IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SARA WECKHORST, Plaintiff, v. KANSAS STATE UNIVERSITY, an agency of the State of Kansas, Defendant.	)	Case No. 2:16-cv-02255-JAR-GEB

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INTRODUCTION

Plaintiff Sara Weckhorst ("S.W.") is a student at Kansas State University ("K-State"). In May of 2014, S.W. reported to K-State that she had been raped multiple times "by two K-State students during a fraternity event and again later at the fraternity house." Compl. ¶ 1.[1] She further reported living in constant fear of the accused students, being harassed by other students about the alleged rapes, and struggling academically. *Id.* ¶¶ 1, 27, 36, 43, 79. K-State informed S.W. that it would do nothing about rapes that occurred "off-campus." *Id.* ¶ 22. Despite months of pleas from S.W. and her family, K-State repeatedly refused to investigate the alleged rapes or take action to address their negative effects on her education or her safety. *Id.* ¶¶ 22, 33, 38, 46.

S.W. alleges that this refusal constitutes deliberate indifference to a hostile environment that denies her the benefits of K-State's education programs and activities in violation of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq*. Title IX prohibits sex discrimination by recipients of federal funds in all education programs and activities, including extracurricular activities such as university-recognized fraternities. K-State has moved to dismiss S.W.'s Title IX claims, arguing that it need not respond to reports of student-on-student rape at "off campus" fraternity houses or events, and that S.W. must, yet fails to, allege that K-State's deliberate indifference caused her alleged assailants to harass her again. K-State is incorrect, and its motion should be denied.

INTERESTS OF THE UNITED STATES[2]

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C § 517, to provide the correct legal standards governing private sexual harassment claims for both

[1] The United States understands that these are Plaintiff's allegations. Because this Statement of Interest is filed at the motion to dismiss stage, the United States accepts all of the allegations in the Plaintiff's Complaint as true.

[2] The Federal Rules of Civil Procedure and local rules do not set forth a procedure for filing a statement of interest on behalf of the United States with the district courts, although it should be noted that Fed. R. App. P. 29(a) provides that the United States may file an amicus brief without consent of the parties or leave of court. When the Clerk's office was consulted, it opined that this statement could be filed without additional notice or motion.

monetary and equitable relief under Title IX. The United States Departments of Justice ("DOJ") and Education ("ED") share responsibility for enforcing Title IX in the education context. ED has four open Title IX investigations of K-State involving sexual harassment.

In addition to its own enforcement interest, the United States has an interest in ensuring effective private enforcement of Title IX in court. Students who experience sexual assault and others injured by Title IX violations may seek both equitable relief, including injunctive relief compelling their schools to investigate their allegations and address their hostile environments, and monetary damages to compensate for injuries caused by the schools' deliberate indifference. As explained below, the legal standards for evaluating damages and equitable claims under Title IX are similar but distinct, and the United States has a strong interest in their proper application.

STATEMENT OF FACTS

S.W.'s allegations are as follows. As a freshman at K-State, S.W. attended a fraternity event at Pillsbury Crossing, a frequent K-State party spot. Compl. ¶ 13. After becoming intoxicated, S.W. blacked out. *Id.* Her last memory was meeting J.K, a K-State student and the fraternity's designated driver. *Id.* J.K. allegedly sexually assaulted the incapacitated S.W. three times: once in his car while 15 other K-State students watched and recorded the assault with videos and photos; once as he drove her to the University-recognized fraternity house; and once in the public, multi-bed sleeping room of the fraternity house. *Id.* ¶¶ 13-15. Then J.K. abandoned S.W., naked and passed out. *Id.* ¶ 15. Hours later, she awoke to another K-State student and fraternity member allegedly raping her. *Id.* ¶ 16. When she tried to escape him, he followed her onto the fraternity balcony and allegedly raped her again. *Id.*

Soon thereafter, S.W. learned that videos and photos of the first alleged rape were being shared among students on social media. *Id.* ¶ 18. She also received harassing messages about her alleged rapes. *Id.* ¶43. She became fearful on campus, worried she would run into the accused.

Id. ¶¶ 27, 29, 36, 77. S.W. reported the rapes and related harassment to K-State's Affirmative Action Office ("AAO") in charge of enforcing its sexual misconduct policy. *Id.* ¶¶ 22, 43. There she learned that, despite the fact that 21 percent of K-State students participate in fraternities and sororities, *id.* ¶ 59, "K-State would do nothing about the rapes or the two-student assailants because the rapes occurred off-campus," *id.* ¶ 22. Undeterred, S.W. reported the rapes to deans from the Office of Student Life, but they also told her they would not investigate what they viewed as off-campus rape. *Id.* ¶ 38. In June 2014, S.W. and her family met with two deans of Student Life and the Interim Director of the AAO. *Id.* ¶ 46. Despite notice of the continuing effects the alleged rapes had on S.W.'s education and mental health, the officials told her K-State would not respond to reports of off-campus rape. *Id.* Yet, K-State suspended the fraternity for serving alcohol in violation of K-State rules at the event where she was allegedly raped. *Id.* ¶¶ 39, 41, 62.

As a result of her alleged rapes and K-State's refusal to investigate them, S.W. has spent the last two years of college in constant fear. *Id.* ¶¶ 29, 36. She exhibits symptoms of Post-Traumatic Stress Disorder. *Id.* ¶¶ 78. She stopped going to classes and hid in her dorm room. *Id.* ¶ 36. She refused to access campus resources unless friends could accompany her. *Id.* ¶ 77. She turned down academic opportunities. *Id.* ¶ 80. Her grades fell and she lost her scholarship. *Id.* ¶ 79.

QUESTIONS PRESENTED

1. Whether S.W. sufficiently pleads facts alleging severe, pervasive, and objectively offensive harassment that created a hostile environment in a K-State education program or activity, where she alleges being raped multiple times by two K-State students in a fraternity recognized by K-State, and experiencing continuing effects of the rapes on campus?

2. Whether K-State had a duty to respond once it had actual knowledge of reports of rape perpetrated by K-State students over which it exercises disciplinary authority, and again upon notice of S.W.'s ongoing experience of a hostile environment on campus created by those alleged rapes?

3. Whether S.W. sufficiently pleads that K-State acted with deliberate indifference by refusing to respond to her reports of student-on-student rape and by maintaining an official policy of not investigating reports of "off-campus" rapes in its fraternities, which are a university-recognized extracurricular activity?

4. Whether S.W. sufficiently pleads plausible claims for equitable relief under Title IX?

ARGUMENT

Title IX covers all education programs and activities of a federally funded school, including the house and events of a school-recognized fraternity. The continuing effects of student-on-student rape, including the constant fear of exposure to one's assailant, can render a student's educational environment hostile. Thus, a school must respond to allegations of sexual assault in fraternity activities to determine if a hostile environment exists there or in any other education program or activity. Even if an alleged student-on-student assault occurs outside of such a program or activity, a school has a duty to respond to the allegations to determine if a hostile environment related to the assault exists in one of its programs or activities. If a school responds in a manner that is deliberately indifferent to the alleged assault or attendant hostile environment, it may be held liable for damages. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999). Contrary to K-State's suggestion, a student who has notified her school of a hostile educational environment created by rape at a fraternity need not wait to be raped or otherwise harassed again by her student assailant to trigger her school's Title IX duty to respond or seek relief in court.

In this case, S.W. alleges sufficient facts to establish a plausible Title IX claim for damages under *Davis*. First, S.W. alleges that she experienced severe, pervasive, and objectively offensive harassment by other K-State students in the context of an education activity over which K-State exercises substantial disciplinary and regulatory control: at the event and house of a K-State-recognized fraternity. S.W. alleges that K-State had actual knowledge of her reported

rapes, the related peer harassment, and the hostile educational environment thereby created, and that it was deliberately indifferent in refusing to investigate or otherwise address the alleged rapes and attendant hostile environment. In addition, the Complaint alleges sufficient facts showing that K-State created and maintained an "official policy … of deliberate indifference" by interpreting its sexual misconduct policy to exempt rapes at fraternities and fraternity events—its own extracurricular activities—and by refusing to investigate reports of such rapes. *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007).

Because S.W.'s allegations are sufficient to establish all elements of a Title IX damages claim, they are more than sufficient to state a Title IX claim for equitable relief.

I. S.W. has pled a plausible Title IX claim for damages under the *Davis* standards

Title IX prohibits recipients of federal funds from discriminating on the basis of sex in all of their education programs and activities. 20 U.S.C. § 1681(a). In *Davis,* the Supreme Court considered whether a recipient could be held liable for damages for peer sexual harassment and "conclude[d] that recipients … may be liable for 'subject[ing]' their students to discrimination 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." 526 U.S. at 646-47. The Court limited damages liability to circumstances wherein the recipient "exercises substantial control over both the harasser and the context" in which the harassment occurred, *id.* at 645, and defined "deliberate indifference" to mean "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances," *id.* at 648.

In reversing the lower court's dismissal of Davis's complaint under Rule 12(b)(6), the Court determined that the alleged verbal and physical harassment over a five-month period was "severe, pervasive, and objectively offensive" and "had a concrete, negative effect on [Davis's]

daughter's ability to receive an education." *Id.* at 653-54. With respect to the other elements of a Title IX damages claim, the Court stated that the "complaint also suggests that [Davis] may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment." *Id.* at 654. The allegations in S.W.'s Complaint likewise suffice under *Davis*'s Rule 12(b)(6) analysis.

Consistent with *Davis*, the Tenth Circuit has held that a school may be liable for damages under Title IX where it "(1) has actual knowledge of, and (2) is deliberately indifferent to, (3) [sexual] harassment that is so severe, pervasive[,] and objectively offensive as to (4) deprive access to the educational benefits or opportunities provided by the school." *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1119 (10th Cir. 2008). The allegations in S.W.'s Complaint also state a plausible Title IX claim for damages under binding Tenth Circuit case law, which explicitly recognizes that sexual assault occurring off school grounds can create liability under Title IX provided there is "some nexus between the out-of-school conduct and the school." *Id.* at 1121 n.1 (citing *Davis*, 526 U.S. at 645).

A. S.W. has sufficiently pled that K-State knew of severe, pervasive, and objectively offensive sexual harassment that created a hostile educational environment

To establish a claim for damages based on peer sexual harassment, a student must show a school had actual knowledge of sufficiently severe, pervasive, and objectively offensive sexual harassment that created a hostile environment in an education program or activity. Rape constitutes a severe form of sexual harassment that can create a hostile educational environment under *Davis*. *See, e.g.*, *Soper v. Hoben*, 195 F.3d 845, 854-55 (6th Cir. 1999). Student-on-student rape can have continuing effects that create a hostile educational environment for the victim. *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1297-98 (11th Cir. 2007); s*ee also Wills v. Brown Univ.*, 184 F.3d 20, 37 (1st Cir. 1999) ("The effect of such abusive conduct

on a victim does not necessarily end with a cessation of the abusive conduct, particularly if the victim and the abuser retain the same or similar roles in an educational institution.").

S.W. sufficiently alleges that she gave K-State actual notice of severe, pervasive, and objectively offensive sexual harassment in an education activity covered by Title IX when she reported being repeatedly raped by K-State students at the house and event of a university-recognized fraternity. Compl. ¶¶ 13-16, 22. Even if the alleged rapes had not occurred in an extracurricular activity covered by Title IX, S.W.'s repeated reports to K-State made clear that the continuing effects of the alleged rapes created a hostile environment on campus that denied her educational benefits and opportunities. *Id.* ¶ 27, 79, 80. She reported her constant fear and risk of encountering the accused, harassing posts about the alleged rapes by peers on social media, and how both conditions deprived of her of access to K-State programs and activities. *Id.* ¶¶ 29, 30, 43, 46.

1. K-State-recognized fraternities are education activities covered by Title IX

Title IX's text, case law, regulations, and guidance clearly instruct that a university-recognized fraternity is an education activity, and that S.W. may state a Title IX claim based on K-State's refusal to respond to a report of rape at such a fraternity's house or event. Title IX defines "program or activity" as "all of the operations of … a college [or] university." 20 U.S.C. § 1687(2)(A). Thus, as K-State acknowledges, sex discrimination that occurs under any of its programs or activities is covered by Title IX. MTD at 7. K-State contends, however, that rape at a fraternity house or event located "off campus" is not covered. MTD at 7-12. This contention is incorrect. As S.W.'s allegations illustrate, a K-State-recognized fraternity is a covered education activity, and K-State may be held liable for its failure to respond to rapes that occur at such a fraternity's house or event. Compl. at ¶¶ 23, 39-41, 43, 57-59, 62-63, 67, 69-72.

Title IX is broad remedial legislation whose text "should be accorded 'a sweep as broad as its language.'" *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)). The all-encompassing language of §§1681 and 1687—"*any* education program or activity," and "*all* of the operations"—is qualified only by the statute's express exemptions. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition."). The explicit exceptions to Title IX mandates in § 1681(a)(1)-(9) do not exempt extracurricular activities that extend off campus, such as fraternities.[3] Nor does the statute's text provide any geographic limitations on Title IX's application to these activities. To the contrary, the Tenth Circuit and other courts have recognized that off-campus conduct occurring under a school's activity or program is covered by Title IX. *See, e.g., Simpson*, 500 F.3d at 1178-80, 1184 (finding football recruiting activities taking place off campus are part of university's program and finding Title IX liability may lie for response to student-on-student sexual assaults by recruits at a private apartment); *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002) (finding study abroad program was covered under Title IX).

Consistent with this case law, ED has long interpreted Title IX and its regulations to protect students while they participate in extracurricular activities that extend outside the geographic confines of campus. ED's regulations clarify that Title IX's broad sweep includes any "extracurricular" activity or program of a university, 34 C.F.R. § 106.31(a), and its guidance explains that this means "whether [those programs] take place in the facilities of the school, on a

[3] The exemption in § 1681(a)(6)(A) applies only to fraternity membership practices.

school bus, at a class or training program sponsored by the school at another location, or elsewhere," 2001 Revised Sexual Harassment Guidance at 2-3.[4]

Additional Title IX guidance from ED made clear that schools "must determine whether … alleged off-campus sexual violence occurred in the context of an education program or activity of the school," and if it did, "the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus." 2014 Questions and Answer on Title IX and Sexual Violence at 29 ("2014 Q&A").[5] This guidance spoke directly to whether university-recognized fraternities are "extracurricular" programs or activities and, thus, whether Title IX extends to misconduct at university-recognized fraternity houses and events:

> **Off-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school;** school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (*e.g.*, a debate team trip to another school or to a weekend competition).

Id. (emphasis added). ED's regulations and guidance on this issue are consistent with Title IX's broad text and remedial purpose, are supported by case law, and should be afforded *Chevron* and *Auer* deference, respectively. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).[6]

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[4] A*vailable at* http://www.ed.gov/ocr/docs/shguide.pdf; *see also* Office for Civil Rights ("OCR") 2011 Dear Colleague Letter on Sexual Violence 4 ("2011 DCL"), *available at* http://www.ed.gov/ocr/letters/colleague-201104.pdf ("For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.").

[5] *Available at* http://www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[6] The Tenth Circuit and other courts have afforded ED this deference in interpreting Title IX. *See Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993) ("We defer substantially to [ED's] interpretation of its own regulations. This is especially so when, as here, they are effectively legislative, pursuant to a statutory delegation.") (internal citations omitted); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 U.S. App. LEXIS 7026, at *19, 26-28 (4th Cir. Jan. 27, 2016) (finding ED's interpretation of an ambiguous term should be given controlling weight if it reflects the agency's fair and considered judgment); *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) ("It is well settled that where, as here, Congress has expressly delegated to an agency the power to 'elucidate a specific provision of a statute by regulation,' the resulting regulations should be accorded 'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.' It is also well established 'that an agency's

The facts alleged in S.W.'s Complaint underscore the reasonableness of ED's guidance, and demonstrate that K-State *itself* considers the fraternities to be its extracurricular activities. First, S.W. states that at the time of her alleged rapes, K-State endorsed the fraternity and its house with official University recognition. Compl. ¶ 23. Official recognition brings with it a host of benefits, including financial benefits, personnel, and other resources. *Id*. ¶¶ 23, 59, 67, 69. S.W. also alleges that "Fraternities are student organizations, boasted by K-State as an integral part of its campus experience and highlighted as part of its self-promotion." *Id*. ¶ 63. K-State hosts a Greek Affairs website, where it provides information about university-recognized fraternities and houses, and discusses the value of "Our Greek Community" consisting of 17 sororities, 28 fraternities, and nearly 4,000 undergraduate students, approximately 21 percent of K-State's student population. *Id*. ¶ 57, 59. Indeed, K-State markets itself and the educational experience it offers by promoting fraternity life to prospective students and their parents. *Id*. ¶ 58. The Complaint alleges that K-State's website states: "The Greek experience at K-State provides a *safe* and fun way to maximize the college experience." *Id*. (emphasis added).

To conclude, as K-State does, that the off-campus activities of its recognized fraternities are not covered by Title IX would leave students who are participating in the school's extracurricular activities without any recourse from the school should a sexual assault occur. *See King*, 221 F. Supp. 2d at 791. Surely, when K-State boasts of the value of its Greek life and promotes that life to students, it does not mean to exclude the bulk of activities at the houses and events of its university-recognized fraternities. Those houses and activities are hallmarks of Greek life at universities nationwide, and K-State is no exception.

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construction of its own regulations is entitled to substantial deference.'") (quoting *Chevron*, 467 U.S. at 844 and *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991)).

2. K-State had actual knowledge of the hostile environment on campus

Even if S.W.'s alleged rapes at the fraternity house and event had not been within a K-State extracurricular activity, S.W. adequately pleads that she notified K-State that the alleged rapes created a hostile environment that she continued to experience in other education programs and activities on campus. *Id*. ¶ 22, 38, 46. For example, S.W. reported to K-State that: she felt "at risk and in constant fear of encountering [her] student-assailants on campus"; she hid in her dorm, stopped going to classes, and even withdrew from a math class; and her grades fell and she lost her scholarship. *Id.*¶¶ 29, 36, 79. These allegations show K-State knew that the reported rapes and the hostile environment they created in education programs and activities on campus had a "concrete, negative effect on [her] ability to receive an education" to which it had a duty to respond. *Davis*, 526 U.S. at 654.

B. Reports of student-on-student rape, whether the rape occurred on or off campus, trigger the Title IX duty to determine if a hostile environment exists

S.W.'s report to K-State that she was raped by students at a K-State fraternity house and event triggered its Title IX duty to investigate or otherwise determine if the effects of the alleged rapes rendered her educational environment hostile. Though K-State ignored this duty, S.W. repeatedly put K-State on notice that the alleged rapes, subsequent peer harassment about them, and constant fear of encountering the accused created a hostile environment on campus. *Id.* ¶¶ 21-22, 29, 30, 38, 43-46. K-State's duty to evaluate whether the alleged rapes occurred and created a hostile educational environment was thus triggered again. Yet, again, K-State refused to fulfill its Title IX duty to investigate or otherwise determine what occurred.

1. Courts and ED interpret Title IX to include this duty

Davis predicates a school's liability for monetary damages on whether a school has actual knowledge of the harassment and substantial control over the harasser and the context of the

harassment. 526 U.S. at 645. Courts have interpreted this to allow for sexual harassment claims under Title IX even where some or all of the alleged misconduct occurred in a location outside the control of the school, as long as there is "some nexus between the out-of-school conduct and the school." *Rost*, 511 F.3d at 1121 n.1. A hostile environment in the education setting caused by the off-campus harassment creates such a nexus. *See Crandell v. N.Y. Coll., Osteopathic Med.*, 87 F. Supp.2d 304, 315-16 (S.D.N.Y. 2000) (student alleged nexus between off-campus sexual harassment by faculty member and hostile environment on campus because incident "made her feel frightened and uncomfortable and consequently caused her to miss her anatomy class").

When assessing whether off-campus rape creates a hostile environment on campus, courts have recognized that the pernicious effects of rape by another student are not limited to the event itself and can permeate the educational environment. *See, e.g., Williams*, 477 F.3d at 1297-98; *Spencer v. Univ. of N.M. Bd. of Regents*, 15-cv-00141-MCA-SCY (D.N.M. Jan. 11, 2016) (finding in a case involving off-campus rape that "[a] single act of severe sexual harassment—particularly rape … can support a Title IX claim where the claim is premised upon the school's response to the report of the incident of sexual harassment.") (Exhibit A); *see also Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists, and noting that courts look to Title VII cases for guidance in analyzing Title IX sexual harassment claims); *Ferris v. Delta Air Lines Inc.*, 277 F.3d 128, 136-37 (2d. Cir. 2001) (holding that an employer had duty under Title VII to take steps to respond to employee-on-employee rape that occurred outside of work, explaining that although employer's "ability to investigate was curtailed by the fact that the . . . rapes occurred off-duty," that did not absolve employer "of all responsibility to take reasonable care to protect co-workers, much less justif[y] a supervisor's affirmative steps to prevent a victim from filing a written complaint.").

This is due to the daily potential of the victim student encountering her assailant as they both live and learn at the college. *Williams*, 477 F.3d at 1297-98; *Wills*, 184 F.3d at 36-37; *see also Doe ex rel. v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 445 (D. Conn. 2006) (noting "that an interaction with [her assailant] would be sufficiently distressing or threatening such that the fact of their continued mutual presence in the same building and concomitant possibility of potential interaction impacted" her academic decisions); *Kelly v. Yale Univ.*, No. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) ("[A] reasonable jury could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.").

Further, as the Court recognized in *Davis*, "the deliberate indifference by [a school] to the unwelcome sexual advances of a student" can itself create "an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." 526 U.S. at 636. The Eleventh Circuit in *Williams* came to the same conclusion. There, the University of Georgia (UGA) delayed its investigation of a student-on-student gang rape for eight months and its corrective process for another three. *Williams*, 477 F.3d at 1296-97. The court found that UGA's failure "to take any precautions that would prevent future attacks...either by, for example, removing from student housing or suspending the alleged assailants, or implementing a more protective sexual harassment policy to deal with future incidents" created a hostile environment that prevented the plaintiff's return to school. *Id.* at 1297. *Davis* and *Williams* recognize that severe peer sexual harassment can create a hostile educational environment, and that a school's failure to respond to the known harassment for months can create such an environment and worsen an existing one.

Consistent with the case law and Title IX's general prohibition on subjecting a student to discrimination, ED issued guidance explaining a school's duty to respond to reports of off-

campus sexual violence through the grievance procedures required in the Title IX regulations, and the duty to consider the effects of off-campus sexual violence when evaluating if there is a hostile environment on campus. *See* 2011 DCL at 4;[7] 2014 Q&A at 29-30 ("The mere presence on campus or in an off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment."). K-State urges this Court to reject ED's guidance, arguing that it is inconsistent with Title IX. MTD at 11-12.

ED's interpretation that a school cannot ignore reports of off-campus student-on-student rape is reasonable, consistent with Title IX and *Davis*, and should be afforded deference. *See supra* note 6. This interpretation recognizes, as so many courts have, that the hostile effects of a rape can permeate the academic environment and deprive the student of educational benefits. *See discussion supra* at 12-13. S.W.'s Complaint starkly illustrates this reality, alleging numerous details about "the continuing effects of the rapes in the educational setting, including fear of encountering the student-assailants on campus," and the effects of having the videos of her assaults shared on social media. *Id.* ¶¶ 27, 29, 30, 36, 43, 46, 77-80.

Despite S.W.'s repeated reports of these continuing effects, for over two years K-State allegedly refused to take any "precautions that would prevent future attacks," *Williams*, F.3d at 1297, or otherwise fulfill its Title IX duty to respond to the hostile educational environment that the alleged rapes created. *Id.* ¶¶ 76, 77.

[7] The 2011 DCL states: "If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus."). *Id.*

2. K-State's claim that it had no duty to respond due to a lack of substantial control ignores the allegations in the Complaint and the relevant case law

K-State seeks to dismiss S.W.'s Title IX claims for damages, arguing that it had no duty to investigate the reported rapes or otherwise determine what occurred because they occurred "off university property and at a private event," and were out of K-State's "contemporaneous control." MTD at 6-12. In making this argument, K-State ignores binding precedent and the well-pled facts, and relies principally on two inapposite cases from the Eighth Circuit.

First, "contemporaneous control" is not the standard articulated in *Davis*. Rather, *Davis* limited damages liability "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." 526 U.S. at 645. As the Court explained, control over the context of the harassment, but "[m]ore importantly … over the harasser," allows the school to respond to the hostile educational environment, and exposes the school to monetary liability when its response is clearly unreasonable. *Id.* at 646, 648. A school's "substantial control" and potential liability under Title IX is therefore not defined solely by a school's ability to ***prevent*** the harassment at the moment it happens, as K-State suggests, but also by its ability to ***respond*** to the harassment once on notice of a hostile environment in any of its programs or activities. *Id.* at 648 (liability will lie "where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances").

Second, contrary to K-State's insistence that it has no Title IX duty to respond to reports of "off-campus" rape at fraternities, Tenth Circuit precedent recognizes that neither a school's duty to respond under Title IX, nor potential liability under *Davis*, ends simply because a sexual assault originated off campus, *see* S*impson*, 500 F.3d at 1177, or even wholly outside of one of its programs or activities, *see Rost*, 511 F.3d at 1124; *see also C.R.K. v. U.S.D. 260*, 176 F. Supp.

2d 1145 (D. Kan. 2001). The Tenth Circuit thus recognizes Title IX's broad sweep by correctly examining whether a rape created a hostile environment in an education program or activity even if the rape occurred off campus. K-State's limited focus on the location of a student's rape thus ignores the pertinent issue, namely, whether the rape gave rise to a hostile environment in a program or activity over which the school has substantial control (*e.g.*, the authority to issue a no-contact order, change a class or dormitory, or revise its policies to better respond to rape). *See Williams*, 477 F.3d at 1297. K-State's interpretation of its duty under Title IX artificially confines the negative effects of a student-on-student sexual assault to the geographical location where the assault occurred. To accept this interpretation, this Court would have to believe that the effects of a student-on-student rape in a campus dorm could create a hostile educational environment, but the effects of the exact same rape occurring across the street in a university-recognized fraternity would not. Such an interpretation defies common sense.

In this case, S.W.'s allegations demonstrate the myriad ways in which K-State exercised substantial control over the alleged harassers and the context of the harassment. First, S.W states that the accused are K-State students subject to K-State's conduct policies and disciplinary authority. Compl. ¶¶ 13, 16, 23. Further, as detailed above, *see supra* at 10, S.W. alleges that K-State granted recognition to the fraternity, which subjects it to regulatory and disciplinary control. *Id.* ¶¶ 23, 39-41. Specifically, K-State imposes rules for student conduct at fraternity events and houses, and imposes sanctions for violating those rules, including withdrawal of university recognition. *Id*. ¶¶ 39-41, 43, 44, 62-64, 109. S.W. alleges that K-State exercised its substantial control by investigating and sanctioning the fraternity for alcohol use at the events where the rapes occurred, but not for the rapes themselves. *Id.* ¶ 41. That K-State chose not to exercise this substantial control to investigate the rapes in S.W.'s case and discipline the accused students does not mean that such control did not exist. *See id.* ¶ 31; *Murrell v. Sch. Dist. No. 1,*

Denver, Colo., 186 F.3d 1238, 1247-48 (10th Cir. 1999) (finding substantial control existed where principal had authority to, and in fact did, discipline students for conduct stemming from the context at issue, regardless of her decision not to exercise that authority to address the alleged harassment).

K-State ignores these facts, relying instead on two inapposite cases from the Eighth Circuit to argue that it had insufficient control over the alleged rapes to incur any liability for the hostile environment they created in its programs and activities. First, both *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014), and *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. 2003), involved assaults that occurred at private parties in private residences, *not* at a university-recognized fraternity house or event. Moreover, the Eighth Circuit found that, in both cases, the summary judgment record lacked evidence sufficient to show that the defendant-schools exercised *any* regulatory or disciplinary authority over the private places and events where the assaults took place. *See Roe*, 746 F.3d at 878, 884 (finding that "on the facts of this case there was no evidence that the University had control over the student conduct at the off campus party" and noting that the private apartment party was "not an official fraternity event"); *Ostrander*, 341 F.3d at 745, 748, 750-51 (noting several times that the sexual assault occurred at a private residence that was *not* the fraternity's official "chapter house").

Similarly, the courts in the other cases cited by K-State found the records devoid of facts indicating that the schools exercised substantial control over the private residences and events in question. *See Clifford v. Regents of Univ. of Cal.*, No. 2:11-CV-02935-JAM, 2012 WL 1565702, at *7 (E.D. Cal. Apr. 30, 2010) (finding "no facts alleged" to show university had any control over conduct at a private home in Lake Tahoe); *Samuelson v. Or. State Univ.*, No. 6:15-CV-01648-MC, 2016 WL 727162, at *6 (D. Or. Feb. 22, 2106) (finding that plaintiff did not allege

facts to demonstrate university had any control over a rape by a non-student at a private apartment).

These cases are therefore unlike this one. S.W.'s Complaint is replete with allegations sufficient to show that K-State exercises substantial control over both the accused students and the fraternity house and event at issue. *See supra* at 16-17.

K-State's reliance on the Tenth Circuit's decision in *Rost* and the district court's decision in *C.R.K.* is similarly misplaced. Those cases do not support its argument that it has no duty to respond to off-campus student-on-student rape at a university-recognized fraternity's house and event. Rather, in both *Rost* and *C.R.K.*, the courts evaluated the reasonableness of the schools' responses to reports of off-campus harassment under the *Davis* deliberate indifference standard, even though the initial harassment occurred outside of any school program or activity. Unlike K-State, the school in *Rost* contacted and cooperated with law enforcement to take the lead on an investigation of harassment that occurred outside of any school program or activity before either student was even enrolled, and the school took steps to prevent further harassment by finding safe educational alternatives. *Rost*, 511 F.3d at 1124. The court's decision thus turned on insufficient evidence of deliberate indifference, not a lack of substantial control. *Id.*; *see also C.R.K.*, 176 F. Supp. 2d at 1167 (finding the evidence of deliberate indifference insufficient where school did not ignore the student's reports of off-campus harassment over the summer, but rather, took numerous steps to address it).

Similarly, in *Roe*, the Eighth Circuit found insufficient evidence of deliberate indifference where the victim did not initially give the school enough information to investigate, and yet the school still informed the victim of her rights and where to seek support, and then opened an investigation promptly when the victim did file a formal request. 746 F.3d at 881-84; *see also Ostrander*, 341 F.3d at 751 (finding insufficient evidence of deliberate indifference

where, after receiving complaints, the college met with local fraternity chapter about conducting a thorough investigation of the rape allegations and in-house educational programming on sexual assault).

Put simply, the main cases that K-State relies upon in it motion to dismiss—*Roe*, *Ostrander*, *Rost*, and *C.R.K.*—are not like S.W.'s, where K-State refused to take any action to protect her or investigate her reports of rape by two students, even though it has disciplinary authority over them, their fraternity house, and its events. These cases also were all decided at the summary judgment stage, at which point the court was evaluating not whether it was *possible*, as a matter of law, for a school to be held liable for its response to an off-campus rape, but whether the evidentiary record was sufficient to show the school's response was clearly unreasonable.

In short, none of the cases cited by K-State construes what Title IX liability a university may have when it refuses to investigate a report of student-on-student rape at the house or event of one of its recognized fraternities over which it has disciplinary control. Moreover, the Tenth Circuit recognizes that Title IX, as interpreted by *Davis*, prohibits a school from "sitting idle" or sticking its head in the sand, professing it lacks authority to respond to reports of harassment that deny a student's access to education. Rather, Title IX requires a school to examine whether harassment that originated on or off campus creates a hostile environment in an education program or activity, and to respond to such harassment in a manner that is not "clearly unreasonable." *See, e.g.*, *Rost*, 511 F.3d at 1121.

Applying *Davis*'s standards correctly at the motion to dismiss stage, S.W. sufficiently pleads that K-State knew she was allegedly raped while participating in a "program or activity" of K-State; that she continues to experience a hostile environment on campus in other K-State programs and activities as a result of those alleged rapes; and that K-State exercises substantial

control over both her alleged harassers and the context of the alleged harassment. *See Davis*, 526 U.S. at 644-48 (holding that liability may lie where the recipient has the "authority to take remedial action" and "the harasser is under the school's disciplinary authority"). S.W. has thus sufficiently alleged that K-State had and continues to have a duty under Title IX to respond to her reports of rape in a manner that is not clearly unreasonable.

C. S.W. has sufficiently pled that K-State was deliberately indifferent to the hostile educational environment that existed in the fraternity and on campus

S.W. sufficiently alleges facts showing that K-State acted with deliberate indifference by refusing to investigate and otherwise respond to her reports of student-on-student rape, and by maintaining an official policy of not investigating reports of "off-campus" rapes at fraternities and fraternity events even though they are a university-recognized extracurricular activity.

A school evinces deliberate indifference when its "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. Once on notice of student-on-student sexual assault that created a hostile environment, a school may not "remain idle." *Id.* at 641; *see also Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155 (10th Cir. 2006) (("[A] minimalist response is not within the contemplation of a reasonable response.") (quoting *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000)).

In *Davis*, a fifth-grade student alleged a prolonged pattern of sexual harassment by a classmate and reported each incident to the school. 526 U.S. at 633-34. The Supreme Court reversed the trial court's grant of a motion to dismiss, holding that "petitioner may be able to show that the Board 'subjected' [her] to discrimination by failing to respond in any way over a period of five months." *Id.* at 649; *see also Williams*, 477 F.3d at 1296-97 (finding UGA deliberately indifferent where it waited almost 11 months to take action after notice of a student

gang rape despite a campus police report filled with evidence corroborating the plaintiff's account).

Here, S.W. sufficiently alleges facts that K-State evinced deliberate indifference to both the alleged rapes and the hostile on-campus environment they created, as it has "remained idle" for over two years despite her repeated reports. *See Davis*, 526 U.S. at 649. Similar to the schools in *Davis* and *Williams*, K-State failed to conduct any type of investigation, telling S.W. that "K-State would not investigate or take action to hold the student-assailants responsible, remove them from campus, sanction them, or protect [S.W.] and the rest of the student population from their presence on campus in any way." Compl. ¶22. This refusal to respond in any way was clearly unreasonable in light of the known circumstances, especially as S.W.'s reports to K-State put the school on notice of allegedly predatory behavior by the accused students,[8] and continuing threats to S.W. and others. K-State's refusal to investigate these reports makes S.W., and others, "more vulnerable" to rape. *See Davis*, 526 U.S. at 645; Compl. ¶ 83.

S.W. also pleads sufficient facts to show that K-State was deliberately indifferent to the known hostile educational environment the alleged rapes created. S.W. reached out to K-State administrators to inform them of "the continuing effects of the rapes in the educational setting, including fear of encountering the student assailants on campus," but "K-State did not take those effects into account in evaluating the hostile environment she suffered and refused to investigate." Compl. ¶ 27. The unreasonableness of K-State's refusal contributed to the hostile environment, causing S.W. to lose her sense of security on campus, "living in constant hypervigilance and dread," *id.* ¶ 36, 77, and deprived her of educational benefits, *id.* ¶¶ 36, 47, 78-80.

[8] The first student allegedly used his position as the fraternity's designated driver to prey on S.W., sexually assaulting her three times – the first time quite publicly. *Id.* ¶ 13-15. The second student allegedly raped her once inside the fraternity house, followed her as she attempted to escape, and raped her again on the patio. *Id.* ¶ 16.

S.W. also alleges that K-State's own affirmative acts made her vulnerable to further harassment and contributed to the hostile environment. A K-State investigator called the accused students to tell them that S.W. had filed a report which "egregiously exposed [her] to potential retaliation, compromised her safety, placed her in fear, and undermined the police investigation by tipping off the student-assailants and giving them an opportunity to coordinate their stories." Compl. ¶ 33. An Assistant Dean revealed S.W.'s name and other private information in her reports to fellow K-State students. *Id.* ¶ 48. These disclosures, which "shattered any remaining sense of privacy" for S.W., were clearly unreasonable since K-State had decided not to investigate the alleged rapes. *Id.*

K-State tries to justify its refusal to investigate the reported rapes on the grounds that it lacked control over the accused students and their fraternity. This argument is discredited not only by the allegations discussed above in Section I.B.2, but also by the following: (1) K-State decided it could investigate "the harassing and retaliatory posts [regarding an off-campus assault] on social media," (2) "has in other circumstances investigated off-campus reports of sexual assault, including a sexual assault by a K-State basketball player," and (3) informed S.W. that they would suspend the chapter for off-campus alcohol use, but not the alleged rapes. *Id.* ¶¶ 30, 31, 39, 41. Though K-State tries to analogize its situation to that of other schools which courts found were not deliberately indifferent, its efforts ignore the pled facts and strain credulity. *See* MTD at 8-11, 17-19 (discussing several cases).

First, none of the schools in *Rost, C.R.K., Roe,* or *Ostrander* involved a situation where, as here, "a school [] learned of a problem and did nothing." *Rost*, 511 F.3d at 1121-22. Unlike the schools in *Rost* and *C.R.K*, K-State did not defer to an already open law enforcement investigation with which it stayed intimately involved and assisted. Instead, K-State impeded S.W.'s law enforcement investigation by calling her alleged assailants and putting them on

notice that she had filed charges against them. Compl. ¶ 33. Unlike the plaintiff in *Roe*, the pled facts reveal that K-State's refusal to respond was not stymied by lack of cooperation by S.W., who requested an investigation multiple times. *Id.* ¶¶ 22, 33, 38, 46; *see also* discussion of *Ostrander supra* at 18-19. Rather, like the schools in *Davis* and *Williams*, K-State remained idle for months despite having sufficient evidence to proceed, including witnesses to S.W.'s alleged rape who K-State could have interviewed or from whom video-recordings or photos might have been obtained. *Id.* ¶¶ 1, 13, 22, 33, 38, 46.

Second, all of these cases reinforce that the location of the assault is not the end of the liability analysis under *Davis*. Each of the courts proceeded through the *Davis* standards to determine if the school's response to the alleged harassment evinced deliberate indifference to a hostile environment created within a school program or activity. *See discussion supra* at 15-19.

Third, *Escue*, *Rost* and *Rouse* do not stand for the proposition that a plaintiff must affirmatively assert additional acts of sexual harassment after a school's refusal to respond to establish liability. MTD at 17-19. The specific facts of those cases showed that the schools did not cause further harassment because their responses were not clearly unreasonable. *Escue*, 450 F.3d at 1155-56 (finding no deliberate indifference where school's "response was not minimal," or "ineffective such that she was further harassed."); *Rost*, 511 F.3d at 1124 (finding the school "district took steps to prevent further harassment of [the victim] by working with [her mother] to find safe educational alternatives …."); *Rouse v. Duke Univ.*, 914 F. Supp. 2d 717, 725-26 (M.D.N.C. 2012) (finding no deliberate indifference where there was no evidence that the school's failure to investigate *either* caused further harassment *or* influenced the plaintiff's decision to leave school).

This Court should thus reject K-State's contention that Title IX requires a student, who reports being raped by another student under the school's disciplinary authority, to undergo

additional harassment *before* her school has to respond to her report. As courts recognize, requiring "that a student must be harassed or assaulted a second time before the school's clearly unreasonable response to the initial incident becomes actionable … runs counter to the goals of Title IX." *Karasek v. Regents of Univ. of Cal.*, No. 15-cv-03717-WHO, 2015 U.S. Dist. LEXIS 166524, at *38-39 (N.D.CA. Dec. 11, 2015); *Spencer*, 15-cv-00141-MCA-SCY (D.N.M. Jan. 11, 2016) ("A victim does not have to be raped twice before the school is required to respond appropriately."); *Takla v. Regents of Univ. of Cal.*, No. 2:15-cv-04418-CAS(SHx), 2015 U.S. Dist. Lexis 150587, at *16 (C.D. Cal. Nov. 2, 2015) ("[P]lacing undue emphasis on whether further harassment actually occurred to gauge the responsiveness of an educational institution would penalize a sexual harassment victim who takes steps to avoid the offending environment in which she may again encounter the harasser.").

As *Davis* instructs, K-State's motion to dismiss should be denied because the pled facts state that the university made "no effort whatsoever either to investigate or to put an end to the harassment." 526 U.S. at 654. Indeed, courts have correctly concluded that a plaintiff may survive a motion to dismiss when alleging constant fear and anxiety about encountering an assailant on campus, and the school fails to address this hostile aspect of her daily environment. *See, e.g., Williams*, 477 F.3d at 1297 (UGA's "inexplicable" failure to "take any precautions that would prevent future attacks" constituted further discrimination); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172 (1st Cir. 2007) ("Though removed from the vicinity of her harassers, the victim … could still be subject to the university's discrimination, which in that case took the form of a failure to take any precautions that would prevent future attacks."); *Doe v Bibb Co. Sch. Dist.*, 126 F. Supp. 3d 1366, 1380 (N.D.GA. 2015) ("'[F]urther discrimination' can be a response on the part of the funding recipient that is so ineffective it bars the victim's access to educational opportunities."); *Derby*, 451 F. Supp. 2d at 444 ("[E]ven absent actual post-assault

harassment by [the assailant], the fact that he and plaintiff attended school together could be found to constitute pervasive, severe, and objectively offensive harassment."); *Kelly*, 2003 WL 1563424, at *3 (same).

In addition, S.W. adequately pleads that K-State was deliberately indifferent by maintaining an official policy of not investigating reports of off-campus rape at fraternities. "A funding recipient can be said to have 'intentionally acted in clear violation of Title IX,' when the violation is caused by official policy …" *Simpson*, 500 F.3d at 1178 (quoting *Davis*, 526 U.S. at 642). The Tenth Circuit recognized that "implementation of an official policy can certainly be a circumstance in which the recipient exercises significant 'control over the harasser and the environment in which the harassment occurs.'" *Id.* at 1178.[9]

S.W. alleges sufficient facts under *Simpson* to show that K-State had an official policy not to investigate rapes at the houses and events of university recognized fraternities. Compl. ¶¶ 2, 5, 24, 25, 27-28, 34, 49, 72-74, 83, 88-90. S.W. alleges that this refusal effectively "tolerated" such misconduct within one of its own extracurricular activities. *Id.* ¶ 87; *see also id.* ¶¶ 49, 56, 71-74, 83; *Simpson*, 500 F.3d at 1172, 1175, 1178, 1184-85.

II. S.W.'s Complaint States a Plausible Claim for Equitable Relief under Title IX

S.W. seeks not only damages for K-State's violations of Title IX, but also equitable relief. Specifically, she requests injunctive relief ordering K-State "to conduct an investigation and disciplinary proceedings into [S.W.]'s report of sexual assault," and to revise its policies, procedures, and practices so that it is in compliance with Title IX. Compl. at Prayer for Relief.

Congress authorized ED, and other federal departments, to issue rules, regulations, and orders to effectuate Title IX, and to enforce compliance, when recipients refuse to comply

[9] *See also CT v. Liberal Sch. Dist.*, 562 F. Supp. 2d 1324, 1339-40 (D. Kan. 2008) (recognizing that *Simpson* standard applies where the very operation of the school-sanctioned program created a risk of sexual abuse such that need for training would be obvious).

voluntarily, by administrative hearings to terminate federal funding or by "any means authorized by law." 20 U.S.C. § 1682. The latter option includes DOJ seeking equitable relief in court to secure the recipient's compliance. *See* 34 C.F.R. 100.8(a).[10] In 1979, the Court recognized a private litigant's right of action to equitable relief under Title IX. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 705 & n.38, 710 n.44, 711–712 (1979); *Gebser*, 118 S.Ct. at 1997–98 (citing same).

Both before and since *Gebser*, the United States has provided clear notice to recipients that the Title IX liability standards for agencies' administrative enforcement and authorized court enforcement to effect compliance through equitable relief, 20 U.S.C. § 1682, do not require actual knowledge of or deliberate indifference to a hostile education environment. Rather, for close to two decades, recipients received repeated notice of their Title IX liability to equitable claims or agency enforcement proceedings if (1) the recipient knows or reasonably should know of sexual harassment that (2) creates a hostile environment in an education program or activity, and (3) the recipient fails to take immediate and appropriate corrective action. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (1997) ("1997 Guidance") ("[Un]der these circumstances, a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX"); *see also* 2001 Guidance at 12 (describing these circumstances as those under which a school will be deemed in violation of Title IX); 2011 DCL (same); 2014 Q&A (same).

As the United States explained in its amicus brief to the Supreme Court in *Davis*, equitable relief should be available without the heightened showing of actual knowledge and

[10] ED's Title IX regulations adopted the enforcement procedures in the regulations implementing Title VI of the 1964 Civil Rights Act. *See* 34 C.F.R. 106.71 adopting 34 CFR 100.6–100.11.

deliberate indifference required by *Davis* because, unlike money damages, equitable relief does not raise the Court's "central concern" under the Spending Clause that a federal fund recipient be on notice of its exposure to liability for a monetary award. *See* Brief of the United States as Amicus Curiae in *Davis*, No. 97-843, U.S. S. Ct. Briefs LEXIS 776, at *31 (1998) (see Exhibit B); *Gebser*, 118 S. Ct. at 1998 (discussing central concern underlying *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), and *Guardians Assn v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)); *Davis*, 526 U.S. at 641 ("the scope of liability in private damages actions under Title IX is circumscribed by *Pennhurst's* requirement that funding recipients have notice of their potential liability"). The more exacting actual knowledge and deliberate indifference standards announced in *Gebser* and *Davis* reflect issues of notice relevant to damages claims, and thus are inapplicable to actions seeking equitable relief or administrative enforcement of Title IX.

Indeed, the Court in *Davis* repeatedly and carefully differentiated the scope of liability in a private damages action from "the scope of behavior that Title IX proscribes." *See* 526 U.S. at 639 ("Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages"). *Davis* also carefully distinguished the scope of liability in a private damages action from the broader scope of the Government's authority to enforce the requirements of Title IX. *See* 526 U.S. at 641-645 (citing cases for the proposition that the Government's enforcement authority is broader than the scope of liability for a private right of action, and discussing relevant distinctions between the two). Following *Davis*, ED sought public notice and comment on its proposed Title IX guidance that the damages standards in *Gebser* and *Davis* were limited to private actions for damages, and that the administrative enforcement standards reflected in ED's 1997 Guidance remained valid in agency enforcement actions. *See* 2001 Guidance at iv. The public comments supported ED's

interpretation, *see id.* at iv, which was set forth in its final 2001 Guidance (and subsequent guidance and enforcement). *See, e.g.*, 2011 DCL at 4 n.12; 2014 Q&A at 1 n.9.

The 2001 Guidance also notified recipients of the United States' view that "the standards set out in ED's guidance for finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable relief." *Id.* at iv n.2 (citing Brief of U.S. as Amicus Curiae in *Davis*). Because the statute and the regulation authorize ED to refer unresolved findings of noncompliance made under the administrative enforcement standards to DOJ for litigation, the United States' longstanding view that the standards for equitable relief in court should be the same as the administrative enforcement standards is also reasonable. *See* 20 U.S.C. § 1682; 34 C.F.R. 100.8(a). It would not make sense for Congress to authorize agencies to explain how they will evaluate recipients' compliance with Title IX and to effectuate such compliance through "any other means authorized by law," 20 U.S.C. § 1682, and then require a higher evidentiary showing to obtain equitable relief compelling the recipient's compliance. As the United States explained in its Amicus Brief in *Davis*, "A plaintiff in a private enforcement action should likewise be entitled to equitable relief without a showing of deliberate indifference." *U.S. Amicus Brief* in *Davis* at *36.

Thus, should this Court reach the question of whether S.W. alleges facts sufficient to state a plausible claim for equitable relief under Title IX, it should find in the affirmative. Not only has she alleged facts sufficient to meet the well-established liability standards for equitable relief, she also alleges facts showing the urgent need for injunctive relief. S.W. is still enrolled at K-State where she remains in constant fear and at constant risk of encountering the accused. Compl. ¶¶ 36, 77. Moreover, K-State unwaveringly asserts that Title IX does not impose a duty to respond to her alleged rapes, and has signaled no intent to voluntarily comply with any request that it investigate the accused. In this case, an award of individual equitable relief to a private

litigant is fully consistent with and necessary to the orderly enforcement of the statute. *See Cannon*, 441 U.S. at 705–06. Even if S.W. had not pled facts demonstrating K-State's actual knowledge and deliberate indifference as required for a damages claim under *Davis*, K-State's motion to dismiss should still be denied with regard to S.W.'s claims for equitable relief.

CONCLUSION

S.W.'s Complaint is replete with allegations showing K-State had actual knowledge of the hostile education environment created by alleged student-on-student rapes, and that its failure to respond or protect her amounts to deliberate indifference that created "an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." *Davis*, 526 U.S. at 636. That is all that is required at the motion to dismiss stage, and this Court should allow her Title IX claims for damages and equitable relief to go forward. *See Davis*, 526 U.S. at 654 ("On this complaint, we cannot say beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle her to relief … the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.") (internal citations omitted).

Respectfully submitted,

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Date: July 1, 2016

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

COURTNEY SPENCER,

Plaintiff,

v. **No. 15-CV-141 MCA/SCY**

University of New Mexico Board of Regents,

Defendant

MEMORANDUM OPINION AND ORER

THIS MATTER is before the Court on *Defendant The University of New Mexico Board of Regents' Motion to Dismiss* and *Memorandum Brief in Support of Defendant's Motion to Dismiss* filed April 27, 2015. [Docs. 7-8] The Court has considered the parties' submissions, the record, the relevant law, and has otherwise been fully advised in the premises.

BACKGROUND

Plaintiff Courtney D. Spencer filed the present lawsuit against Defendant seeking damages arising from Defendant's alleged willful indifference in its response, or failure to respond, to her report of having been the victim of a "gang rape" on and near campus perpetrated by University of New Mexico (UNM) football players. [Doc. 3 p. 1] Plaintiff seeks monetary relief under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.A. § 1681(a). [Doc. 3 p. 1, 30-31] Defendant seeks dismissal on the ground that Plaintiff has failed to state a viable claim for a private right of action under Title IX. [Doc. 8 p.1]

As alleged in Plaintiff's *First Amended Complaint*, the circumstances that led to the present lawsuit are the following. [Doc. 3] During the 2013-14 school year Plaintiff was a freshman at the University of New Mexico (UNM). [Doc 3 ¶ 2] Late in the evening on April 12-13, 2014, two UNM football players, Crusoe Gongbay and SaQwan Edwards, and a former UNM student, Ryan Ruff took Plaintiff, who was incapacitated and disheveled, from an off-campus house party and put her inside Ruff's vehicle. [Doc. 3 ¶¶ 7, 15, 64] A video taken inside the vehicle depicts the three men inside the vehicle chanting the phrase "slutty boys." [Doc. 3 ¶ 18] The video is overlaid with text that reads: "SLUTTYBOY GANGBANG COMIN SOON." [Id.] Plaintiff alleges that "gangbang" means "gang rape." [Doc. 3 ¶ 19] Each of the men had sex with Plaintiff inside the vehicle. [Doc. 3 ¶ 7]

After they had sex with her Gongbay, Edwards, and Ruff dropped Plaintiff off outside of the dorms on UNM campus. [Id.] Plaintiff immediately contacted a security person who, in turn, called UNM police (UNMPD) and, at approximately 2:50 a.m. on April 13, Plaintiff reported to UNMPD what had occurred in the vehicle recalling that one of the men was named "Crusoe." [Doc. 3 ¶¶ 7-8] Plaintiff then underwent a nurse sexual assault examination (SANE examination) in which DNA evidence was collected from Plaintiff's body and her bruising and injuries were documented. [Doc. 3 ¶ 9] DNA from each of the three men was found on Plaintiff's body. [Doc. 3 ¶¶ 25, 30-31] The SANE examination did not include testing for "rape drugs." [Doc 3 ¶ 10]

Days later Plaintiff learned through social media that a video "possibly existed" that depicted her activities prior to her encounter with Gongbay, Edwards and Ruff, and

that the video had been seen by other students. [Doc. 3 ¶¶ 12-14] After Plaintiff watched some of the videos (it turned out that there were several) Plaintiff realized that she had no memory of the four hours that preceded her encounter with Gongbay, Edwards, and Ruff. [Doc. 3 ¶¶ 12, 16-18, 70, 87] Eventually, through social media, UNMPD's investigative reports, and videos provided by a criminal defense attorney for one of the alleged rapists, Plaintiff learned some of what had occurred during those four hours. [Doc. 3 ¶¶ 12, 14-17, 20-21] During that time frame Plaintiff, along with two unnamed UNM football players and several other students were together in a campus dorm common room. [Doc. 3 ¶¶ 20, 36] According to witnesses, Plaintiff's behavior "changed very suddenly and in a manner [that] made no sense given how little alcohol [Plaintiff] was witnessed to have consumed." [Doc. 3 ¶ 14] Witnesses reportedly believed that Plaintiff "acted as if she had been drugged (with a rape drug or some other substance like ecstasy)." [Id.] Videos taken during that time frame variously depict Plaintiff "in an apartment or dorm room somewhere, apparently having sex, and standing around partially clothed saying bizarre things." [Doc. 3 ¶ 20] The videos show that Plaintiff was "incapacitated," and that she "was acting drugged and dancing around provocatively." [Doc. 3 ¶ 21] One of the unnamed football players drove Plaintiff from the campus dorm common room to an off-campus house party from where Gongbay, Edwards, and Ruff picked her up immediately upon her arrival. [Doc. 3 ¶ 15] During the drive to the off-campus house party the unnamed football player reportedly "engaged Plaintiff in 'consensual' sexual activity." [Doc. 3 ¶ 36] Plaintiff has no memory of the

events depicted in the videos taken in the campus common dorm room or of the drive to the off-campus house party. [Doc. 3 ¶¶ 17, 36]

On the morning of April 13, 2014 Gongbay met with Coach Davie, a member of the UNM athletic Department "about the drunk girl situation last night." [Doc. 3 ¶ 22] In the afternoon of April 13, 2014 UNMPD interviewed Gongbay. [Doc. 3 ¶ 24] In his April 13 interview with UNMPD Gongbay denied having been in a vehicle with Plaintiff; he told UNMPD that he had met Plaintiff outside of a party, told her his name and that he was a football player, and he had gone home by himself where he lived alone. [Doc. 3 ¶ 25] On April 15, 2015 an assistant football coach contacted UNMPD to say that Gongbay had an alibi for the entire time that Plaintiff claimed to have been in Ruff's car; a woman claimed that she was with Gongbay during the relevant time frame, and, accordingly, the woman was an alibi witness who "would clear up all misunderstanding about the incident with the 'drunk girl.'" [Doc. 3 ¶ 26] UNMPD immediately interviewed Gongbay's alibi witness, but her testimony was "riddled with inconsistencies" and UNMPD subsequently learned that she had been engaging in text messages with Gongbay from different locations throughout the hours that she claimed to be with him. [Doc. 3 ¶ 27] Further, Gongbay did not live alone, he had a roommate. [Doc. ¶ 64]

On April 21, 2014, Gongbay and Edwards were arrested for their involvement in the alleged "gang rape," Ruff was arrested the following day. [Doc. 3 ¶¶ 29-31] On April 21 and 22, 2014, Gongbay and Edwards were suspended from the football team.

[Doc. 3 ¶ 47] The district attorney ultimately decided not to prosecute the men. [Doc. 3 ¶ 55]

On April 23, 2014 Plaintiff requested that Defendant, through its Office of Equal Opportunity (OEO), open a Title IX investigation. [Doc. 3 p. 2, ¶ 48] On May 13, 2014, the OEO acknowledged receipt of Plaintiff's request and indicated that it would "soon begin an investigation." [Doc. 3 ¶ 49] (Emphasis omitted). OEO met with Gongbay and Edwards for the first time on July 1 and 2, 2014 to inform them of the OEO investigation. [Doc. 3 ¶ 50] Plaintiff alleges that among other problems with OEO investigators, they were inadequately trained in how to perform an investigation into acts of sexual violence, and that one of them, Bryan Brock, expressed favoritism in the media for the UNM football team. [Doc. 3 ¶¶ 57-60, 76-79]

After her encounter with Gongbay, Edwards, and Ruff, Plaintiff reported to OEO that she "was constantly fearful of attack, had panic attacks being on campus, and moved out of her dormitory residence hall to live off campus with her parents." [Doc. 3 ¶ 44] Defendant "accommodated Plaintiff somewhat with her coursework after the" incident; however, Defendant did "not accommodate Plaintiff with safety measures and accommodations so that she could safely pursue her studies[.]" [Doc. 3 ¶ 45, 97 (u)] Defendant did "nothing to eliminate the sexual assault risks posed by Gongbay and Edwards" or to prevent a recurrence of sexual assault. [Doc. 3 ¶ 97 (s)] Gongbay and Edwards were not suspended from school and, aside from suspending them from the football team during the off season when they were arrested, Defendant took no further disciplinary action against them. [Doc. 3 ¶ 47]

On July 28, 2014 Plaintiff wrote to OEO to request that it consider information and evidence about rape drugs, including that a "nationally known expert career law enforcement detective and trainer . . . was willing to provide . . . her opinions [to OEO] . . . that Plaintiff was apparently given a rape drug and/or other substance, and that the sexual acts in [Ruff's vehicle] were thus drug-facilitated rapes." [Doc. 3 ¶ 51] Plaintiff's letter also mentioned the fact that DNA from Gongbay, Edwards, and Ruff was found on her body, that the men had inconsistent stories, and that a video existed that depicted the men in Ruff's vehicle with Plaintiff, the text of which video indicated that a "gangbang" was about to occur. [Doc. 3 ¶ 51]

Alleged Deficiencies in OEO's Investigation

Plaintiff alleges that OEO "refused to permit [her] to present evidence of any kind that she was drugged with a rape drug or ingested a substance in addition to alcohol which together altered her mental state, precluding her ability to consent to sexual activity[;] . . . refused to accept testimony which would account for her total memory loss, and conduct"; and it "refused to accept and therefore consider [that] evidence as an explanation for the" video clips showing Plaintiff's behavior during the four hours prior to her encounter with Gongbay, Edwards, and Ruff. [Doc. 3 ¶ 52] OEO accepted and considered two video clips showing Plaintiff during the four hours prior to the incident as evidence that Plaintiff consented to sex with Ruff, Gongbay, and Edwards. [Doc. 3 ¶ 53] OEO "ignored" the video taken inside Ruff's vehicle that indicated that a "gangbang" was "comin soon." [Doc. 3 ¶ 54] OEO did not seek or obtain a copy of the SANE examination report that indicated physical proof of forced sexual activity, and in regard to

the UNMPD's witness interviews, OEO relied exclusively upon the statement given by the football player who claimed to have engaged in a consensual sex act with Plaintiff as he drove her to the place where she was picked up by Gongbay, Edwards, and Ruff. [Doc. 3 ¶¶ 39, 68] Additionally, during its investigation into Plaintiff's report of the incident, Defendant was aware of the fact that two other women in addition to Plaintiff, and independent of one another, had reported that Gongbay had sexually assaulted them. [Doc. 3 ¶ 41]

On August 12, 2014, the suspensions of Edwards and Gongbay from the UNM football team were lifted. [Doc. 3 ¶ 74] Approximately two weeks later, on August 28, 2014 OEO issued a "Preliminary Letter of Determination" indicating its finding of "No Probable Cause." [Doc. 3 ¶ 61] The preliminary letter of determination noted that OEO "found it significant" that Gongbay had an alibi for the time during which the rapes occurred. [Doc. 3 ¶ 64] The letter also noted that OEO did not interview Edwards or Gongbay and that it determined their credibility based solely upon letters written by their respective private attorneys denying Plaintiff's allegations. [Doc. 3 ¶ 66] OEO also determined that the unnamed football player's statement that Plaintiff consented to a sex act with him on the way to the off-campus house party meant that Plaintiff also consented to sex with Gongbay, Edwards, and Ruff. [Doc. 3 ¶ 39] A final letter of determination was issued by OEO on September 15, 2014, and Plaintiff appealed. [Doc. 3 ¶ 81]

As grounds for her appeal of OEO's determination Plaintiff stated, among other things, that the determination was untimely and premature; it was the result of an investigation which was not thorough; the sexual abuse nurse examiner was not

interviewed; UNMPD investigators were not interviewed; the UNMPD investigation was not yet complete; Plaintiff's expert witness was prohibited from testifying; and, although Plaintiff's account of the events had never changed, Gongbay's story, which was credited by OEO, had "changed materially twice, with a third version being depicted on the video of him in [Ruff's vehicle] with Plaintiff"; and that OEO had never interviewed Edwards. [Doc. 3 ¶ 81] The president of UNM denied Plaintiff's appeal. [Doc. 3 ¶ 82]

As a result of the foregoing, among other facts alleged in her complaint, Plaintiff "psychologically, emotionally[,] and out of fear for her own physical safety, could not return to UNM" for the remainder of 2014 spring semester or for the fall 2014 semester. [Doc. 3 ¶¶ 44-45, 89]

In her lawsuit against Defendant, Plaintiff does not allege that Defendant is liable for failing to prevent Gongbay and Edwards from having sex with her in Ruff's vehicle when she was incapacitated. [Doc. 14 p. 5] Rather, in Plaintiff's words, her Title IX "claim involves only [Defendant's] conduct *after* the [incident] was reported to it." [Id.] Defendant argues that Plaintiff's *First Amended Complaint* fails to state a viable claim for a private right of action under Title IX and, thus, should be dismissed with prejudice. [Doc 8, p. 1]

Analysis

In determining whether Plaintiff's first amended complaint can survive Defendant's motion to dismiss the Court considers whether Plaintiff has stated "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court accepts, as true, factual allegations in a complaint, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Additionally, in determining whether the complaint states a plausible claim for relief the Court draws "on its judicial experience and common sense"; "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (alteration omitted).

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a). "Title IX is . . . enforceable through an implied private right of action," and "monetary damages are available in the implied private action." *Gebser v. Largo Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998). Title IX may be enforced only against the recipient of federal funds and the funding recipient may only be liable in damages under Title IX for its own misconduct. *Davis ex rel. Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). Thus, in order to be liable under Title IX the funding recipient *itself* must have, on the basis of sex, acted to exclude a person's participation in, deny a person the benefits of, or subject a person to discrimination under an education program or activity that receives federal financial assistance. *Davis*, 526 U.S. at 640-41. Plaintiff alleges, and Defendant does not argue

otherwise, that Defendant receives federal funding and is subject to Title IX. [see Doc. 3 ¶ 4]

In the context of student-on-student sexual harassment, it is only "in certain limited circumstances" that a private action for monetary damages under Title IX may be brought against a school that receives federal financial assistance. *Davis*, 526 U.S. at 639, 643. A funding-recipient school may be held directly liable under Title IX where it is "deliberately indifferent to sexual harassment, of which [it has] actual knowledge, that is 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." *Davis*, 526 U.S. at 650. Thus, in order to state a Title IX claim that is premised on student-on-student sexual harassment, a plaintiff is required to allege that the school: "(1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it . . . deprived the victim of access to the educational benefits or opportunities provided by the school." *Murrell v. Sch. Dist. No. 1, Denver, Colorado.*, 186 F.3d 1238, 1246 (10th Cir. 1999). "[A] single instance of [student-on-student] harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systematic effect of denying access to a scholastic program or activity." *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172-73 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).

Actual Knowledge

Plaintiff alleges, and Defendant does not argue otherwise, that Defendant's report that Gongbay and Edwards[1] had sex with Plaintiff in Ruff's car while she was incapacitated gave Defendant "actual knowledge" of an act of student-on-student sexual harassment. [Doc. 3 ¶ 93; see Doc. 8 p. 14-17]

1. *Deliberate Indifference*

In support of its *Motion to Dismiss* Defendant argues that its accommodation of Plaintiff with her course work, its act of investigating her report of sexual harassment that led to its conclusion that the report lacked probable cause; and its suspension of Gongbay and Edwards from the football team; demonstrate that its response to Plaintiff's report of the harassment was not clearly unreasonable. [Doc. 8 p. 15-16]

"A [school] is deliberately indifferent to acts of student-on-student harassment only where the [school's] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 (10th Cir. 2008) (alteration omitted). Title IX does not require a school to "remedy peer harassment" or to "ensure that students conform their conduct to certain rules." *Davis*, 526 U.S. at 648 (alteration and ellipses omitted). Nor does it "require flawless investigations or perfect solutions." *Rost*, 511

[1] Plaintiff acknowledges that Defendant did not have disciplinary control over Ruff such that it could be held liable for its response to learning that he was one of the perpetrators of the rapes. [Doc. 14 p. 5] *See Davis*, 526 U.S. at 646-47 (stating that a school's liability under Title IX is limited to circumstances in which "the harasser is under the school's disciplinary authority").

F.3d at 1122 (alteration and ellipses omitted). Rather, the school must "merely respond to known harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 649.

In considering whether a school's response to student-on-student harassment was clearly unreasonable, "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648. While hindsight observations that suggest that there were other and better ways to investigate or remedy student-on-student harassment may demonstrate simple or even heightened negligence in the school's response, such observations are insufficient to demonstrate deliberate indifference. *Rost*, 511 F.3d at 1122; *see Fitzgerald*, 504 F.3d at 171 (stating that "'deliberate indifference' requires more than a showing that the institution's response to harassment was less than ideal"). However, a "minimalist response is not within the contemplation of a reasonable response[,]" *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (2000); and deliberate indifference may be indicated where the school fails "to meaningfully and appropriately discipline the student-harasser[,]" or where "the harasser and other students are left to believe that the harassing behavior has the 'tacit approval' of the" school. *S.S. v. Alexander*, 177 P.3d 724, 739 (Wash. Ct. App. 2008).

On a motion to dismiss, a court may "identify a response as not clearly unreasonable as a matter of law." *Davis*, 526 U.S. at 649. The facts of this case as alleged in Plaintiff's complaint, however, do not permit the Court to conclude, as a matter of law, that Defendant's response to Plaintiff's report was not clearly unreasonable.

Viewed in the light most favorable to Plaintiff, a reasonable jury could find that the circumstances known to OEO during its investigation were the following. Plaintiff, having been possibly been drugged with a rape drug or a similar substance that left her incapacitated and caused her to lose her memory for four hours, was transported by an unnamed football player to an off-campus party where she was immediately picked up by Gongbay, Edwards, and Ruff. A reasonable inference could be drawn that the unnamed football player had arranged in advance to deliver Plaintiff, who was incapacitated, to the three men. Gongbay, Edwards, and Ruff put Plaintiff, who was, according to a video recording, obviously incapacitated and disheveled into Ruff's car with the intention to engage in a "gangbang" with her. When the three men dropped Plaintiff off at campus she immediately found campus security and reported to UNMPD that she had been raped by the three men, one of whom was named Crusoe. "Crusoe" was identified by UNMPD by the next afternoon as Gongbay. Gongbay had reportedly perpetrated sexual assaults on two women prior to his encounter with Plaintiff. After the incident Gongbay made several statements that were later revealed to be untrue about his whereabouts during, and involvement in, the incident. DNA from Gongbay, Edwards, and Ruff was found on Plaintiff's body and a SANE examination revealed that she had bruising and injuries. A cursory investigation was performed by OEO investigators, including among them, one investigator who publicly expressed favoritism for the football team. The investigation did not involve interviewing Gongbay or Edwards, the investigators ignored substantial relevant evidence that supported Plaintiff's account of events, and they accepted the

clearly controverted version of events offered by the football players to conclude that Plaintiff's report was not supported by probable cause.

Viewed in the light most favorable to Plaintiff, the fact that, under the circumstances here, OEO found that Plaintiff's report of sexual harassment was not supported by probable cause; combined with the fact that Defendant took no disciplinary action against Edwards and Gongbay except to suspend them for four months during football's "off season" could lead a reasonable jury to find that that Defendant's response to Plaintiff's report of sexual harassment was clearly unreasonable in light of the known circumstances. *See Davis*, 526 U.S. at 648 (stating that a school's response to a report of sexual harassment may be deemed "deliberately indifferent" where its "response to the harassment is . . . clearly unreasonable in light of the known circumstances"); *Vance*, 231 F.3d at 260 (stating that a "minimalist response is not within the contemplation of a reasonable response" to a report of student-on-student harassment). A reasonable jury could conclude that temporarily suspending Gongbay and Edwards from the football team during the off season did not constitute reasonable and appropriate discipline for having participated in a "gangbang" with Plaintiff when she was clearly incapacitated, and (in Gongbay's case) having lied to UNMPD during its investigation of the matter. *See S.S.*, 177 P.3d at 739 (stating that deliberate indifference may be indicated where the school fails "to meaningfully and appropriately discipline the student-harasser"). A reasonable jury could also find that Defendant's decision to permit Gongbay, who was reported to have sexually assaulted two women prior raping Plaintiff, and Edwards, who was known to have participated in raping Plaintiff, to remain on campus, without being

subjected to meaningful discipline could lead Gongbay, Edwards, and other student athletes to believe that they could perpetrate acts of student-on-student sexual harassment without facing serious consequences. *See id.* ("It constitutes a deliberately indifferent response if the harasser and other students are left to believe that the harassing behavior has the tacit approval" of the school.). In sum, the allegations in Plaintiff's first amended complaint, which the Court assumes to be true, satisfy the "deliberate indifference" element required to state a Title IX claim. *See Murrell*, 186 F.3d at 1246 (enumerating the elements required to state a Title IX claim).

2. *Harassment that Was so Severe, Pervasive, and Objectively Offensive That it Deprived Plaintiff of the Educational Benefits of the School.*

Defendant argues that, even assuming that its response to Plaintiff's report of sexual harassment demonstrated deliberate indifference, Plaintiff's claim fails because she has not alleged that its deliberate indifference caused her to suffer further discrimination. [Doc. 8 p. 17-20]

A school may not be held liable for damages under Title IX "unless its deliberate indifference subjects its students to harassment. That is, the deliberate indifference must, at minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 644-45 (alterations omitted). To "subject" a student to harassment means "to cause [her] to undergo" the harassment, or to "expose" or to make her "vulnerable" to it. *Id.* at 645. The harassment must be "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." *Id.* at 650.

A single act of severe sexual harassment—particularly a rape (Plaintiff characterizes the incident as a gang rape) can support a Title IX claim where the claim is premised upon the school's response to the report of the incident of sexual harassment. *Vance*, 231 F.3d at 259 n.4; *SS.*, 177 P.3d at 742-43. In the context of Title IX, "there is no 'one free rape' rule"; and a victim does not have to be raped twice before the school is required to respond appropriately. *SS.*, 177 P.3d at 741. A jury may conclude that harassment is severe, pervasive, and objectively offensive from evidence that a student who is known to have perpetrated a sexual assault upon another student is permitted to continue attending the same school as the victim, leaving open the potential for interactions between the two. *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F.Supp.2d 438, 444 (D. Conn. 2006). Further, "a reasonable jury [may] conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university." *Kelly v. Yale Univ.*, No. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. 2003). Thus, where the victim of student-on-student sexual harassment whose report of a rape was met with deliberate indifference by the school *voluntarily* withdraws from school to avoid exposure to further harassment, the voluntary withdrawal may yet support a finding that *the school* "effectively barred her access to an educational opportunity[.]" *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1296-98 (11th Cir. 2007) (alterations omitted) (reasoning that where a student had been raped by three student athletes, including one whose past sexual conduct was known to the university, and the university's response did not assuage her

concerns of a future attack, her decision to withdraw from the university was "reasonable and expected").

As discussed earlier a reasonable jury could conclude that Defendant's response to Plaintiff's report of the incident of sexual harassment, which she characterizes as a rape, was clearly unreasonable. Plaintiff alleges that as a result of Defendant's deliberate indifference, including its "deliberate decision to do nothing to eliminate the sexual assault risks posed by Gongbay and Edwards, [or] to prevent its recurrence[,]" her safety was at risk if she continued to attend UNM. [Doc. 3 ¶¶ 95, 97 (s)] She also alleged that "psychologically, emotionally[,] and out of fear for her own physical safety, [she] could not return to UNM" for the remainder of the 2014 spring semester or for the fall 2014 semester. [Doc. 3 ¶¶ 89, 92] From these facts, a reasonable jury could find that Defendant's deliberately indifferent response to the report of sexual harassment left Plaintiff exposed or vulnerable to a recurrence of harassment by Gongbay and Edwards who may have been led to believe that such behavior was "tacitly" permitted. *See S.S.*, 177 P.3d at 739 (stating that deliberate indifference is indicated where the school's response to a report of harassment leads the harasser to believe that harassment has the school's tacit approval). A reasonable jury could also find that Plaintiff's decision to withdraw from UNM rather than accede to these risks was the reasonable and expected outcome of Defendant's response to her report of sexual harassment, and that under these circumstances Defendant effectively deprived Plaintiff of access to the educational opportunities or benefits provided by UNM. *See Williams*, 477 F.3d 1282, 1296-98

Defendant argues that Plaintiff's allegations and her argument in response to the *Motion to Dismiss* show that Plaintiff seeks to hold Defendant liable for its failure to "immediately banish[] the accused harasser[s] from its campus." [Doc. 16 p. 6] Building on that premise, Defendant argues that Plaintiff's claim fails because our Tenth Circuit Court of Appeals has upheld summary judgment in favor of schools in two cases, namely, *Rost*, 511 F.3d 1114; and *Escue v. Northern Oklahoma College*, 450 F.3d 1146 (10th Cir. 2006), in which the accused harasser was permitted to remain on campus following the victim's report of harassment. [Doc. 16 p. 6-7] The Court does not share Defendant's view that Plaintiff's *First Amended Complaint* and her arguments in response to Defendant's *Motion to Dismiss* claim that Defendant's liability under Title IX stems from its decision not to "banish" Gongbay and Edwards from UNM. Plaintiff's allegations and arguments are that Defendant failed to take *any* meaningful disciplinary action against the students who had sex with her while she was incapacitated thereby exposing and making her vulnerable to further harassment that effectively deprived her of an educational opportunity. Thus, while "banishing" (or expelling or suspending) Gongbay and Edwards may have been one of many disciplinary tools available to Defendant, Plaintiff's *First Amended Complaint* does not claim that by failing to take that particular action, Defendant violated Title IX. *See Davis*, 526 U.S. at 648 (stating that victims of student-on-student sexual harassment do not have "the right to make particular remedial demands").

Nor is the Court persuaded that the Plaintiff's claim so closely resembles the facts in *Rost* and *Escue* that, pursuant to those cases, dismissal of Plaintiff's *First Amended*

Complaint is clearly required. Although the victims in *Rost* and *Escue* reported severe forms of sexual harassment, the allegations in Plaintiff's complaint set this case apart from the circumstances described in *Rost* and *Escue*. *See Rost*, 511 F.3d at 1117-18 (describing incidents of student-on-student sexual harassment that occurred off school grounds including boys coercing the victim into performing various sex acts, and phoning the victim to pester her for oral sex); *Escue*, 450 F.3d at 1149-51 (describing harassing behaviors perpetrated upon a student by her professor, including acts of touching and sexual comments).

In her complaint Plaintiff alleges that, while she was incapacitated, possibly as the result of having been drugged, she was transported by a football player from an on-campus gathering to an off-campus location where, immediately upon her arrival, she was put in a car by three men, including two UNM football players. The three men "gang raped" her inside the vehicle. The moments preceding the alleged "gang rape" were memorialized on a video that announced an impending "gangbang," and the video was disseminated via social media [Doc. 3 ¶ 87] The incident left her with documented bruises and injuries, and with DNA from each of the three men on her body. "Rape is unquestionably among the most severe forms of sexual harassment[.]" *S.S.*, 177 P.3d at 737 (quoting *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967-68 (9th Cir. 2002)); *see also Doe ex rel. Doe.*, 451 F.Supp.2d at 444; *Kelly* 2003 WL 1563424, at *3 (recognizing that the possibility of on-campus encounters specifically between rapists and their victims can deprive the victims of educational opportunities). Without minimizing the experiences of the plaintiffs in *Rost* and *Escue*, the Court does not believe that the

question in the present case— whether Defendant's response to the Plaintiff's report of sexual harassment was "not clearly unreasonable"— may be resolved as a matter of law by comparing it to the responses of the schools in *Rost* and *Escue*.

CONCLUSION

The Court concludes that Plaintiff's complaint alleges facts from which a reasonable jury could find that Defendant violated Title IX.

IT IS THEREFORE HEREBY ORDERED that *Defendant The University of New Mexico Board of Regents' Motion to Dismiss* and *Memorandum Brief in Support of Defendant's Motion to Dismiss* [Docs. 7-8] is **DENIED**.

IT IS SO ORDERED this 11th day of January, 2016 in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
Chief United States District Judge

EXHIBIT B

8 of 8 DOCUMENTS

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AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D., PETITIONER v. MONROE COUNTY BOARD OF EDUCATION, ET AL.

No. 97-843

SUPREME COURT OF THE UNITED STATES

1997 U.S. Briefs 843; 1998 U.S. S. Ct. Briefs LEXIS 776

October Term, 1998

November 10, 1998

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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[*I] QUESTION PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The question presented is:

Whether a school board can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe and pervasive sexual harassment by another student in the course of the school's education programs and activities. [*III]

INTERESTS: INTEREST OF THE UNITED STATES

The United States Department of Education administers federal financial assistance to education programs and activities and is authorized by Congress to effectuate Title IX in those programs and activities. *20 U.S.C. 1682.* Pursuant to that authority, the Department, through its Office for Civil Rights (OCR), has promulgated regulations effectuating Title IX, 34 C.F.R. Pt. 106, and policy guidance on the prohibition of sexual harassment under Title IX, *62 Fed. Reg. 12,034 (1997).* The Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title IX by the Department of Education and other executive agencies. Exec. Order No. 12,250, *45 Fed. Reg. 72,995 (1980);* 28 C.F.R. 0.51 (1998). The Department of Justice also may enforce Title IX in federal court in cases referred to it by the Department of Education. At the Court's invitation, the United States filed a brief at the petition stage of this case. The United States also participated as amicus curiae in the court of appeals before the panel and the en banc court.

STATEMENT

1. a. Petitioner filed this action alleging, inter alia, a violation of Title IX of the Education Amendments of 1972, *20 U.S.C. 1681* et seq., and seeking damages and injunctive relief on behalf of her daughter, LaShonda D., against respondent Monroe County Board of Education. n1 Petitioner alleges that the Board of Education, a recipient of federal financial assistance, responded with deliberate indifference to repeated complaints made by her and her daughter (then a fifth-grade student in a school administered by respondent) about severe sexual harassment of her daughter over a period of more than five months by a male classmate, G.F. Petitioner alleges that respondent's deliberate indifference to the complaints of sexual harassment perpetuated an intimidating, hostile, offensive, and abusive school environment that limited her daughter's ability to participate in and to benefit from the education program, in violation of respondent's obligations under Title IX. Pet. App. 93a-101a.

n1 Petitioner's Title IX claims against two individual school officials, her race discrimination claim under *42 U.S.C. 1981,* and her various claims under *42 U.S.C. 1983* were rejected below and are not before this Court. See Pet. App. 2a-3a & n.3.

[**6]

Petitioner alleges that G.F. harassed her daughter on at least eight separate occasions at school and during school hours, between December 17, 1992, and May 19, 1993. n2 School officials were informed about each of those incidents by petitioner, her daughter, or both. Pet. App. 95a-97a. G.F. repeatedly attempted to touch LaShonda's breasts and vaginal area. On one occasion, G.F. rubbed his body against LaShonda in a sexually suggestive manner. Id. at 96a. On another occasion, G.F. put a door stop in his pants and behaved in a sexually suggestive manner toward LaShonda. Ibid. G.F. also directed vulgar comments to LaShonda, indicating a desire to have sexual contact with her. Id. at 95a-96a. After an incident on May 19, LaShonda told petitioner that she "didn't know how much longer she could keep him off her." Id. at 97a. As a result of that incident, G.F. was charged with and pled guilty to sexual battery. Ibid.

n2 Because petitioner's complaint was dismissed for failure to state a claim, the allegations of the complaint must be taken as true. *Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).*

After each incident, LaShonda reported G.F.'s behavior to one or more of [**7] her teachers; she complained to at least three different teachers at the school that G.F. was sexually harassing her in classes or activities under their supervision. Pet. App. 96a-97a. Petitioner also complained to at least two of her daughter's teachers, and was assured that the school principal had been notified about the sexual harassment. Ibid. At one point, LaShonda and other girls who had been sexually harassed by G.F. wanted to go as a group to speak to the principal about the harassment, but their teacher told them, "If he wants you, he'll call you." Id. at 96a. On or about May 19, petitioner and her daughter spoke directly to the principal to see what action would be taken about the sexual harassment, but the principal merely stated: "I guess I'll have to threaten him (G.F.) a little bit harder." Id. at 97a. During that conversation, the principal asked LaShonda "why she was the only one complaining." Ibid.

Petitioner alleges that school officials did not discipline G.F. at any time during the period in which he was harassing LaShonda, despite LaShonda's and petitioner's repeated complaints. Pet. App. 97a. G.F. was not suspended for this conduct, kept away from LaShonda, [**8] or reprimanded in any other way. Ibid. Moreover, school officials refused even to take minimal measures to keep G.F. away from LaShonda during a substantial part of that time. For example, LaShonda's assigned classroom seat was next to G.F. and, although LaShonda asked several times to be moved to a different seat so that she could prevent contact with G.F., she was not permitted to do so for over three months. Ibid.

During this entire period, the Board of Education had no policy regarding sexual harassment and had not given its employees any training or other guidance on how to respond to complaints from students about sexual harassment. Pet. App. 98a.

As a result of respondent's inaction in response to the complaints about the continuing sexual harassment, a hostile educational environment persisted at the school, and LaShonda's ability to attend school and to perform her studies and activities was impeded. Pet. App. 97a. Her ability to concentrate on her school work was affected by her constant efforts to fend off G.F.'s sexual harassment, and her grades dropped. Ibid. In April 1993, LaShonda's father discovered a suicide note she had written. Ibid.

Petitioner alleges that respondent [**9] engaged in deliberate indifference and intentional discrimination against LaShonda that warrants money damages and equitable relief. Petitioner specifically alleges that respondent, in its "failure to have a policy concerning sexual harassment of students and in [its] failure to respond to the complaints of this student, was willfully and deliberately indifferent." Pet. App. 98a. She alleges that "the deliberate indifference [of respondent] to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." Id. at 100a. Respondent's "failure to take action resulted in extreme emotional damage to LaShonda." Id. at 100a-101a. Petitioner asserts that, "had [the school principal] intervened as was necessary, the injury to LaShonda would have been mitigated and the situation would have been ended." Id. at 100a. In addition to damages, petitioner sought an injunction requiring respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students," and enjoining respondent "from discriminating against female students by failing [**10] to respond to complaints of sexual harassment." Id. at 102a.

b. The district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Pet. App. 82a-90a. The court recognized that Title IX is enforceable through an implied cause of action, id. at 88a (citing *Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992))*, but ruled that "sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." Pet. App. 88a. In the court's view, petitioner had not alleged "that the Board or an employee of the Board had any role in the harassment," and therefore "any harm to LaShonda was not proximately caused by a federally-funded educational provider." *Id. at 88a-89a.*

2. a. A divided panel of the Eleventh Circuit reversed the district court's dismissal of the Title IX claim and remanded for further proceedings. Pet. App. 62a-81a. The panel noted that, fairly construed, petitioner's complaint alleged that harm to LaShonda was proximately caused by the school officials' "failure to take action to stop the offensive acts of those over whom [**11] the officials exercised control." *id. at 75a,* thereby discriminating against LaShonda and denying her the benefits of the education program on the basis of her sex, *id. at 66a.* The panel concluded that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id. at 73a-74a* (citing *Franklin, 503 U.S. at 74-75).* In such circumstances, "the harassed student has 'be[en] denied the benefits of, or be[en] subjected to discrimination under' that educational program in violation of Title IX." Pet. App. 75a (internal quotation marks and brackets in original).

One panel member dissented, arguing that Title IX did not apply because petitioner did not allege that respondent

or any of its employees had committed an act of harassment against LaShonda. Pet. App. 80a.

b. The Eleventh Circuit granted rehearing en banc, vacated the panel's opinion, and affirmed the district court's judgment dismissing the complaint. Pet. App. 91a-92a, 1a-45a. The en banc majority construed petitioner's [**12] complaint to allege that LaShonda had been subjected to hostile environment sexual harassment, that one teacher knew of at least four instances of harassment, that at least two other teachers and the principal each knew of at least two incidents of harassment, and that respondent took no action except to threaten G.F. with disciplinary action. Id. at 6a-7a & n.6. But it concluded that Title IX does not impose upon school officials any obligation "to take measures sufficient to prevent a non-employee from discriminating" on the basis of sex against a student. Id. at 22a. The en banc court characterized petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student." Id. at 10a. The en banc court reasoned that Congress enacted Title IX under its Spending Clause power and that Title IX gave educational institutions that receive federal funds notice that "they must prevent their employees from themselves engaging in intentional gender discrimination," id. at 21a, but not that they could be liable for failing to prevent one student from sexually harassing another, id. at 19a. n3

> n3 The author of the opinion for the en banc court, Judge Tjoflat, included two sections that were not joined by any other member of the court: a discussion of the due process rights of alleged harassers and possible suits by disciplined harassers, Pet. App. 22a-29a (Part III.B), and a discussion of the possible number of lawsuits involving harassment by fellow students, id. at 30a-32a (Part III.C). See Id. at 33a; id. at 36a & n.1 (opinion of Carnes, J., concurring specially).

[**13]

Four members of the court dissented, Pet. App. 46a-61a, arguing that the plain language of Title IX makes it clear that "liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination," because of sex, id. at 47a. The dissent noted that this construction of the statute is supported by the interpretation of the Department of Education, Office for Civil Rights (OCR), an agency charged with enforcing Title IX, which states:

> [A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Id. at 48a (quoting Sexual Harassment Guidance, *62 Fed. Reg. 12,034, 12,039-12,040 (1997)).* The dissent disagreed with the majority's reliance on the absence of a discussion of student-on-student [**14] harassment in the legislative history of Title IX because a failure to mention it in congressional debate "does not mean that it was not encompassed within Congress's broad intent of preventing students from being 'subjected to discrimination' in federally funded educational programs." Pet. App. 50a. The dissent pointed out that, under the majority's narrow interpretation, the cause of action under Title IX recognized by the Court in Franklin would not be supported because it also was not mentioned during congressional debate. Ibid. The dissent also reasoned that sufficient notice was provided to fund recipients to satisfy the Spending Clause prerequisite for damages under Title IX, because the plain meaning of the statute "unequivocally imposes liability on grant recipients for maintaining an educational environment in which students are subjected to discrimination." Id. at 51a. Here, where petitioner alleges that at least three teachers and the school principal had actual knowledge of the harassment and took no meaningful action to end it, the dissenters believed that the district court's dismissal of the Title IX claims against the Board should have been reversed. Id. at 61a. [**15]

TITLE: BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SUMMARY OF ARGUMENT

The court of appeals' ruling completely forecloses a private right of action under Title IX of the Education Amendments of 1972, *20 U.S.C. 1681* et seq., whether for damages or equitable relief, for a school district's failure to respond to known sexual harassment of a student by another student. Such a categorical exclusion is inconsistent with this Court's decision in *Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998),* and with the plain meaning of the statute.

The lower courts erred in dismissing petitioner's Title IX claims. In Gebser, this Court held that a school district receiving federal financial assistance may be held liable in a private action for damages under Title IX as a result of sexual harassment of a student by a teacher if "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 responds with deliberate indifference. *118 S. Ct. at 1999.* [**16] Under Gebser, a recipient's liability for damages in those circumstances is imposed not for the actions of the employee, based upon agency principles, but for the recipient's own refusal to remedy the hostile environment created by sexual harassment. That standard is equally applicable to a recipient's refusal to remedy a hostile environment created by repeated instances of sexual harassment of a student by another student. Because petitioner alleged that her daughter was subjected to repeated instances of sexual harassment at school, that the school's principal and at least three teachers had actual knowledge of the harassment, and that they responded to her complaints with deliberate indifference, she has stated a claim for damages under Gebser.

Moreover, to the extent petitioner seeks equitable relief rather than damages, she may be entitled to relief even if her proof fails to meet the Gebser standard. The requirement of actual knowledge and deliberate indifference responds to concerns about subjecting a fund recipient to potential liability for money damages where the recipient is unaware of the discrimination in its programs and would be willing to institute prompt corrective [**17] measures. Because equitable relief does not present the same concerns, petitioner may establish a violation of Title IX and entitlement to equitable relief if she can show that LaShonda was subjected to a hostile environment in the school's programs or activities, respondent's officials knew or should have known of the harassment, and they failed to take prompt, appropriate corrective action. See Department of Education, Office for Civil Rights, Sexual Harassment Guidance, *62 Fed. Reg. 12,034, 12,039 (1997).* The equitable relief petitioner seeks--an injunction requiring respondent to institute a policy providing guidance to its employees in the handling of sexual harassment complaints about fellow students, and prohibiting respondent from continuing to discriminate by failing to respond to sexual harassment complaints--requires nothing more of respondent than is already required by the statute and the Department of Education's longstanding Title IX regulations. Respondent could be required by the Department of Education to take such actions to bring itself into compliance with the statute and regulations as part of the statutorily-mandated administrative effort to obtain [**18] compliance through voluntary means, *20 U.S.C. 1682,* in order to avoid the ultimate filing of an administrative action to terminate federal financial assistance. Petitioner should likewise be able to obtain equitable relief in the private right of action that has been judicially implied.

ARGUMENT

PETITIONER HAS STATED A CLAIM UNDER TITLE IX FOR BOTH DAMAGES AND EQUITABLE RELIEF

A. Title IX, As Construed By This Court In Gebser, Provides An Implied Private Right Of Action For Damages Based On A Fund Recipient's Deliberate Indifference To Repeated Complaints About Severe And Pervasive Sexual Harassment Of A Student By Another Student In The Recipient's Education Programs And Activities.

1. Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *20 U.S.C. 1681*. The "discrimination" prohibited by Title IX includes sexual harassment. *Gebser, 118 S. Ct. at 1995* (citing *Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002-1003 (1998));* [**19]

Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992). An employee is "subjected to discrimination under" a federally funded education program in violation of Title IX if she is "forced to work under more adverse conditions" than male employees. *North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982);* cf. *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)* ("disparate treatment of men and women in employment * * * includes requiring people to work in a discriminatorily hostile or abusive environment"). Similarly, when a student is forced to attend school in a hostile or intimidating environment caused by pervasive sexual harassment known to the recipient, and that hostile educational environment adversely affects the student's ability to participate fully in or benefit from the education program in which the student is enrolled, the student is "excluded from participation in" and "denied the benefits of" the education program, and is "subjected to discrimination under" the program, and this is so whether the harasser is a teacher or a fellow student.

In Gebser, this Court addressed the circumstances in which an educational [**20] institution receiving federal funds may be held liable for damages in an implied private right of action under Title IX as a result of sexual harassment of a student by a teacher. The Court concluded that damages could be recovered in such a case only 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 responds with deliberate indifference. *118 S. Ct. at 1999.* The Court reasoned that, because Title IX's express remedial scheme for permitting termination of the federal funds received by a school through administrative enforcement is predicated on notice and an opportunity for the recipient to rectify a violation, Congress did not intend to subject recipients of federal financial assistance to damages liability in a private action when the recipient "was unaware of discrimination in its programs and is willing to institute prompt corrective measures." Ibid.

The Gebser Court's ruling about the educational institution's potential liability for damages did not depend upon the harasser's status as an employee. [**21] In fact, the Court expressly rejected arguments that liability for damages could be based on agency principles of respondeat superior or constructive notice that result from the employer-employee relationship. *118 S. Ct. at 1995, 1997.* Rather, the Court emphasized that the educational institution's liability for damages rests on its own "official decision * * * not to remedy the violation," not on the independent actions of its harassing employees. *Id. at 1999.*

It follows from that analysis that when school officials know that severe or pervasive sexual harassment of a student is occurring in their education programs or activities, their decision not to exercise their authority to remedy the harassment perpetuates a hostile educational environment and they may be held liable in damages for that violation of Title IX, whether the student's harasser is a school employee or another student. In either case, the school officials are ultimately responsible for providing the benefits of the education programs and activities to all students without subjecting them to discrimination or exclusion on the basis of sex. In either case, the school officials have [**22] the authority to institute corrective measures, whether by disciplining, reassigning, excluding, or otherwise inducing a change in the behavior of the offender, or by offering the victim an alternative assignment. In either case, the official decision not to remedy the hostile educational environment means that the student is required to attend school in a discriminatorily hostile or abusive environment. This is particularly so in the case of elementary and secondary students who are subject to compulsory attendance laws, and frequently have no choice about what school they attend. Thus, when school officials respond with deliberate indifference to a known sexually hostile or abusive environment in an education program or activity, they subject the harassed student to that environment in violation of Title IX, whether the harasser is a school employee or another student.

The identity of the harasser as a student rather than a teacher is irrelevant to the theory of liability set forth in Gebser. Indeed, the identity of the harasser may not always be known, as when a student finds an unrelenting barrage of sexually denigrating graffiti on his or her locker or athletic equipment, [**23] or finds sexually explicit cartoons referring to the student posted daily on the school walls. The harassed student may suffer the same impairment of educational opportunity, and the school officials may manifest the same deliberate indifference to the student's plight, whether the harassers are fellow students or school employees.

The court of appeals erroneously interpreted petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student," Pet. App. 10a, and concluded that, unlike *Franklin v. Gwinnett County Public Schools, supra*, which it interpreted as holding a school district liable for the actions of its employee, id. at 9a-10a, the school district could not be held liable in this case because the harassing student was not an employee, id. at 22a. But Title IX focuses on the relationship between the student and the education program or activity operated by the Title IX recipient, not on the identity of the harasser. See *Gebser, 118 S. Ct. at 1999-2000;* cf. *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986)* (citing *Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)*, cert. denied, *406 U.S. 957 (1972))*. [**24] The statute holds the recipient responsible not for the acts of the harassing individuals, but for its "own actions and inaction in the face of its knowledge that the harassment was occurring." *Doe v. Univ. of Illinois, 138 F.3d 653, 662 (7th Cir. 1998)*, petition for cert. pending, No. 98-126. n4 Thus, the Department of Education's Title IX Sexual Harassment Guidance makes clear that "Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice." *62 Fed. Reg. at 12,040;* see also *Doe, 138 F.3d at 667* (noting that Guidance reflects longstanding policy of Department of Education as demonstrated by official Letters of Finding dating back to 1989 (copies filed in court of appeals below)).

n4 As Judge Easterbrook has observed, "failure to protect pupils from private aggression is a species of discrimination. This is the original meaning of equal protection of the laws." *Doe, 138 F.3d at 678* (statement respecting the denial of rehearing en banc).

Differences between students and teachers may of course be relevant to determining [**25] an institution's liability in damages for its failure to respond adequately to incidents of sexual harassment. The words or actions of a child may not have the same meaning and impact as the words or actions of an adult teacher. Thus, the identity of the harasser and the social context in which the incident occurs may be relevant to determining whether the harassment is sufficiently severe, persistent, or pervasive to constitute actionable harassment. See *Oncale, 118 S. Ct. at 1002-1003.* n5 Similarly, because schools' means of controlling the actions of employees differ from their means of controlling the actions of students, the harasser's status in relation to the school may be relevant in determining whether officials' response to harassment was deliberately indifferent. n6 Thus, although such issues will need to be resolved on a case-by-case basis, differences between students and employees do not justify the court of appeals' rule that, as a categorical matter, an educational institution has no obligation under Title IX to respond to complaints of sexual harassment because the harasser is another student.

n5 As the initial panel below emphasized, "a hostile environment in an educational setting is not created by a simple childish behavior or by an offensive utterance, comment, or vulgarity." Pet. App. 76a. The panel recognized that a hostile educational environment is created only "'when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment.'" Id. at 76a-77a (citing *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)*, quoting *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986))* (citation omitted).

Nor does every interaction between students occur "under [the] education program or activity receiving Federal financial assistance." *20 U.S.C. 1681*. A recipient's liability for failing to respond appropriately is limited to student-on-student sexual harassment that "takes place while the students are involved in school activities or otherwise under the supervision of school employees." *Doe v. Univ. of Illinois, 138 F.3d 653, 661 (7th Cir. 1998)*, petition for cert. pending, No. 98-126.
[**26]

n6 As the Seventh Circuit explained in *Doe, 138 F.3d at 667-668*, school officials who learn of sexual

> harassment must choose "from a range of responses," and "it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit." See *62 Fed. Reg. at 12*.042.

2. The court of appeals erred in ruling that a school district cannot be held responsible under Title IX for failing to respond to harassment of one student by another because, in the court of appeals' view, Title IX gave recipients of federal funds notice only that "they must prevent their employees from themselves engaging in intentional gender discrimination," Pet. App. 21a, and not that fund recipients could be liable for failing to prevent one student from sexually harassing another, ibid. The court's rationale for distinguishing between the two situations was based on its view that a fund recipient is directly liable as an employer for its employees' discrimination, but that a recipient cannot be held directly liable for a student's wrongdoing. [**27] Id. at 10a. That distinction cannot, however, survive Gebser's explanation that a fund recipient can be held responsible for harassment by teachers not because of vicarious responsibility for the acts of employees but only because of its inaction in response to known sexual harassment of one of its students. Thus, following Gebser, there is no support for the distinction drawn by the court of appeals.

Moreover, the antidiscrimination mandate of Title IX is clear, and it provides fund recipients with ample notice of their obligations under the statute. In this respect, Title IX stands in sharp contrast with the merely precatory language that was held insufficient to impose an obligation on fund recipients in *Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)*. Cf. *School Bd. of Nassau County v. Arline, 480 U.S. 273, 286 n.15 (1987)* (noting that "the contrast between the congressional preference at issue in Pennhurst and the antidiscrimination mandate of § 504 [of the Rehabilitation Act of 1973, *29 U.S.C. 794*] could not be more stark"). As Gebser recognized, Title IX put fund recipients on notice that, as a [**28] condition of federal funding, they must respond appropriately to known sexual harassment of students in their programs and activities that excludes students from participating in, or denies them the benefits of, those education programs and activities. As this Court observed in *Bennett v. Kentucky Department of Education, 470 U.S. 656, 666, 669-670 (1985)*, the government's failure to "prospectively resolve every possible ambiguity concerning particular applications" of the statutory requirements of a federal funding education program did not undermine the adequacy of notice given to a funding recipient concerning its statutory obligations, particularly because "grant recipients had an opportunity to seek clarification of the program requirements." And, as the Seventh Circuit correctly ruled, prior to Gebser:

> If, as alleged, school * * * officials knew about the [student-on-student] harassment and intentionally failed, and indeed flatly refused in some instances, to take steps to address it, then the plea that the institution was not "on notice" that such failure could subject it to Title IX liability rings hollow.

Doe, 138 F.3d at 663. [**29]

In any event, Gebser's requirement that, for purposes of recovering damages, a plaintiff must prove not only that a recipient knew of the sexual harassment, but also was deliberately indifferent to it, ensures that a recipient is liable for monetary damages only for its own deliberate perpetuation of discrimination prohibited by statute.

3. Petitioner's allegations meet the Gebser standard. Petitioner alleges that her daughter was subjected to repeated incidents of sexual harassment by another student while at school, Pet. App. 95a-97a, that three teachers and the principal of the school had actual knowledge of the harassment, id. 96a-98a, that the harassment occurred while the students were "under the supervision of teachers," id. at 96a, that the principal "was responsible for supervising discipline of the students in his school," id. at 98a, and that respondent responded with deliberate indifference to her complaints, id. at 100a. Thus, the complaint fairly alleges that "official[s] of the recipient entity with authority to take corrective action to end the discrimination" had actual knowledge of the harassment and failed to act to stop it. *Gebser, 118 S. Ct. at 1999*. [**30] Thus, the lower courts erred in dismissing petitioner's complaint.

B. Petitioner's Allegations Need Not Meet The Gebser Standard To Support A Claim For Equitable Relief

Even if petitioner's proof on remand fails to meet the Gebser standard of actual knowledge and deliberate indifference, petitioner may nonetheless be able to establish an entitlement to equitable relief for a Title IX violation under a less demanding standard. Unlike the plaintiff in Gebser, who sought only damages, petitioner here also sought an injunction ordering respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students" and enjoining respondent "from discriminating against female students by failing to respond to complaints of sexual harassment." Pet. App. 102a. Entry of the injunction would, in essence, command respondent to comply with existing legal obligations under the federal statute and regulations; therefore, it does not raise the same concerns as did a potential award of damages in Gebser.

Injunctive and other equitable relief has been available in a private action under Title IX, without the showing of actual knowledge [**31] and deliberate indifference required by Gebser as a prerequisite for damages, since this Court first recognized a private right of action in 1979. *Cannon v. Univ. of Chicago, 441 U.S. 677, 705 & n.38, 710 n.44, 711-712 (1979);* see *Gebser, 118 S.Ct. at 1997-1998* (citing same). Unlike damages, equitable relief does not raise the Court's "central concern" under the Spending Clause n7 that a federal fund recipient be on notice of its exposure to liability for a monetary award. *Gebser, 118 S. Ct. at 1998* (discussing central concern underlying *Pennhurst, Franklin, and Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983)).* And unlike damages for past violations, equitable relief that is a condition on future funding can be avoided by the recipient by withdrawing from the federal funding program.

> n7 Although Franklin left open the question whether Title IX was enacted exclusively pursuant to the *Spending Clause, 503 U.S. at 75 n.8,* other decisions of this Court reflect the view that Title IX (like Title VI and Section 504 of the Rehabilitation Act, which are similar federal funding statutes with nondiscrimination conditions) was enacted pursuant to Section 5 of the Fourteenth Amendment. See *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982)* (assuming that Title IX is Section 5 legislation); *Cannon v. Univ. of Chicago, 441 U.S. 677, 686 n.7 (1979)* (noting Congress's reference to its enforcement responsibilities under the Fourteenth Amendment as justification for including Titles VI and IX in the amendment to the Civil Rights Attorneys Fees Awards Act of 1976, *42 U.S.C. 1988*); cf. *Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 n.2 (1987)* (Section 504); *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 244 n.4 (1985)* (Section 504); *United Steelworkers v. Weber, 443 U.S. 193, 206 n.6 (1979)*(contrasting Title VI with Title VII, which was "not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments"); *United States v. Fordice, 505 U.S. 717, 732 n.7 (1992)* (in context of dismantling former dual system of higher education, protections of Title VI extend no further than the Fourteenth Amendment).

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Moreover, this distinction between the standard for damages and the standard for injunctive relief is consistent with the analysis, set forth in Gebser, that the express statutory scheme for administrative enforcement provides guidance for inferring congressional intent with regard to the implied private right of action. Title IX expressly creates an enforcement mechanism that anticipates and encourages resort to equitable remedies before the recipient has manifested the extreme intransigence that warrants resort to the ultimate administrative sanction of terminating federal funds.

The administrative enforcement scheme created by Congress begins with notice to the recipient of its violation. *20 U.S.C. 1682*. n8 An agency can take further action only after it determines that "compliance cannot be secured by voluntary means." Ibid. An agency's efforts to obtain compliance by voluntary means may include a variety of equitable solutions. The Department of Education's longstanding regulations, promulgated pursuant to express authority delegated by Congress to effectuate Title IX (see *20 U.S.C. 1682*), n9 provide that administrative [**33] compliance efforts may include conditioning a recipient's continued funding on its providing equitable relief to a victim of discrimination. *34 C.F.R. 106.3*. The Court in Gebser expressly recognized the availability of such equitable relief under the administrative scheme. *118 S. Ct. at 1998* (citing *34 C.F.R. 106.3*, as well as *North Haven, 456 U.S. at 518*, where agency conditioned continued funding on reinstatement of employee who had been subjected to sex discrimination). In fact, the Department of Education's regulations require that each potential recipient submit to the Department, along with its application for

federal financial assistance, an "assurance of compliance" stating that its education programs and activities will be operated in compliance with the Department's regulations and that it will commit itself to, inter alia, "take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination." *34 C.F.R. 106.4(a).* Such equitable relief may also include, in [**34] the case of a sexually hostile environment created by the sexual harassment of a student by a teacher, "the offending teacher's resignation and the district's institution of a grievance procedure for sexual harassment complaints." *Gebser, 118 S. Ct. at 1998* (noting that, in *Franklin, 503 U.S. at 64 n.3,* the Department of Education had identified a Title IX violation but concluded that the recipient had come into compliance when the offending teacher resigned and the recipient instituted a sexual harassment grievance procedure). n10

n8 The Department of Education's standard for establishing a violation of Title IX in a sexual harassment case involving student-on-student harassment requires a showing that:

> (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.

62 Fed. Reg. at 12,039; id. at 12,037 ("Constructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.") When school officials know or should know that a sexually hostile environment exists in their education programs or activities, their failure to exercise their authority to take appropriate corrective action subjects the victim to discrimination, and may deny her the benefits of its education programs and activities in violation of Title IX. That rationale is consistent with the Department's longstanding investigative guidance on racial harassment. See *59 Fed. Reg. 11,448-11,454 (1994); id. at 11,449.* Although, under Gebser, a damages award would not be appropriate without proof of actual knowledge and deliberate indifference, equitable relief may be warranted for the reasons discussed in this brief.
[**35]

n9 Pursuant to Section 431(d)(1) of the General Education Provisions Act, as added by Education Amendments of 1974, Pub. L. No. 93-380, § 509(a)(2), 88 Stat. 567, *20 U.S.C. 1232(d)(1)* (1970 & Supp. IV 1974), these regulations were submitted to Congress when they were issued on June 4, 1975, by the Department of Health, Education, and Welfare, *40 Fed. Reg. 24,128 (1975),* and did not become effective until 45 days later, after Congress failed to exercise its authority to disapprove them during that period, see 45 C.F.R. Pt. 86 (1975); see also *North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531-532 (1982).* Because of this unique history, the Court has accorded the Title IX regulations particular deference as an interpretation of the statute. See *Grove City College v. Bell, 465 U.S. 555, 567-568 (1984).*

n10 The Department of Education's regulations require that federal fund recipients notify students, parents, and employees of the Title IX prohibition against sex discrimination in its education programs and activities, *34 C.F.R. 106.9(a),* and "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" alleging any violation of Title IX or the regulations, *34 C.F.R. 106.8(b).* Recipients also must designate a Title IX coordinator to handle complaints and investigations and identify that person to all students and employees as the person to whom questions about Title IX should be referred. *34 C.F.R. 106.8(a), 106.9(a).* Although violation of the grievance procedure regulations "does not itself constitute 'discrimination' under Title IX," *Gebser, 118 S. Ct. at 2000,* and would not satisfy the requirements for a damages award, evidence of such a violation, as alleged by petitioner in this case, Pet. App. 98a, could warrant injunctive relief in a private action if it was shown that it contributed to the plaintiff's injury. The Department of Education has detailed the features of an effective nondiscrimination policy and grievance process, *62 Fed. Reg.*

at 12,044-12,045, and has emphasized that they provide schools with not only an effective means of responding to sexual harassment, but also "an excellent mechanism to be used in their efforts to prevent sexual harassment before it occurs," *id. at 12,038.*

By contrast, evidence that a fund recipient has in place an effective and adequately publicized policy and grievance procedure may constitute an affirmative defense in a Title IX suit if the recipient establishes that the plaintiff suffered avoidable harm because she unreasonably failed to avail herself of the preventive and remedial measures. See *Gebser, 118 S. Ct. at 2007* (Ginsburg, J., joined by Souter, Breyer, JJ., dissenting).

[**36]

Only after such efforts at achieving compliance through voluntary and equitable solutions have failed, can an agency commence administrative action to terminate federal funding. *20 U.S.C. 1682*. In addition, before taking action to terminate, or refuse to grant or continue, federal financial assistance, the agency must afford the recipient an opportunity for a hearing and the agency must make an express finding on the record of the recipient's failure to comply with the relevant statutory or implementing regulatory requirement. Ibid.

Thus, it is clear that, under the administrative enforcement scheme, a violation of Title IX may trigger an obligation on the part of the recipient to take remedial action before the recipient has demonstrated the extreme intransigence required to terminate funding, i.e., the showing that the Gebser Court analogized to deliberate indifference. See *118 S. Ct. at 1999.* A plaintiff in a private enforcement action should likewise be entitled to equitable relief without a showing of deliberate indifference. As this Court recognized in *Cannon, 441 U.S. at 705-706,* because of the limited government resources [**37] available for the enforcement of Title IX, "the award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with--and in some cases even necessary to--the orderly enforcement of the statute." See also *id. at 706-708 & nn. 41, 42.*

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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