2010 WL 4053706, at *4 (S.D. Tex. Oct. 14, 2010) (citing *Massey*, 82 F. Supp. 2d at 744 n.7); Doe v. Farmer, No. 3:06-0202, 2009 WL 3768906, at *8 (M.D. Tenn. Nov. 9, 2009).

92. 720 F. Supp. 2d 1274 (M.D. Ala. 2010).

93. *Id.* at 1287 (internal quotation marks omitted).

offending employees, the court held that the school could not require students to use a sham reporting procedure.[94]

The logic of that approach seems to have broad appeal and has been endorsed in several other decisions.[95]

IV. WHY APPROPRIATE-PERSON ANALYSIS DOESN'T WORK

The Tenth Circuit's hyper-fastidious inquiry into the precise boundaries of a police force's authority—facts likely subject to judicial notice in most cases—highlights the potential for the appropriate-person test to undermine the public policy embodied in Title IX.

Strictly enforcing the appropriate-person test may be justifiable in the context of harassment by teachers or other staff; a subordinate who knows that someone in his chain of command is harassing students is not empowered to separate the two or impose any discipline on the offender—though he is obviously able to report to someone who is. The good news for the victims of peer harassment is that—unlike in cases involving employees, who are more likely to be protected by tenure, collective bargaining agreements or employment contracts—schools have "comprehensive authority . . . to prescribe and control conduct in the schools."[96] The fact of schools' ability to discipline their students

94. *Id.* at 1306. ("[A] recipient of federal funds should not be able to construct a grievance procedure so as to shield itself from Title IX liability.").

95. *See, e.g.*, Baynard v. Malone, 268 F.3d 228, 243 (4th Cir. 2001) (Michael, J., dissenting) ("Because [the principal] was the supervisor of the school and the official designated to receive complaints about sexual assaults, the school board should not be able to avoid liability for [his] deliberate indifference to a known risk of teacher-on-student sexual abuse."); *Yog*, 2010 WL 4053706, at *4 (rejecting contention that "notice to an official who the defendant school has designated to serve as its 'compliance manager' is not also sufficient to satisfy Title IX's notice requirements"); *Doe*, 2009 WL 3768906, at *8 (holding that "responsibility under the school district's policy to receive allegations of sexual abuse" rendered principal an appropriate person); Roe *ex rel.* Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1030 (E.D. Cal. 2009) (citing *Doe*, 2009 WL 3768906, at *9 (holding that "responsibility under the school district's policy to receive allegations of sexual abuse" rendered principal an appropriate person)). *But see* Douglas v. Brookville Area Sch. Dist., 836 F. Supp. 2d 329, 360 n.14 (W.D. Pa. 2011) (finding that such an approach "would cause liability under Title IX to collapse into something akin to *respondeat superior* liability"); Ross v. Univ. of Tulsa, 859 F.3d 1280, 1291–92 (10th Cir. 2017) (holding that policy requiring employees to "begin the university's 'corrective processes'" was insufficient to render them appropriate persons).

96. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 646 (1999) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)) (internal quotation marks omitted).

"during school hours and on school grounds" [97] is generally unobjectionable, and it appears to have greatly simplified the Court's analysis of whether to award money damages against recipients of Title IX funding when the U.S. Supreme Court first took up the question of peer harassment in *Davis*.

To provide more useful guidance to that effect, the Court should clarify what it means by corrective action and why virtually any school employee can be presumed to have authority to implement it in cases of peer harassment.

A. What Is Corrective Action?

Courts recognize that determining whether an official is an "appropriate person" is "necessarily a fact-based inquiry."[98] Because the same job title may carry different job responsibilities from one school to the next, courts have consistently refused to "name job titles that would or would not adequately satisfy this requirement."[99] But before answering whether an individual has the authority to take corrective action, one must know what "corrective action" actually means. The term could refer merely to actions taken to punish harassment, or it could refer to efforts to ensure the victim can enjoy the benefits of an education de-spite the harassment.

1. Corrective Action Means More Than Swift and Severe Punishment

Some courts have taken the narrow approach, asking only whether an official has the authority to punish the harasser.[100] But others have taken a more holistic approach, finding that corrective action can also be focused on victims.[101] The latter approach is more consistent with

97. *Id.*

98. Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1247 (10th Cir. 1999).

99. *Id.*

100. *Baynard*, 268 F.3d at 239 (holding an appropriate person must have "independent authority to suspend, reassign, or terminate" an offending employee); Blue v. D.C., 850 F. Supp. 2d 16, 34 (D.D.C. 2012), *aff'd*, 811 F.3d 14 (D.C. Cir. 2015) ("'[A]uthority to take corrective action' means the ability to fire or discipline the teacher in question.").

101. *See* Waters v. Drake, 222 F. Supp. 3d 582, 595 (S.D. Ohio 2016), *appeal dismissed*, No. 16-4043, 2016 WL 9665545 (6th Cir. Dec. 27, 2016) ("The corrective action included strengthening the Band's leadership, updating the Band's policies and procedures to ensure Title IX compliance, training Band staff on Title IX issues, providing counseling for victims of sexual harassment, distributing written materials on sexual harassment and sexual violence to Band staff and members, and conducting assessments of the effectiveness of efforts to change the Band's culture."); J.K. v. Ariz. Bd. of Regents, No. CV06-916-PHX-MHM, 2008 WL 4446712, at *13 (D. Ariz.

Department of Education guidance, which explicitly calls for steps beyond disciplining the offending party to "eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects."[102]

The Court has signaled the importance of these regulations in determining the scope of liability under Title IX, pointing specifically to 34 C.F.R. § 106.3, the Department of Education's regulation requiring schools to identify past and present discriminatory practices and implement remedial measures to eliminate their discriminatory effects.[103] That mandate stands in stark contrast with the Tenth Circuit's rationale in *Ross*, which appears to be focused almost exclusively on punitive measures.[104] But the Supreme Court has rejected an approach that insists on "expulsion of every student accused of misconduct involving sexual overtones" or that makes "particular remedial demands."[105]

Instead, administrators are only required to respond to complaints "in a manner that is not clearly unreasonable."[106] In *Gebser*, for instance, the Court took no exception when a principal who received reports of a teacher's off-color jokes merely cautioned the teacher "to be careful about his classroom comments."[107] And in *Davis*, it signaled that the school may have responded adequately to complaints of sexual harassment by merely threatening to discipline the offender.[108]

So understood, the universe of school employees with the power to take corrective action becomes far larger than the Tenth Circuit acknowledges. If, as was the case in *Ross*, the school concludes that no offense or only a *de minimis* offense had been committed, it would of course have been within the power of campus police to administer a

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Sept. 30, 2008) (mentioning that the corrective action included a "report . . . to Judicial Affairs for possible Code of Conduct violations.").

102. DEPT. OF ED., OFFICE OF CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 2–3, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [perma.cc/NLJ7-HHX7].

103. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288 (1998) ("In the event of a violation, a funding recipient may be required to take 'such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination.'") (quoting 34 C.F.R. § 106.3(a) (2017)).

104. *See supra* notes 1–18 and accompanying text.

105. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999).

106. *Id.* at 649.

107. *Gebser*, 524 U.S. at 278.

108. *Davis*, 526 U.S. at 649 ("[I]t remains to be seen whether petitioner can show that the Board's response to reports of G.F.'s misconduct was clearly unreasonable in light of the known circumstances.").

verbal warning to the accused rapist or to counsel him on the potential for more serious consequences that could come from failing to secure affirmative consent before having sex.

2. Corrective Action Includes Remedial Measures to Benefit the Victim

More importantly, the Tenth Circuit's narrow definition of corrective action appears to come from a misconception of the action to be corrected. In a criminal context, a student reporting sexual assault is seeking to have the assault punished, so the punishment is an appropriate way to evaluate the response. But Title IX does not, strictly speaking, provide a remedy for people who have been harassed or assaulted; more precisely, it provides a remedy for people who, based on their sex, have been excluded from participating in an educational program, who have been denied its benefits, or who have been subjected to discrimination.[109]

"Corrective action," therefore, hardly needs to be limited to disciplinary action targeting the offender; instead, it may be more appropriately focused on the victim. If the school can take action to ensure that a victim continues to enjoy the full benefits of her education, de-spite having been harassed or assaulted, any action it takes to that end would constitute corrective action. Properly refocused on this question, courts should have little difficulty finding that any given school employee has the power to take corrective action that is "not clearly un-reasonable."[110] Depending on the severity of the incident, it may be enough for a school to take corrective action by talking to the victim, by referring her to counselors or police, by notifying her of her rights under Title IX, or by personally requesting that the Title IX office initiate a formal investigation. Even in more severe cases, similar re-medial measures directed at the perpetrator—referring him to counseling or for some other intervention, for instance—may also be adequate. If any of these were reasonably calculated to ensure that the incident did not derail the victim's education or the education of any future victim, they could be enough to survive a court's scrutiny.

Title IX certainly does not suggest that offenders should not be punished for creating a hostile environment, but its implementation has consistently focused more heavily on taking actions on behalf of the

109. 20 U.S.C. § 1681 (2016). The Supreme Court has already recognized an analogous principle in the Title VII context. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) ("[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive . . . .") (citing Rogers v. EEOC, 454 F.2d 234, 238 (1972)).

110. *Davis*, 526 U.S. at 649.

students whom that environment has denied the benefit of their education. Guidance from the Department of Education's Office of Civil Rights ("OCR") breaks this requirement into three separate categories: First, to "eliminate any hostile environment that has been created," OCR recommends requiring the harasser to apologize to the harassed student, assisting the harassed student in making schedule changes to avoid a hostile environment, and communicating to students that such harassment will not be tolerated.[111] Second, to "address the effects of the harassment," it suggests providing tutoring, tuition adjustments, or professional counseling.[112] Finally, to "prevent any further harassment," the guidance recommends ensuring that the harassed student understands how to report further problems, counseling her to ensure she understands the full scope of prohibited conduct, checking in to see if any more harassment has occurred, and providing similar services to other students to ensure that the problem is not more widespread.[113]

B. The Collegiate Athletic Coach: A Case Study

To illustrate the breadth of school employees' authority to implement OCR-prescribed corrective measures, consider the example of an athletic coach at a large state school. Colleges have considerably less authority over their students than they would if they were charged with educating small children.[114] And governed as they are by constitutional restraints, state schools have even less authority than their private counterparts.[115] Despite these limitations, even a state-school coach who learned that one of her athletes was being sexually harassed or had been sexually assaulted would continue to wield considerable authority to implement corrective measures on all three dimensions in the OCR guidance discussed above.

111. OFFICE OF CIVIL RIGHTS, DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENT, OR THIRD PARTIES 16 (2001).

112. *Id.* at 16–17.

113. *Id.* at 17.

114. *Davis*, 526 U.S. at 646 ("[T]he nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.") (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)).

115. Widmar v. Vincent, 454 U.S. 263, 267 (1981) ("[Having] created a forum generally open for use by student groups . . . the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.").

1. Courts Generally Accept Coaches as Appropriate Persons in Peer-Harassment Cases

There is no reason to think that a coach cannot be an appropriate person simply because she was not the president of the university or the full-time Title IX coordinator, as some cases have seemed to demand. Consistent with the general reluctance to attach appropriate-person status to any given job title, courts have not made any definitive pronouncements that coaches are or are not appropriate persons, though several cases have examined the question.

In *Kinsman v. Florida State University Board of Trustees*,[116] a student alleged a Title IX violation after a football player raped her and the school failed to investigate.[117] The trial court denied a motion to dismiss, holding that because determining who is an appropriate person is "a fact-based inquiry," it could not hold as a matter of law that neither a football coach nor an associate athletic director was an appropriate person.[118] It recognized that the facts may "show that one or both of these officials had enough authority over a member of the foot-ball team to take corrective action."[119]

In *Roe ex rel. Callahan v. Gustine Unified School District*,[120] a football player alleged a Title IX violation based on sexual harassment he endured at a football camp.[121] The district court granted summary judgment in favor of the defendants, holding that it could not conclude as a matter of law that the football coach was not an appropriate person.[122] The court pointed to several facts indicating that the coach had sufficiently substantial control, noting that he had formulated all aspects of the football camp and football program, was chief administrator and disciplinary authority for the football program, had acted as administrative proxy between the program and the school district, had determined eligibility criteria, was responsible for athletes "on and off the field," and was considered "school personnel in charge" to whom inappropriate behavior should be reported.[123]

116. No. 4:15CV235-MW/CAS, 2015 WL 11110848 (N.D. Fla. Aug. 12, 2015).

117. *Id.* at *2.

118. *Id.* (quoting Doe v. Sch. Bd. of Broward Cty., Fla., 604 F.3d 1248, 1256 (11th Cir. 2010)).

119. *Id.*

120. 678 F. Supp. 2d 1008 (E.D. Cal. 2009).

121. *Id.* at 1011.

122. *Id.* at 1033–34.

123. *Id.* at 1034.

In *Doe ex rel. Conner v. Unified School District 233*,[124] a student alleged a Title IX violation based on harassment from fellow students.[125] Although the court granted summary judgment for the defendants, its analysis concluded that the plaintiff had notified an appropriate person when he talked to a teacher and track coach.[126] Relying on a previously established presumption that teachers have authority to take corrective action against peer-to-peer harassment during the school day on school grounds, the court noted that Doe had complained to a track coach at track practice on school grounds—"similar enough for the court to presume [the coach] had the requisite control to take corrective measures."[127]

S.S. v. Alexander[128] appears to have come the closest to directly answering the question. There, an assistant equipment manager for the University of Washington football team brought a Title IX complaint after being raped by a football player and watching her complaints go unaddressed by a series of school employees of escalating authority.[129] The Washington Court of Appeals held that the equipment manager and an assistant football coach were not appropriate persons because their "duties are at a lower level, more akin to a classroom instructor."[130] But it held that an assistant athletic director and associate athletic director were appropriate persons because each "holds an administrative position involving the exercise of significant discretion and each plainly had the authority to 'institute corrective measures'"[131] and was "in a position to exercise control over the harasser and the context in which the harassment took place."[132] The head coach was apparently never notified, so there was no holding on whether he would have qualified.[133]

Some courts have rejected coaches as appropriate persons, but those instances appear to be limited to cases of harassment by employees. In *Najera v. Independent School District of Stroud No. I-54 of Lincoln*

124. No. 12-2285-JTM, 2013 WL 3984336 (D. Kan. Aug. 1, 2013).

125. *Id.* at *1, *3.

126. *Id.* at *5, *8.

127. *Id.* at *5.

128. 177 P.3d 724 (Wash. Ct. App. 2008).

129. *Id.* at 728.

130. *Id.* at 738.

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

132. *Id.* (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 645 (1999)).

133. *Id.* at 729.

County,[134] a parent alleged a Title IX violation based on her daughter's interactions with a school employee whose husband and father—both teachers and coaches for the school district themselves—were aware of the relationship.[135] The court granted summary judgment for the school for any harassment that occurred while they were the only ones who knew of it, saying that there was no evidence that either of them had any authority to take corrective action.[136]

And in *Doe No. 1 v. Boulder Valley School District No. Re-2*,[137] a group of high school students alleged Title IX violations based on sexual harassment by a wrestling coach.[138] The court granted a motion to dismiss, holding that no appropriate person was aware of the harassment.[139] The case presented a strange fact pattern in which the harasser, Travis Masse, was initially a volunteer assistant coach for the Boulder Valley School District while working on his education degree and doing a field placement in another school district.[140] That district informed Mark Schmidt, Boulder Valley's head wrestling coach, that Masse had been harassing girls, but Schmidt retained Masse.[141] After Masse landed a full-time teaching job with Boulder Valley, he and Schmidt swapped positions in the wrestling program, with Masse becoming head coach and Schmidt becoming an assistant.[142] While the court seemed to allow for the possibility that a wrestling coach could be an appropriate person, it said that Schmidt was not because Masse's harassment of the plaintiffs in this case came after Masse's promotion.[143] Given his position as a subordinate, the court said, "[t]here is no plausible allegation that he had any authority to address the alleged dis-crimination and take corrective action."[144]

The general consensus that a coach may be an appropriate person in the context of peer-harassment cases is only reinforced by the Supreme Court's observations on the special significance of coaches in

134. No. CIV-14-657-R, 2015 WL 4310552 (W.D. Okla. July 14, 2015).

135. *Id.* at *1.

136. *Id.* at *2.

137. No. 11-CV-02107-PAB-KLM, 2012 WL 4378162 (D. Colo. Sept. 25, 2012), *aff'd*, 523 F. App'x 514 (10th Cir. 2013).

138. *Id.* at *1–2.

139. *Id.* at *5.

140. *Id.* at *1.

141. *Id.*

142. *Id.* at *1–2.

143. *Id.* at *4 n.2.

144. *Id.*

the context of addressing Title IX violations, saying they "are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."[145] Kent State University also seems to acknowledge the importance of coaches in addressing student-athletes' grievances, as its literature discourages students from reporting problems to the media and instructs them instead that "the coaches' office is the *only* place" to take their complaints.[146]

2. Coaches Employed by Schools Are Explicitly Empowered to Take Corrective Action

Despite the few cases expressing skepticism, the courts have—with good reason—generally been at least open to the idea that a coach can be an appropriate person. The occasional hesitation seems to be due to concerns about their disciplinary authority, but as Section IV.A discussed, that is only the smallest concern when evaluating their authority to implement corrective action. To illustrate the breadth of options available, this case study draws from authorities applicable to a single employee of a single institution—in this case, Kent State University.

A variety of authorities would explicitly empower—and in some cases obligate—that coach to take meaningful action in response to a credible report of sexual harassment or assault. Under federal law, state law, and university policy, the coach would have the authority to help eliminate the hostile environment by:

- Reporting the rape to police for a criminal investigation;[147]

145. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181 (2005).

146. Kent State Univ., Student-Athlete Handbook 83 (2014), https://www.kentstatesports.com/documents/2015/2/16//REV_SA_HANDBOOK_ALL_14_15.pdf?id=4222 [perma.cc/5WTG-WHXP] (emphasis added).

147. Kent State Univ., Policy Register, ch. 5-16.2(D)(3) ("[U]niversity employees . . . are required to report to the appropriate law enforcement agency information brought to their attention concerning [felony crimes]."); Kent State Univ., Sexual and Relationship Violence Support Services, Your Role as Responsible Employee: Reporting Sex Discrimination, Sexual Harassment and Sexual Misconduct [hereinafter Role as Responsible Employee], https://www.kent.edu/rvss/your-role-responsible-employee [perma.cc/HP5M-56WH] (last visited Feb. 25, 2018) ("All Kent State University employees are REQUIRED to report any instance of sexual harassment or misconduct to the Title IX Coordinator or a Deputy Coordinator, and in the case of sexual assault, to the police.").

- Notifying the victim that she may report the rape to police;[148]
- Assisting the victim in reporting the rape to police;[149]
- Notifying the victim that she may be able to obtain a civil order protecting her from her harasser;[150]
- Reporting the rape to the university's Title IX coordinator for an internal investigation;[151]
- Notifying the victim that she could pursue disciplinary charges against her harasser;[152] and
- Notifying the victim how to pursue these options while protecting her confidentiality.[153]

Because none of these corrective measures would violate anyone else's rights, any person, including the coach, would have the authority to implement them.

The coach could also take action to address the effects of the harassment by:

- Referring the victim to counseling;[154]
- Referring the victim for mental health services;[155]
- Referring the victim for victim-advocacy services;[156]
- Referring the victim for legal assistance;[157]

148. 20 U.S.C. § 1092 (f)(8)(B)(ii–iii) (2017) (requiring rape victims to be notified of rights and university policies concerning sexual assault).

149. *Id.*

150. 20 U.S.C. § 1092(f)(8)(B)(iii)(IV) (2012).

151. OHIO ADMIN. CODE 3342-5-16.2(D) ("All employees of the university are required to report all instances of gender/sexual harassment, sexual misconduct, stalking, and intimate partner violence to the Title IX coordinator . . . ."); ROLE AS RESPONSIBLE EMPLOYEE, *supra* note 147.

152. 20 U.S.C. § 1092(f)(8)(B)(iv) (2012).

153. *Id.* § 1092(f)(8)(B)(v).

154. *Id.* § 1092(f)(8)(B)(vi).

155. *Id.*

156. *Id.*

157. *Id.*

- Notifying the victim about the availability of assistance in changing her academic, living, transportation, and working arrangements;[158]
- Referring the victim to another university official more familiar with the resources available to the victim;[159] and
- Rescheduling the victim's practices to accommodate her efforts to avail herself of the above services.[160]

As with the corrective measures aimed at eliminating the hostile environment, the coach would need no special authority to take any of these actions.

OCR also provides guidance on how to handle the offending party when sexual harassment occurs, calling for "reasonable, timely, age-appropriate, and effective corrective action."[161] It suggests that the person receiving the complaint: "counsel, warn, or take disciplinary action against the harasser";[162] take steps to "separate the harassed student and the harasser";[163] and direct the harasser "to have no further contact with the harassed student."[164]

Once the coach's attention turns away from offering the victim assistance and toward punishment for the offender, her authority is necessarily diminished in deference to a student's recognized property interests in his education.[165]

3. Students Are Obligated to Comply with a Coach's Directives

Still, as long as the coach ensured that her response was proportional to the reported misconduct and within the constraints of due process, she would enjoy substantial authority to pursue any of the

158. *Id.* § 1092(f)(8)(B)(vii).

159. *See* OHIO ADMIN. CODE 3342-5-16.2(D) (2018).

160. OHIO ADMIN. CODE 3342-4-02.4(D)(1) (granting coaches authority to set rules for student-athlete training).

161. OFFICE OF CIVIL RIGHTS, DEPT. OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE 16 (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/D5H2-P9N2].

162. *Id.*

163. *Id.*

164. *Id.*

165. Goss v. Lopez, 419 U.S. 565, 576 (1975) ("Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.").

above options, and the offender would be obligated to comply. University-wide policies confer broad authority on university employees to make reasonable requests to maintain an environment conducive to education, and they subject students to disciplinary sanctions for failing to comply with those requests.[166] And if a sexual assault occurred in a residence hall, that conduct would also be governed by Kent State's "Hallways Handbook," a separate set of rules imposing an independent obligation on students to "comply with reasonable requests made by university officials."[167]

Assuming that the coach is a faculty member, as is normally the case, she would also enjoy the substantial disciplinary authority inherent in that role. The Supreme Court has repeatedly recognized the general authority of school officials to control the behavior of their students.[168] In the context of higher education, Ohio courts have held that that power is especially strong among faculty members.[169] For more than 100 years, they have said that matters of discipline at universities "have been left largely, if not entirely, to the faculty, and their action in such matters is binding upon the institution they represent."[170] That approach has been roughly codified in a statute

166. KENT STATE UNIV., CODE OF STUDENT CONDUCT 2, 13 (2014), https://web.archive.org/web/20150423043957/http://www.kent.edu:80/studentconduct/code-student-conduct [https://perma.cc/2Z9C-NYM4].

167. KENT STATE UNIV., HALLWAYS HANDBOOK 3.1 (2017), http://www.kent.edu/housing/hh-3-residence-hall-policies [perma.cc/5B5V-4YN7].

168. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (recognizing school officials' "comprehensive authority . . . to prescribe and control conduct in the schools"); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (Powell, J., concurring) (relaxing warrant requirements out of deference to "substantial need of teachers and administrators for freedom to maintain order in the schools"); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 646 (1999) (acknowledging school officials' "substantial control" over students' conduct).

169. Several courts have acknowledged the importance of these types of state-specific considerations in determining whether someone is an appropriate person. *See* Baynard v. Malone, 268 F.3d 228, 239 (4th Cir. 2001) (holding that principal was not an appropriate person because state law required superintendent's permission to reassign an offending teacher); Hawkins v. Sarasota Cty. Sch. Bd., 322 F.3d 1279, 1286 (11th Cir. 2003) (holding that an appropriate-person determination would require an inquiry into "the authority and responsibility granted by state law to administrators and teachers"); Annamaria M v. Napa Valley Unified Sch. Dist., No. C 03-0101 VRW, 2006 WL 1525733, at *4 (N.D. Cal. May 30, 2006) (acknowledging that state law determines who "exercises substantial control for the purposes of Title IX liability").

170. Koblitz v. W. Reserve Univ., 1901 WL 689, at *8 (Ohio Cir. Ct. Jan. 21, 1901).

recognizing the broad authority of faculty "to take appropriate disciplinary action, through such procedures as may be provided by rule, regulation, or custom of such college or university . . . ."[171]

Given the power to institute almost any of the OCR-suggested disciplinary corrective actions, an athletic coach easily meets the *Davis* standard and likely the higher bar set in *Gebser*. Because most of the authorities cited above are standard provisions across schools and across jurisdictions, and because they are typically not limited to coaches, a similar—and often expanded—portfolio of corrective authority is available to virtually any school employee who learns of harassment.

C. Ross *Is Wrong*

Given the established precedent recognizing the broad authority of coaches and schools in general to regulate their students' conduct, the abundance of formal guidance on appropriate corrective measures, and the purposes underlying Title IX, there is little left to justify the holding in *Ross*, which took an exceptionally narrow approach to defining "corrective measures."[172] In so doing, the court afforded the school virtually no discretion to consider and impose the most suitable punishment under the circumstances.

There was no suggestion in *Davis* that the Court expected lower courts to import its appropriate-person test for teacher-on-student harassment cases from *Gebser* into peer-harassment cases. The Court did not apply the test itself or say that the test should be the same as in *Gebser*; instead, it explicitly announced a different test, finding liability in cases "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."[173] *Ross* makes clear that the Court needs to be more explicit still. Its holding—that Title IX offers no relief to a victim of peer harassment because campus security officers lack "authority to take corrective action" to address a rape on their campus[174]—is consistent with neither the test set out in *Davis* nor with common sense.

In justifying its decision in *Ross*, the Tenth Circuit professed a certain degree of ignorance about how a police force works, finding that the plaintiff had failed to proffer sufficient facts to create a substantial question of material fact on points that most people would probably

171. Ohio Rev. Code Ann. § 3345.24(A) (West 2017).

172. Ross v. Univ. of Tulsa, 859 F.3d 1280, 1289–92 (10th Cir. 2017).

173. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 646–47 (1999).

174. *Ross*, 859 F.3d at 1284.

consider too obvious to mention.[175] This conceit was aided by the court's recharacterization of the "Tulsa University Campus Police"—as it was consistently labeled in the District Court's decision—to merely "campus security."[176] So downgraded, the agency's powers were suddenly open enough to interpretation that the court found it unclear exactly how "officers combat campus violence,"[177] whether investigating a rape report would constitute corrective action,[178] and whether arresting a rapist would constitute corrective action.[179]

It seems unlikely that many people would struggle with these questions or require detailed factual showings before conceding that when sexual harassment takes the form of rape, sworn police officers and even civilian security personnel would generally have the "authority to end the harassment."[180] Part of the problem appears to come from the exceedingly narrow conception of *Gebser*'s demand for notice to an official with "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf."[181] The *Ross* court never defined what would actually constitute a corrective measure, but the only thing that it seemed to accept was action by the university's dean of students, who presumably had authority to mete out punishments to students.[182]

As Part IV explained, *Davis* rejects any attempt by either plaintiffs or reviewing courts to select and impose their own preferred corrective measures, whether punitive or remedial. Instead, they are bound to consider the measures actually taken by the school and evaluate whether they were clearly unreasonable—and in so doing, they are obligated to extend the school a healthy dose of deference to those decisions.[183]

175. *Id.* at 1288–89.

176. *Id.* The court went so far as bracketing out Ross's reference to "CAMPO," the school's vernacular for "campus police," and replacing it with "campus security." *Compare Ross*, 859 F.3d at 1291 *with* Appellant's Reply Brief at 12, Ross v. Univ. of Tulsa, 859 F.3d 1280 (10th Cir. 2017) (No. 01019732904).

177. *Ross*, 859 F.3d at 1290 n.7.

178. *Id.* at 1291 ("Perhaps investigation is a form of corrective action; perhaps not.").

179. *Id.* at 1292 n. 9.

180. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998).

181. *Id.* at 290.

182. *Ross*, 859 F.3d at 1290.

183. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999) ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.").

V. Resolutions

Given these deficiencies in *Ross*, the Court should grant certiorari and take the opportunity to clarify the test it laid out in *Davis*. Most easily, the Court could explicitly differentiate the two tests and continue to apply different tests in teacher-student and peer-harassment cases. It may, however, be easier to simply recharacterize *Gebser* as the generally applicable test for Title IX harassment cases while characterizing *Davis* as establishing a presumption that in peer-harassment cases, almost any employee will have the authority necessary to be considered an appropriate person.

The latter approach may be more sensible, as it would provide lower courts with a single test with broader applicability, streamline the analysis for a large share of the cases to which it is applicable, and retain sufficient flexibility to address the rare case in which a party with knowledge of peer harassment truly lacks the capacity to do anything.

Moreover, this approach would shift the burden of proof to the party with greater access to relevant information. Operating in a framework where proof that the recipient of a report had authority to launch a rape investigation and arrest the perpetrator may not be enough to satisfy a court of appeals, plaintiffs will be required to engage in even more extensive and detailed discovery on the precise contours of the recipients' authority, all the potential sources of that authority, its record of exercising that authority, and its record of exceeding that authority. Rather than imposing those costs on both parties, a simple presumption of authority would allow trial courts to accept as true an assertion that the Supreme Court has already acknowledged is generally accepted as a matter of fact and law, while permitting defendants to contest the issue in the rare cases where there is actually some basis to do so.

Conclusion

The Tenth Circuit's decision in *Ross* is fatally flawed. It is not consistent with the landmark precedents on which it is based, nor is it consistent with the subsequent decisions reached by almost all of its sister circuits. These discrepancies provide sufficient grounds alone for the Court to review and reverse the case; more problematic are the implications of this decision on the innumerable students who are experiencing exactly the kind of discrimination that Title IX is meant to address but are nonetheless unable to find relief because their universities have failed to implement adequate procedures to encourage those students to report and reassure them that those reports will be taken seriously.

Contrary to *Ross*'s narrow conceptions of corrective action and school officials' power to implement it, virtually any employee—and especially a campus police officer—has more than enough authority to take meaningful steps to mitigate the effects of sex-based discrimination on students' educational experience. The Court should reverse that decision, clarify that this kind of analysis is too superfluous to be demanded, and provide schools an incentive to better protect their students from sexual harassment and assault.

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