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LEFT IN THE RAIN WITHOUT AN UMBRELLA: HOW *DOE v. BROWN UNIVERSITY* LEAVES NONSTUDENTS UNSHELTERED BY FEDERAL TITLE IX PROTECTIONS

EMILY S. BLEY\*

“Rain does not fall on one roof alone.”<sup>1</sup>

I. THE PERFECT STORM: AN INTRODUCTION TO TITLE IX

Title IX of the Education Amendments Act of 1972 (Title IX) has been a lightning rod for controversy since it first emerged decades ago as a means for women to enter the world of college sports.<sup>2</sup> The Act has significantly evolved from its origins in the athletic realm; today, Title IX is arguably better known for the protection it provides to sexual assault survivors than the equality it establishes in university locker rooms.<sup>3</sup> Though instances of sexual misconduct are no more frequent in our contemporary society than at the time of Title IX’s passage, the issue of sexual misconduct has certainly achieved greater visibility in recent years.<sup>4</sup> Public reports of alleged sexual harassment and the filing of formal legal complaints against offenders, have been central topics of discussion

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\* J.D. Candidate, 2020, Villanova University Charles Widger School of Law; B.A., 2017, Saint Louis University. This Note is dedicated to my parents, Joseph and Susan, as well as my sisters, Ellen, Erica, and Elyse, who have given me so much love and support over the years. I would also like to thank the staff of the *Villanova Law Review* for providing thoughtful feedback throughout the writing and publication of this note.

1. Cameroonian proverb, WISE OLD SAYINGS, <http://www.wiseoldsayings.com/rain-quotes/> [<https://perma.cc/89JP-JS9D>] (last visited Oct. 4, 2018).

2. See Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 99 (2010) (explaining Title IX is best known for role in expanding women’s sports at high school and collegiate levels).

3. See generally *Know Your Rights: Sexual Harassment and Sexual Assault Under Title IX*, AM. ASS’N U. WOMEN, <https://www.aauw.org/what-we-do/legal-resources/know-your-rights-on-campus/campus-sexual-assault/> [<https://perma.cc/A2HF-M6H5>] (last visited Oct. 4, 2018) (answering frequently asked questions about Title IX rights); *Title IX, END RAPE ON CAMPUS*, <http://endrapeoncampus.org/title-ix/> [<https://perma.cc/Y3LJ-WVTQ>] (last visited Oct. 4, 2018) (listing resources available to students under Title IX); *Title IX, RAPE ABUSE AND INCEST NAT’L NETWORK*, <https://www.rainn.org/articles/title-ix> (last visited Oct. 4, 2018) (explaining available enforcement mechanisms under Title IX); *Title IX and Sexual Assault*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/know-your-rights/title-ix-and-sexual-assault> (last visited Oct. 4, 2018) (describing student rights under Title IX after sexual assault occurs).

4. See Ann Jones, *Sexual Harassment Has Not Changed So Much Since the 1970s*, THE NATION (Dec. 12, 2017), <https://www.thenation.com/article/sexual-harassment-has-not-changed-so-much-since-the-1970s/> [<https://perma.cc/EQK3-ZU4S>] (detailing author’s own experiences with sexual harassment throughout the 1960s and 70s, as well as multiple stories of sexual misconduct affecting other women). Jones noted that during the recent #MeToo movement, some commentators grossly underestimated the universality of sexual harassment toward women in the past few decades. See *id.* In Jones’s words, “None of this is new, though we tend to act as if it were . . . for instance, I heard three young women radio reporters explain that women back in the 1970s or 1980s accepted ‘unwanted male attention’ in the office and in life ‘because that’s just the way things were.’” See *id.*

in current news and pop culture.<sup>5</sup> Society has increasingly scrutinized colleges and universities, in particular, to pursue sexual assault allegations with focused consistency and increased aggression.<sup>6</sup> Nevertheless, against the backdrop of the burgeoning #MeToo movement and the looming threat of more relaxed federal guidance by the current administration, the future of Title IX is conflicted and uncertain.<sup>7</sup> Despite the political rhetoric swirling around its fate, Title IX has long been hailed as an instrument of gender equality and a pillar of justice for assault survivors.<sup>8</sup> Yet most Americans may be surprised to know that Title IX's protections are curiously restrictive for such a liberally-construed statute.<sup>9</sup>

Under federal guidelines mandated by Title IX, an educational institution that receives government funding is required to investigate, adjudicate, and report

5. See Slate Staff, *The Best of the Reckoning*, SLATE (Dec. 21, 2017, 4:12 PM), [http://www.slate.com/articles/double\\_x/doublex/2017/12/the\\_best\\_writing\\_on\\_sexual\\_harassment\\_this\\_year.html](http://www.slate.com/articles/double_x/doublex/2017/12/the_best_writing_on_sexual_harassment_this_year.html) [<https://perma.cc/6G7A-RXEV>] (archiving and praising many articles written about sexual misconduct claims and formal legal complaints in 2017).

6. See RUSSLYNN ALI, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS DEAR COLLEAGUE LETTER (Apr. 4, 2011) (instructing every college that receives federal money to comply with more aggressive Title IX standards: to use the lowest possible standard of proof—preponderance of the evidence—in sexual assault causes, in addition to allowing accusers to appeal not-guilty findings, accelerate their adjudication processes, and strongly discouraged the cross-examination of accusers); see also KC Johnson & Stuart Taylor, *The Path to Obama's 'Dear Colleague' Letter*, WASH. POST (Jan. 31, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm\\_term=.978f289cbffb](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.978f289cbffb) [<https://perma.cc/Y6LL-2F6J>] (discussing political motivations and origins of Department of Education's new federal mandate in 2011).

7. See *History & Vision*, ME TOO., <https://metoomvmt.org/about/#history> [<https://perma.cc/H4XQ-SJQF>] (last visited Nov. 6, 2018) (“The ‘me too.’ movement was founded in 2006 to help survivors of sexual violence, particularly . . . young women of color from low wealth communities, find pathways to healing . . . . In less than six months, because of the viral #metoo hashtag, a vital conversation about sexual violence has been thrust into the national dialogue.”); see also Emily Yoffe, *Reining in the Excesses of Title IX*, THE ATLANTIC (Sept. 4, 2018), [www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/](http://www.theatlantic.com/ideas/archive/2018/09/title-ix-reforms-are-overdue/569215/) [<https://perma.cc/J2GP-UHY7>] (explaining current Secretary of Education Betsy DeVos is on verge of announcing new Title IX guidelines, which would narrow definition of sexual misconduct, and lower school officials' expected knowledge and awareness of sexual misconduct on campuses).

8. See Valerie Jarrett, *40th Anniversary of Title IX*, WHITE HOUSE BLOG (June 21, 2012, 6:36 PM), <https://obamawhitehouse.archives.gov/blog/2012/06/21/40th-anniversary-title-ix> [<https://perma.cc/WH6R-N6FZ>] (“Title IX matters. And it is just as important today as when it was first passed forty years ago. Title IX bans sex discrimination against girls-and boys-in all programs at schools around the country. From addressing inequality in math and science education, to ensuring dormitories are safe, to preventing sexual assault on campus, to fairly funding athletic programs, Title IX ensures equality for our young people in every aspect of their education.”).

9. See Walker, *supra* note 2, at 110 (“Although *Davis* was technically a victory for sexual assault survivors . . . Title IX advocates feared that the Supreme Court had established an impossibly high bar for recovery. The doctrinal test of cases involving allegations of rape or sexual assault on college campuses now has four components . . . .”). See, e.g., *Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 562 (D.R.I. 2017) (limiting private Title IX remedies to students and employees at offending institution, only), *aff'd*, 896 F.3d 127 (1st Cir. 2018). For a discussion of the current elements required by federal law necessary to successfully claim a Title IX violation see *infra* notes 69–84 and accompanying text.

instances of gender-based discrimination and sexual violence.<sup>10</sup> Essentially, a publicly-funded school has a statutory duty under Title IX to ensure that educational opportunities remain untainted by sexual misconduct.<sup>11</sup> Should a school fail to meet the requisite outlined standards for managing Title IX claims, it not only risks financial punishment by the federal government, but also exposes itself to a private right of action by the injured person.<sup>12</sup>

The educational institutions in the United States that receive federal funding under Title IX, especially colleges and universities, often serve a community far beyond the students enrolled in their classes and living on their campuses.<sup>13</sup> These schools not only provide educational opportunities for their own students, but they also host a variety of sporting events, artistic performances, speaking engagements, and traditional celebrations for nonstudents.<sup>14</sup> In addition to a

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10. See *Scope of Title IX*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, [www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [https://perma.cc/N6FE-GD47] (last modified Sept. 25, 2018) (discussing the scope of Title IX and sex discrimination). The Department of Education's Office for Civil Rights has stated:

Title IX applies to institutions that receive federal financial assistance from [the Department of Education], including state and local educational agencies. These agencies include approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums. Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.

*Id.*

11. See 20 U.S.C. § 1681(a) (2018) (imposing duty on publicly-funded institutions to protect program participants from sexual discrimination); see also Annette Thacker, *Helping Students Who Can't Help Themselves: Special Education and the Deliberate Indifference Standard for Title IX Peer Sexual Harassment*, 2011 B.Y.U. EDUC. & L.J. 701, 701–02 (2011) (discussing how Supreme Court has interpreted Title IX as duty on part of educational institutions to ensure student's opportunity to receive an education is not hindered by unwanted sexual misconduct).

12. See Walker, *supra* note 2, at 102, 105–06 (discussing recognition of not only administrative enforcement mechanisms under Title IX, but also implied private right of action).

13. See, e.g., *Library Use Policy*, FALVEY MEMORIAL LIBRARY, <https://library.villanova.edu/using-the-library/access/library-use-policy> [https://perma.cc/8CF9-BB7X] (last visited May 4, 2019) (“Visitors not affiliated with Villanova University may use the Library during visitor hours of Monday-Friday, 9 a.m. – 5 p.m., and will be asked to register at the main library entrance desk and present a photo identification card.”); *Service and Social Justice*, VILLANOVA U. MISSION & MINISTRY, <https://www1.villanova.edu/villanova/mission/campusministry/service.html> [https://perma.cc/G76X-RDBA] (last visited Sept. 20, 2018) (providing various links for student opportunities to advocate and volunteer, get involved in local Philadelphia community, and participate in service and social justice); *Nova Bucks Accepted Here*, VILLANOVA U. UNIT, <https://www1.villanova.edu/villanova/unit/wildcard/accepted.html> [https://perma.cc/BV4E-WPSP] (last visited Sept. 20, 2018) (listing convenience stores, restaurants, grocery stores, salons, and other private establishments that solicit local business from Villanova students via internal currency system operated by Villanova University).

14. See Blake Gumprecht, *The American College Town*, 93 GEOGRAPHICAL REV. 51, 59–61 (2003) (noting most colleges and universities offer programming that appeals to students and also surrounding community members and visitors from around country and world). Gumprecht noted that the typical American college campus operates as a public space just as much as it operates as a learning environment. See *id.* at 59. It is a distinctly American notion that higher education should be a comprehensive experience that extends beyond the classroom. See *id.* This outward-looking view of education in college and universities is what motivates schools to “spend millions of dollars to maintain their campuses and provide a range of activities

variety of public programming, these institutions offer tours and events for enrolled students' families, visiting students, alumni, and local residents.<sup>15</sup> The accessible and central nature of colleges and universities make them a magnet for academic debate, community organization, and socialization.<sup>16</sup> In fact, a single limited geographic area, such as a college town or major U.S. city, may host multiple educational institutions.<sup>17</sup> The central and social nature of college campuses make their boundaries as inexact as they are permeable.<sup>18</sup> These schools do not exist in quiet isolation, but are in constant flux; they are connected by a common community as well as a continuous flow of visitors.<sup>19</sup>

Yet, while enrolled students may be able to take shelter under the umbrella of protection provided by Title IX, that same canopy of security does not extend to any innocent nonstudent who happens to pass through the same storm of

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for students, staff, and people with no direct connection to the educational institution.” *See id.*

15. *See id.* at 69 (“On a half-dozen weekends every autumn, [Auburn, Alabama] is transformed. Auburn’s football stadium holds 86,063 people, twice as many as live in the city. Visitors who attend games spend an estimated \$31.7 million annually.”); *see also* 2017 *National College Football Attendance Report*, NAT’L COLLEGIATE ATHLETIC ASS’N (NCAA), [fs.ncaa.org/Docs/stats/football\\_records/Attendance/2017.pdf](https://fs.ncaa.org/Docs/stats/football_records/Attendance/2017.pdf) [https://perma.cc/4USB-S6XX] (last visited Sept. 20, 2018) (reporting that in 2017, Michigan State, Ohio State, Penn State, and the University of Alabama had an average attendance of over 100,000 individuals at each home football game).

16. *See* Gumprecht, *supra* note 14, at 59 (noting concept of publicly accessible college campuses is American invention). When discussing the phenomena of the American campus existing as a both a private and public space, Gumprecht commented:

In many ways the campus is the center of life in the college town, much as the central business district was in the pre-automobile city or the shopping mall is in suburbia. With their residential areas, restaurants and bookstores, recreational facilities, concert halls, sports stadiums, landscaped grounds, and full calendars of events, campuses often function like self-contained cities. They are centers of culture. They are entertainment districts. They act as parks and historic sites. They have symbolic and public relations importance. They are a hub of activities that serve not only students and staff but also the larger population of the town and region. As such, the campus serves both as an environment for learning and as a public space.

*Id.*

17. *See, e.g., Philadelphia, PA Colleges & Universities*, AREAVIBES.COM, <https://www.areavibes.com/philadelphia-pa/colleges/> [https://perma.cc/AQA4-Z63C] (last visited Sept. 20, 2018) (displaying map of all colleges and universities in Philadelphia urban and suburban area, including twenty four-year institutions and eighteen more institutions that grant junior degrees in various skills and vocations).

18. *See supra* notes 13–17 (demonstrating that college campuses are not only engaged in community outreach with members of public and local communities, but also packed close together in common geographic area, making campus boundaries less defined than perhaps purported to be).

19. *See* Gumprecht, *supra* note 14, at 59–60 (discussing University of Oklahoma in Norman, Oklahoma as a typical example of a U.S. higher educational institution spending and investing significant capital to provide range of activities for students, staff, and those with no direct connection to the school). Gumprecht further notes that the inclusion of certain facilities in the very construction of modern colleges and universities is indicative of the multifaceted role schools play in their respective communities. *See id.* at 59. The University of Oklahoma’s campus is a prime example of an institution that serves both its students and the public; the 2,000-acre property features parks, an eighteen-hole golf course, a public swimming pool, conference facilities, a hotel, an airport, as well as restaurants and bars. *See id.* The school also owns two art museums, which feature rotating exhibits, and draws millions of people every year to campus for sporting events. *See id.*

assault, harassment, or discrimination.<sup>20</sup> In a recent decision, the United States District Court for the District of Rhode Island held that guests, visitors, and prospective students who suffer on-campus sexual misconduct are not owed any federal protections under Title IX.<sup>21</sup> In other words, there is currently no private remedy available under Title IX for nonstudents who are discriminated against, harassed, or assaulted on college campuses by students of that school.<sup>22</sup>

Generally, the past few decades of federal case law regarding private rights of action under Title IX indicate that the statute's protection is limited to students who attend the offending school.<sup>23</sup> Before August 2017, only one case addressed whether nonstudents have standing to bring a private Title IX action against a college or university they do not attend.<sup>24</sup> In *K.T. v. Culver-Stockton College*,<sup>25</sup> the United States Court of Appeals for the Eighth Circuit effectively sidestepped the question of nonstudent standing for Title IX claims.<sup>26</sup> Instead, it dismissed the suit by deciding that the nonstudent-plaintiff could not prove the requisite elements of a Title IX claim.<sup>27</sup>

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20. *See Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 562 (D.R.I. 2017) (“The total absence of a relationship between Ms. Doe’s educational institution (Providence College) and the harassers’ school (Brown University) is dispositive on the issue of whether Ms. Doe has a Title IX claim against Brown in this case. Therefore, the Court finds that Ms. Doe has not alleged that she was denied equal access to education as required for a Title IX claim to exist.”), *aff’d*, 896 F.3d 127 (1st Cir. 2018).

21. *See id.* at 563 (“Finding that Ms. Doe’s status as a non-student, regardless of her allegations that the Court accepts as true, removes her from Title IX’s private-cause-of-action umbrella of protection, the Court need go no further in its analysis of that claim.”).

22. *See id.* at 562 (explaining Jane Doe was not student at Brown University and therefore its actions, or the lack thereof, could not have prevented her from attaining education in environment free of hostility or misconduct). As a result of the Doe decision, nonstudents have no recourse under Title IX against a school that has failed to properly investigate, adjudicate, or report an incident of sexual nature involving them, even if the incident happened on their campus. *See id.* The District Court of Rhode Island further justified its holding by explaining that the total absence of a relationship between Jane Doe and the programs and services provided by Brown University cannot support claim of denial of equal access to education, since Jane Doe had no access to Brown University in first instance. *See id.*

23. *See generally* *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632 (1999) (involving student who sued school after suffering sexual harassment at the hands of another student); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 278–79 (1998) (involving student who sued school after engaging in sexual relations with teacher, alleging that she was harassed in violation of Title IX); *Roe v. Saint Louis Univ.*, 746 F.3d 874, 878–80 (8th Cir. 2014) (involving college student who sued university after sexual assaulted by fraternity member); *Porto v. Town of Tewksbury*, 488 F.3d 67, 70–72 (1st Cir. 2007) (involving student who sued school after experiencing sexually inappropriate behavior by another student); *Frazier v. Fairhaven*, 276 F.3d 52, 65 (1st Cir. 2002) (involving student who sued school after harassed in bathroom).

24. *See K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017) (“The parties dispute whether K.T.’s status as a non-student precludes her from asserting a Title IX harassment claim.”).

25. 865 F.3d 1054 (8th Cir. 2017).

26. *See id.* at 1057 (finding K.T.’s suit had no merit because complaint failed to state plausible claim regarding proving deliberate indifference and actual knowledge on behalf of school administrators necessary in order to survive dismissal).

27. *See id.* at 1058 (“Thus, while K.T. was dissatisfied with Culver-Stockton’s response, based on the allegations in the complaint the response cannot be characterized as deliberate indifference that caused the assault.” (alteration in original)).

Only a month later in *Doe v. Brown University*,<sup>28</sup> the District Court of Rhode Island contemplated the same question the Eighth Circuit declined to answer: whether nonstudents may bring a Title IX claim against a college or university they do not attend.<sup>29</sup> The court, looking to the legislative history and statutory language of Title IX, ultimately issued a blanket denial to all nonstudents seeking Title IX claims against schools they do not attend.<sup>30</sup> In doing so, the court closed a legal door the Eighth Circuit had left open for nonstudents.<sup>31</sup> Under the ruling in *K.T.*, if a nonstudent could demonstrate the requisite elements of a Title IX claim, then regardless of enrollment status, that nonstudent could *potentially* recover.<sup>32</sup> Under the District Court of Rhode Island's holding in *Doe*, if nonstudents are assaulted on a college campus, they are absolutely barred from bringing a Title IX claim against the offending school, regardless of the merits of the claim.<sup>33</sup>

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28. 270 F. Supp. 3d 556 (D.R.I. 2017), *aff'd*, 896 F.3d 127 (1st Cir. 2018).

29. *See id.* at 560 (explaining that Jane Doe must prove most basic criteria of Title IX claim: that she is member of class of persons entitled to Title IX protection).

30. *See id.* at 561 (explaining that statutory language and legislative history of Act shows that enforcing Title IX against educational institution was meant to be program specific, mostly evidenced by fact that financial penalties were applied to specific program where violation occurred); *accord Doe v. Brown Univ.*, 896 F.3d 127, 133 (1st Cir. 2018) (affirming the lower court's decision to preclude Jane Doe from Title IX recovery because she did not participate in Brown University's educational programs). Although the First Circuit affirmed the District Court of Rhode Island's ruling in *Doe*, a footnote in its opinion sets forth an important caveat to its decision:

We clarify, though, that a victim does not need to be an enrolled student at the offending institution in order for a Title IX private right of action to exist. Members of the public regularly avail themselves of the services provided by educational institutions receiving federal funding. For example, they regularly access university libraries, computer labs, and vocational resources and attend campus tours, public lectures, sporting events, and other activities at covered institutions. In any of those instances, the members of the public are either taking part or trying to take part of a funding recipient institution's educational program or activity. In the case before us, however, *Doe* failed to allege that she had availed herself of any of Brown University's educational programs in the past or that she intended to do so in the future. She did not plead that Brown University's alleged deliberate indifference to it prevented her from accessing such resources at Brown.

*Id.* at 132, n.6. This pronouncement by the First Circuit alters the district court's blanket preclusion of recovery for nonstudents under Title IX by focusing on the degree of participation in the institution's educational programs, rather than the enrollment status of the plaintiff. *See id.*

31. *See Doe*, 270 F. Supp. 3d at 562 (agreeing with Eastern District Court of Missouri's previous reasoning in *K.T.*, where it held that nonstudents do not suffer systemic effect on educational programs or activities at school that they do not attend). For a further discussion regarding the implications of the *Doe* decision, and how the Eighth Circuit's silence on nonstudent standing differs from the blanket denial of nonstudent standing see *infra* notes 160–79 and accompanying text.

32. *See K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) (“[K.T.’s] complaint identified no causal nexus between Culver-Stockton’s inaction and K.T.’s experiencing sexual harassment . . . [t]he complaint does not, however, allege that Culver-Stockton’s purported indifference ‘subject[ed] [K.T.] to harassment.’” (quoting *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999))).

33. *See Doe*, 270 F. Supp. 3d at 562 (holding that because Jane Doe was not enrolled at Brown University, she cannot properly allege she was denied equal access to receiving education there, as required for Title IX claim to stand).

This Note analyzes the District Court of Rhode Island's recent decision in *Doe* to categorically exclude nonstudents from the class of persons able to bring Title IX claims against educational institutions.<sup>34</sup> This Note will further advocate for courts to abandon the rules established in *Doe* in favor of a less-restrictive application of Title IX, because the implications of the *Doe* decision are not only inconsistent with the overall purpose of Title IX, but also jeopardize the health and safety of students and the greater college community.<sup>35</sup> Part II provides information regarding the judicial expansion of Title IX over the past forty years.<sup>36</sup> Part III provides the facts and procedure of *Doe*.<sup>37</sup> Part IV discusses the court's reasoning in deciding *Doe*.<sup>38</sup> Part V critically evaluates the flaws in the *Doe* decision and advocates for the adoption of a less-restrictive application of Title IX for nonstudents.<sup>39</sup> Finally, this Note concludes in Part VI, which discusses the impact of the *Doe*.<sup>40</sup>

## II. LIGHTNING STRIKES AND THUNDER FOLLOWS: THE ORIGINS OF TITLE IX

Though Title IX has long been at the center of the gender equality movement in collegiate athletics, its modern emergence as a vehicle of protection for sexual assault survivors is rooted in decades of judicial expansion.<sup>41</sup> In particular, the Supreme Court of the United States' formal establishment of the peer-harassment doctrine signified a seismic shift in the application of Title IX on college campuses.<sup>42</sup> Now nonstudents are invoking the historically broad nature of Title IX's past judicial interpretation to widen the scope of recovery.<sup>43</sup>

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34. See *id.* at 558 (finding expansion Jane Doe advocated for in class of persons able to bring private Title IX claims is not permitted under Title IX or in past cases interpreting language of statute).

35. For a complete argument advocating for the abandonment of the absolute exclusion of nonstudents from bringing Title IX claims in *Doe*, see *infra* notes 160–79 and accompanying text.

36. For a further discussion of the judicial history of Title IX, see *infra* notes 41–101 and accompanying text.

37. For a further discussion of the facts of *Doe*, see *infra* notes 102–18 and accompanying text.

38. For an analysis of the court's reasoning and decision in *Doe*, see *infra* notes 119–38 and accompanying text.

39. For a complete critical analysis of the decision in *Doe* in light of the Eighth Circuit's decision in *K.T.*, see *infra* notes 139–79 and accompanying text.

40. For a complete critical analysis of the decision in *Doe* in light of the Eighth Circuit's decision in *K.T.*, see *infra* notes 139–79 and accompanying text.

41. See Walker, *supra* note 2, at 99 (explaining evolution of Title IX from gender equality statute for college sports to complex mechanism of protection for sexual assault survivors).

42. See *infra* notes 69–84 and accompanying text for a discussion of the peer-harassment doctrine from *Davis* and the introduction of the deliberate indifference standard.

43. See *generally* *Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 562 (D.R.I. 2017) (holding that nonstudent does not have standing under Title IX to bring peer harassment claim), *aff'd*, 896 F.3d 127 (1st Cir. 2018); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1056 (8th Cir. 2017) (involving nonstudent-plaintiff seeking to bring peer-harassment claim under Title IX).



A. *Clouds on the Horizon: The Evolution of Title IX*

Title IX has undergone extensive change in the realm of gender equality since its inception in the 1970s.<sup>44</sup> 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 . . . .”<sup>45</sup> Although athletics are not explicitly mentioned in its statutory language, the unspoken implications of Title IX required schools to offer equal opportunities for women to play sports, as well as provide women with the same athletic facilities and funds as men.<sup>46</sup> The passage of Title IX, according to the legislators who drafted and advocated for the Act, directly targeted several kinds of discrimination that plagued educational institutions across the country.<sup>47</sup> Though the use of Title IX to achieve equality for women’s collegiate athletics was groundbreaking, the untapped transformative potential of Title IX took decades to come into realization.<sup>48</sup>

Congress originally devised Title IX as a means of achieving institutional compliance through a monetary-based incentive system.<sup>49</sup> Within the

44. See Walker, *supra* note 2, at 99 (“The focus on sports has limited the transformative power of Title IX’s non-discrimination mandate. Not every woman plays sports, but a rape-tolerant campus—with ineffective prevention programming, inadequate support services for survivors, and inequitable grievance procedures—threatens every student.”).

45. 20 U.S.C. § 1681(a) (2018).

46. Christine Hepler, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 442–43 (2013) (“Prior to the passage of Title IX, 170,000 men participated in intercollegiate athletics. During the same time, only 30,000 women were involved in intercollegiate athletics. By the Thirtieth Anniversary of the passage of Title IX, 209,000 men and 151,000 women participated in athletics at the college level.”).

47. See 118 CONG. REC. 5812 (1972) (statement of Senator Bayh) (“We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.”); see also Hepler, *supra* note 46, at 447–48 (noting that aside from Senator Bayh, who was most prominent proponent of gender equality under Title IX in Senate, Title IX was supported by two female Democratic representatives in House: Edith Green from Oregon and Patsy Mink from Hawaii).

48. See Hepler, *supra* note 46, at 442–45 (detailing general pre-enactment history of Title IX and statistical evidence of improvements to gender equality in undergraduate athletic programs).

49. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE IX LEGAL MANUAL, <https://www.justice.gov/crt/title-ix> [INSERT PERMALINK HERE] (last modified Aug. 6, 2015) (outlining procedures for terminating federal funding if program found noncompliant with Title IX). The Title IX Legal Manual states:

Agency staff should remember that the primary means of enforcing compliance with Title IX is through voluntary agreements with the recipients, and that fund suspension or termination is a means of last resort. . . . Several procedural requirements must be satisfied before an agency may deny or terminate federal funds to an applicant/recipient. A four step process is involved: 1) the agency must notify the recipient that it is not in compliance with the statute and that voluntary compliance cannot be achieved; 2) after an opportunity for a hearing on the record, the “responsible Department official” must make an express finding of failure to comply; 3) the head of the agency must approve the decision to suspend or terminate funds; and 4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30

Department of Education, the Office for Civil Rights (OCR) retains primary enforcement authority over Title IX claims.<sup>50</sup> Either in response to student complaints or on its own initiative, the OCR may conduct Title IX compliance reviews at schools that receive federal funding.<sup>51</sup> If the OCR determines a school violated Title IX standards, then the OCR has the power to terminate that school's federal funding.<sup>52</sup> Still, the resolution offered by the OCR for institutional transgressions is limited to its administrative impact; in reality, it has little to no effect on the *students* who suffered injury because of a school's failure to investigate, adjudicate, and report their assault.<sup>53</sup> Just a few years after Congress passed Title IX, the Supreme Court recognized the shortcomings in the OCR's ability to provide that effective relief and expanded the method of recovery

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days before terminating funds. The report must provide the grounds for the decision to deny or terminate the funds to the recipient or applicant.

*Id.*

50. See Walker, *supra* note 2, at 101–04 (describing OCR administrative method of redress in response to Title IX claim). Though no official elemental process has been outlined by OCR to issue a Title IX complaint, a summary of scholarly analysis of OCR guidelines has produced the following standard:

The purpose of filing a complaint with OCR is to trigger an investigation into the adequacy of a school's response to peer sexual harassment. The critical inquiry in OCR review is how quickly and effectively the school responded after receiving actual or constructive notice of harassment that impairs a student's access to educational programs or activities . . . . An OCR complaint should demonstrate: (1) impairment of access to educational opportunities, (2) actual or constructive notice, and (3) the inadequacy of the school's response . . . .

*Id.* at 102, 104. Along with investigating institutional compliance with Title IX, the responsibility of the OCR is to issue periodic policy guidelines regarding adequate and reasonable responses by colleges and universities to filed complaints. See *id.* at 102.

51. See 34 C.F.R. § 106 (2018) (authorizes the Office of Civil Rights to oversee and ensure all applications for federal financial by program or institution that operations compliant with Title IX); see also *OCR's Enforcement of Title IX*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, [www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [https://perma.cc/WKY2-NC36] (last modified Sept. 25, 2018) ("OCR evaluates, investigates, and resolves complaints alleging sex discrimination. OCR also conducts proactive investigations, called compliance reviews, to examine potential systemic violations based on sources of information other than complaints.").

52. See *supra* note 50 (outlining method of terminating federal funding of noncompliant educational institutions); see also Walker, *supra* note 2, at 102 (explaining that while OCR has power to terminate federal funding, ultimate goal of OCR review is voluntary compliance). Walker pointed out that while OCR has the power to terminate federal financial assistance and pressure schools into voluntary compliance, "lackluster administrative enforcement [in the OCR] has often forced private litigants to seek vindication of their civil rights within a daunting doctrinal framework." See *id.* Walker explained that Title IX complaints and OCR inquiries are theoretically supposed to be complementary modes of enforcement; schools should change their Title IX procedures in response to OCR sanctions, and then individuals should seek personal remedy for the wrongs suffered as a result of the discriminatory practices of those schools. See *id.* Unfortunately, as Walker discusses, there has been an increased reliance by Title IX claimants on private civil suits because of disorganization and uncertainty at OCR. See *id.*

53. See Walker, *supra* note 2, at 102 (discussing how shortcomings with OCR enforcement, including recent pronounced inconsistencies in policy guidance, underscore importance of bringing private suits); see also *Cannon v. Univ. of Chi.*, 441 U.S. 667, 704–06 (1979) (noting that administrative remedy serves limited government policy ends and offers virtually no substantial redress to individuals impacted by failed compliance with Title IX).

available under the Act.<sup>54</sup>

In *Cannon v. University of Chicago*,<sup>55</sup> the Supreme Court of the United States held that an implied private right of action against an educational institution exists under Title IX.<sup>56</sup> The Court allowed personal recovery under Title IX and reasoned that the right to bring an individual claim was consistent with the legislative intent of the Act.<sup>57</sup> Justice Stevens, writing for the Court, identified two underlying principles upon which Title IX was founded.<sup>58</sup> First, the government should avoid the use of federal resources to support discriminatory practices; second, it should protect individual citizens against those very practices.<sup>59</sup> Though the administrative remedy already in place before

54. See *Cannon*, 441 U.S. at 705–06 (pointing out that standards for making formal complaint with OCR are extraordinarily burdensome on individual litigants). Writing for the Court, Justice Stevens shrewdly noted that a purely administrative remedy was misaligned with the interests of complaining parties:

[I]t makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate. 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.

*Id.*

55. 441 U.S. 677 (1979).

56. See *id.* at 717 (holding that woman who was denied admission to the University of Chicago could sue individually under implied Title IX remedy). Only several years after the initial passage of Title IX, the Supreme Court in *Cannon* faced a relatively limited analytical framework and took note of only two factors before expanding the remedy under Title IX: “Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from participation in the respondents’ medical education programs because of her sex. Second, these education programs were receiving federal financial assistance at the time of her exclusion.” *Id.* at 680.

57. See *id.* at 703 (“[W]hen that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.”); see also *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (allowing monetary relief in private Title IX suits after acknowledging prospective relief and administrative action would leave some plaintiffs without adequate remedy).

58. See *Cannon*, 441 U.S. at 703–04 (noting that both purposes were repeatedly identified in debates over enactment of Title IX). As to the first purpose of keeping federal funds away from discriminatory institutions, Hawaii Representative Patsy Mink stated:

Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

117 CONG. REC. 39,252 (1971) (statement of Rep. Mink). As to the second purpose, of protecting individuals from discriminatory practices, Senator Bayh stated: “[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . .” 118 CONG. REC. 5806–5807 (1972) (statement of Sen. Bayh).

59. See *Cannon*, 441 U.S. at 704, n.36 (deducing two alleged purposes behind passage of Title IX based on arguments offered in support of Act during its drafting and debate in 1971 and 1972). In determining the two purposes behind the passage of Title IX, the Court specifically quoted statements made by Representative Mink and Senator Bayh in the debates surrounding the passage of Title IX. See *supra* note 58 (Congressional statements used by the Court in *Cannon*).

the *Cannon* decision served the first purpose, there were no appropriate means of accomplishing the second purpose at that time.<sup>60</sup> An implied right of action, the Court reasoned, was necessary to accomplish the purpose of the statute: to federally mandate the protection of individuals from discrimination.<sup>61</sup> Therefore, the Court held that Title IX could be used implicitly as a statutory vehicle for individual relief.<sup>62</sup>

For many years, the primary parties involved in private Title IX actions were students bringing claims against universities.<sup>63</sup> The Supreme Court, however, expanded the class of individuals able to seek relief under Title IX in *North Haven Board of Education v. Bell*.<sup>64</sup> According to the Court, both the legislative and postenactment history of Title IX supported the inclusion of employees in the class of people entitled to protection under Title IX.<sup>65</sup> To give Title IX the wide

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60. See *Cannon*, 441 U.S. at 704–06 (discussing deficiencies of administrative redress to provide adequate justice for students injured by an educational institution’s failure to comply with Title IX). According to the Court, the first purpose of Title IX—to avoid the use of federal resources to support sexually-biased institutions—was already served by “the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices.” See *id.* at 704. The Court acknowledged that this remedy is a particularly severe sanction for an educational institution, but it does not provide an appropriate means of accomplishing the second purpose, which is to protect individuals from noncompliant institutions. See *id.* at 705.

61. See *id.* at 699–703 (reasoning that striking parallels between Title VI and Title IX support the creation of a private right of action under Title IX). The Court noted that when Title IX was enacted, Title VI had already been construed several times as creating a private remedy. See *id.* at 696. For Title VI suits, no express cause of action was available under its statutory language, but private suits moved forward anyway. See *id.* at 700. When evaluating the relationship between Title IX and Title IV the Court noted, “Except for the substitution of the word ‘sex’ in Title IX to replace the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language to describe the benefitted class.” *Id.* at 694–95. In the Court’s view, the similar language used in Title VI and Title IX supported the conclusion that Congress intended to create statutes with similar goals of protection, similar modes of enforcement, and similar methods of recovery. See *id.* at 696–98. Since an implied right of action already existed under Title VI, an anti-discriminatory statute, the Court held that the second purpose of Title IX—protecting individuals from discrimination—would also served by “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 that statute.” See *id.* at 705–06.

62. See *id.* at 709 (“Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.”).

63. See generally *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535–36 (1982) (introducing school employees to existing class of persons deserving protection under Title IX). The Supreme Court held that a female employee of a school district who complained of gender discrimination had a cause of action under Title IX. See *id.* at 540.

64. 456 U.S. 512 (1982).

65. See *id.* at 535–36 (borrowing same method of reasoning used in *Cannon*, the Court reviewed Congressional Record and determined that weight of legislative history as well as postenactment developments, are important authority to consider when interpreting scope of Title IX). As an example of how Title IX has been construed broadly in the past, the Court recounted U.S. Senator James McClure’s attempt to introduce an amendment to Title IX that would have restricted the term “educational program or activity” to include only curriculum or graduation requirements of the relevant institution. See *id.* at 535. The Amendment failed after opposition from Senator Bayh, who claimed “it would exempt those areas of traditional discrimination against women that are the reason for the Congressional enactment of Title IX.”

scope of protection Congress intended, the Court construed the Act's written form generously.<sup>66</sup> In doing so, the Court paid special attention to the language Congress selected in Title IX, particularly to the use of the word "person" rather than the selection of a more limited word, such as "student."<sup>67</sup> Title IX's broad directive that no "person" should be subject to gender discrimination ultimately supported the conclusion that employees also should not suffer any exclusion or denial of benefits on the basis of sex.<sup>68</sup>

B. *Changes in Air Pressure: The Supreme Court Establishes the Davis Standard*

The Court issued its last major expansion of recovery under Title IX in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.<sup>69</sup> In its most liberal ruling on Title IX yet, the Supreme Court held that a person may pursue a private cause of action against a school receiving federal funds in the case of student-on-student, or peer, sexual harassment.<sup>70</sup> That is, an educational institution need not be the direct perpetrator of the discrimination or harassment at issue in order to be held privately liable for the harm done to one of its students; it is enough if the school knew about the hostile circumstances and did nothing to address them.<sup>71</sup>

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*Id.* (internal citations omitted).

66. *See id.* at 521–22 (noting that Title IX lists exclusion of classes by specific schools, such as certain religious and military institutions, and that absence of a specific class exclusion for "employees" in this section supported conclusion that Title IX's broad protection of "persons" extends beyond students to include employees).

67. *See id.* at 521 (surmising that Congress's use of the word "person" in Title IX statutory language implies broad application of protection); *see also* 20 U.S.C. § 1681(a) (2018) (declaring that no person shall be subjected to discrimination on the basis of sex by publicly funded educational institution).

68. *See id.* (opining that broad language and purpose of Title IX implies generous interpretation of word "person"). The Court noted that the Congressional selection of the particular word "person" in lieu of other possible class categorizations was significant:

Because [Title IX] neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these "persons" unless other considerations counsel to the contrary. After all, Congress easily could have substituted "student" or "beneficiary" for the word "person" if it had wished to restrict the scope of [Title IX].

*Id.*

69. 526 U.S. 629 (1999).

70. *See id.* at 646–47 (holding that school's failure to investigate, adjudicate, or report known sexual harassment of young girl by a student created an abusive environment that deprived her of educational benefits and opportunities protected under Title IX). The *Davis* decision ultimately announced that a school is not only liable under Title IX for its own misconduct, but also for the misconduct of one of its students when it fails to properly pursue steps to remedy a known instance of student-on-student harassment. *See id.*

71. *See id.* ("We thus conclude that recipients of federal funding 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." (alteration in original)); *see also* *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 277 (1998) (addressing whether school receiving federal funding was liable under Title IX for harassment perpetrated teachers against student). Just a year prior to *Davis*, the Court outlined a deliberate indifference test to determine whether an employee's independent sexual misconduct is attributable to the school district under Title IX. *See id.* In a decision written by Justice O'Connor, the Court held that two criteria must be met in order to succeed

The three-prong test from *Davis* requires a plaintiff to first establish that the sexual harassment was so severe, pervasive, and objectively offensive that it deprived the plaintiff of access to the educational opportunities or benefits provided by the school.<sup>72</sup> Second, the plaintiff must prove that the school had actual knowledge of the sexual harassment.<sup>73</sup> Finally, the plaintiff must show that the school was deliberately indifferent to the harassment.<sup>74</sup> The Court offered a comprehensive discussion regarding the definition of deliberate indifference and its relation to the level of misconduct required to warrant a claim under Title IX.<sup>75</sup> According to *Davis*, not only must the school official have substantial authority over the person, but the conduct in question must have occurred in circumstances under considerable exposure to the official or the institution.<sup>76</sup> The Court defined the deliberate indifference standard as: “the recipient’s response to the harassment or lack thereof [must be] clearly unreasonable in light of the known circumstances.”<sup>77</sup> Since the *Davis* decision, federal courts have

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on a private Title IX claim. *See id.* at 290. First, the plaintiff must show that a school official with the authority to correct the circumstances knew of the offensive conduct. *See id.* The Court went on to clarify that an appropriate official is a person who works at the recipient entity with the authority to take corrective action to end the discrimination. *See id.* Second, the party must show that despite having such knowledge, the school failed to properly respond; or acted with deliberate indifference. *See id.* at 291. The Court further noted that the deliberate indifference standard is one that requires actual notice. *See id.* In sum, the Court defined the deliberate indifference test and stated: “We conclude that damages may not be recovered . . . unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.” *Id.* at 277.

72. *See Davis*, 526 U.S. at 633 (explaining requisite extent of the suffered harassment needed in order to pursue a Title IX claim against an educational institution); *see also* Thacker, *supra* note 11, at 711 (outlining prongs of test from *Davis*).

73. *See Davis*, 526 U.S. at 633 (establishing actual notice as standard of knowledge for school administrators).

74. *See id.* at 643 (reintroducing deliberate indifference standard first outlined by Supreme Court as an appropriate standard for reviewing Title IX claims). For a further discussion on the deliberate indifference standard, *see infra* notes 75–84 and accompanying text.

75. *See Davis*, 526 U.S. at 653 (justifying the high standard of requiring claimant to prove that harassment was so serious as to have systemic effect of denying access to educational program). The Court noted that because a school cannot realistically, or fairly, be held liable for every independent act by each of its students, the standard for Title IX claims is considerably high:

By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.

*Id.*

76. *See id.* at 645 (limiting recipient school’s liability to circumstances where institution exercises substantial control over both harasser and context in which known harassment occurs).

77. *See id.* at 648 (describing deliberate indifference standard); *see also* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998) (explaining deliberate indifference and its implications on enforcement of Title IX); Thacker, *supra* note 11, at 712–13 (“The phrase ‘not clearly unreasonable’ is the prong where circuit courts, as well as district courts, have split. Exactly what type of conduct ensures that a school district’s response to student-on-student harassment is ‘not clearly unreasonable’ is still up for debate.”). The Court explicitly defined deliberate indifference in *Gebser* as “an official decision by the recipient of public funding not

consistently and universally applied the deliberate indifference standard.<sup>78</sup>

Before *Davis*, the Court had not considered claims involving peer-harassment, and it depended heavily on external sources to justify its grant of private claims for peer offenses.<sup>79</sup> Just as in *Cannon* and *Bell*, the Court primarily relied on past judicial interpretations of Title VII, as well as material dispersed by the OCR regarding appropriate responses to peer-harassment.<sup>80</sup> In doing so, the Court broadened the scope of Title IX, and the *Davis* decision became known as a victory for advocates of Title IX's expansion.<sup>81</sup> Still, though the decision gave plaintiffs the power to hold educational institutions liable for failing to act

to remedy the [Title IX] violation" once that recipient has notice of the violation. *See Gebser*, 524 U.S. at 290.

78. *See Davis*, 526 U.S. at 645 ("That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." (alteration in original)); *see, e.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 706-07 (4th Cir. 2018) (stating *Davis* is the standard by which peer harassment claims are evaluated); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017) (holding plaintiff had failed to meet standard for peer harassment claim under *Davis*); *Doe v. Galster*, 768 F.3d 611, 614 (noting *Davis* must be met in order to impose liability on school for peer harassment claim) (7th Cir. 2014); *Porto v. Town of Tewksbury*, 488 F.3d 67, 72-73 (1st Cir. 2007) (outlining elements of *Davis* test); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005) (finding language from *Davis* regarding "actual notice" was sufficient for jury instruction on Title IX claim); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000) ("This is our first application of *Davis* to a student-student harassment case.").

79. *See Davis*, 526 U.S. at 638-49 (discussing precedential decisions issued by Supreme Court on Title IX, examining language of statute, and analyzing records of debates between members of Congress over the proper interpretation of Title IX claims). In particular, the *Davis* decision relied heavily on the holding in *Gebser* just a year prior. *See id.* at 643. The Court specifically stated: "*Gebser* thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher-student discrimination." *Id.* Applying this very same framework from *Gebser*, the Supreme Court successfully created a test in *Davis* to determine whether the independent conduct of a student is attributable to the school district. *See id.* In doing so, the Court expanded the protective reach of Title IX by preventing recipients of federal funding from not only engaging in discriminatory behavior, but also failing to stop discriminatory behavior. *See id.*

80. *See id.* at 636 (borrowing concepts and reasoning from Title VII jurisprudence). The Court noted some similarities between Title VII and Title IX:

[A]s Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, 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.* (quoting *Davis ex rel. Lashonda D. v. Monroe Cty. Bd. of Educ.*, 74 F.3d 1186, 1195 (1996)). The Court in *Davis* also cited a contemporary OCR handbook, which, in its official guidance, advised educators to take immediate steps to investigate the claims and take steps to eliminate a hostile environment. *See id.* at 648.

81. *Compare Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 477 (D.N.H. 1997) ("Accordingly, since the duty of a school to its students should correlate with that of an employer to its employees, it makes sense to apply the knew-or-should-have-known standard to the instant action."), *with Brodeur v. Claremont Sch. Dist.*, 626 F. Supp. 2d 195, 206 (D.N.H. 2009) (outlining elements of *Davis*, including deliberate indifference standard and actual knowledge requirement, as appropriate test for evaluating Title IX claim); *see Thacker, supra* note 11, at 711 (explaining that *Davis* is dominating precedent for Title IX peer harassment claims).

on peer-harassment claims, the *Davis* test is a high burden to overcome.<sup>82</sup> To establish a viable Title IX claim, *Davis* requires the plaintiff to address three elements that are incredibly difficult to prove: deliberate indifference, actual knowledge, and severe, pervasive and objectively offensive harassment.<sup>83</sup> Despite these setbacks, *Davis* stands today as the touchstone decision for evaluating peer-harassment claims pursuant to Title IX.<sup>84</sup>

C. *Eye of the Storm: K.T. v. Culver-Stockton College's Silence on Nonstudent Standing*

Only one month before the District Court of Rhode Island issued its decision in *Doe*, the Eighth Circuit delivered an opinion in a case with almost identical facts: *K.T. v. Culver-Stockton College*.<sup>85</sup> In *K.T.*, Culver-Stockton College invited a female nonstudent to visit the campus as a potential recruit for the school's women's soccer team.<sup>86</sup> While on campus, an enrolled student sexually assaulted the nonstudent at a fraternity house party.<sup>87</sup> According to the nonstudent, she reported the assault to campus authorities the same weekend it occurred, but the college failed to pursue any further action in response to the

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82. See Heather D. Redmond, *Davis v. Monroe County Board of Education: Scant Protection for the Student Body*, 18 LAW & INEQ. 393, 412 (2000) ("Although the ultimate conclusion of the Court in *Davis* was correct, the standard is too narrow."). Redmond argued that the actual notice standard established in *Davis* is ineffective in a school setting because it requires young, inexperienced, and ill-equipped students to make reports of peer harassment to school officials, and effectively gives school officials permission to ignore student conduct until that actual notice is received. See *id.* at 415. Instead, Redmond argued the Court should have adopted a constructive notice standard, which is what several circuits utilized in Title IX cases prior to the *Davis* decision, and is similar to the standard used in Title VII cases of sexual harassment in the workplace. See *id.* at 413. Redmond also took issue with the deliberate indifference standard established by *Davis* because it requires a school to show only that it was not "clearly unreasonable" in its response to a Title IX claim. See *id.* at 415; see also Walker, *supra* note 2, at 110 (pointing out that though Supreme Court had sided with survivor of sexual harassment in creating peer-harassment doctrine, it also established impossibly high bar for recovery).

83. See *Davis*, 526 U.S. at 633 (establishing elements for evaluating peer harassment Title IX claim); see also Thacker, *supra* note 11, at 711 (outlining prongs of test from *Davis*); Walker, *supra* note 2, at 110–11 (discussing how elements of *Davis* have repeatedly frustrated courts and plaintiffs); see, e.g., *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 164, 174 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009) ("[T]itle IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is . . . whether the institution's response . . . is so deficient as to be clearly unreasonable."); *Bostic*, 418 F.3d at 361 (holding notice of mere possibility of sexual harassment to proper official is not sufficient to satisfy actual notice standard); *P.H. v. Sch. Dist. of Kansas City*, 265 F.3d 653, 663 (8th Cir. 2001) (holding instance where principal was notified by teachers about possible inappropriate behavior toward student was insufficient to constitute actual notice).

84. See Thacker, *supra* note 11, at 711 (noting that *Davis* is the most significant precedent in peer-harassment and sexual assault claims).

85. See *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017) (holding that nonstudent who was sexually assaulted on college campus did not meet requisite elements needed to succeed in a private right of action under Title IX).

86. See *id.* (noting means by which nonstudent arrived on college campus, where the sexual misconduct took place).

87. See *id.* (detailing factual circumstances surrounding sexual misconduct).



claim.<sup>88</sup> The nonstudent then sued the college in federal court under Title IX.<sup>89</sup>

Culver-Stockton College replied to the complaint with a motion to dismiss, arguing that the nonstudent-plaintiff failed to state a claim because she was not an enrolled student at the time of the assault.<sup>90</sup> The college contended that the peer-harassment doctrine, as the name suggests, applies only in cases where students sue their school over harassment by a fellow student.<sup>91</sup> The United States District Court for the Eastern District of Missouri agreed, reasoning that the implications of the nonstudent-plaintiff's argument were inconsistent with the appropriate standards for Title IX claims outlined in *Davis*.<sup>92</sup> The decision noted that the Supreme Court requires a degree of misconduct so extreme that it has a systemic effect on educational programs or activities of the claimant—who presumably has access to the programs and activities offered by the offending school.<sup>93</sup> The Eastern District of Missouri postulated that if any person invited to a campus had standing to sue for peer-harassment under Title IX, it would expand the scope of Title IX's protection beyond the limit the Court outlined in *Davis*.<sup>94</sup> Therefore, the court chose to preclude nonstudents rather than, in its view, expose hundreds of colleges and universities to an unprecedented degree of liability.<sup>95</sup>

88. *See id.* (explaining that though incident was reported immediately, defendant college did nothing other than cancel scheduled conference with K.T. and her parents).

89. *See id.* (noting K.T.'s claim was based on a peer-harassment theory first promulgated in the *Davis* decision). The nonstudent-plaintiff brought a private Title IX action according to the standard laid out in *Davis*: "*Davis* held that a federally funded institution may be liable for damages in a private Title IX action if its deliberate indifference to known acts of peer harassment denied the victim access to educational opportunities provided by the institution." *Id.* Specifically, the nonstudent-plaintiff claimed the college acted with deliberate indifference by first failing to take reasonable preventative measures such as supervising her during her visit, and second, by failing to investigate the claim and provide her with adequate treatment after she reported the incident. *See id.*

90. *See id.* at 1056 (explaining procedural posture of case and parties' respective arguments).

91. *See* *K.T. v. Culver-Stockton Coll.*, No. 4:16-CV-165 CAS, 2016 WL 4243965 at \*5 (E.D. Mo. Aug. 11, 2016) (holding at district court level that nonstudent was outside scope of persons Congress intended Title IX to protect). In response to the plaintiff's assertions, Culver-Stockton College responded that both the underlying purpose and overarching extent of Title IX did not support the extension of protection to a nonstudent:

The College replies that the foundational underpinning of the Supreme Court's limited extension of liability for student-on-student harassment in *Davis* is the remedial purpose embodied in Title IX of preventing on-going harassment of students based on their gender. It argues there is a material difference between a student who is enrolled, taking classes, and remains on campus with an alleged harasser, and plaintiff, who alleges she only visited the campus for a day or two.

*Id.*

92. *Id.* at \*6 (noting that *Davis* emphasized the requirement of a substantial effect on access to educational opportunities and benefits of Title IX claimant, and recognizing that the plaintiff's basis for liability was based on a single event).

93. *See id.* (discussing the required elements under test from *Davis*); *see also supra* notes 69–84 and accompanying text for extensive analysis of Title IX standards promulgated by *Davis*.

94. *See K.T.*, 2016 WL 4243965 at \*6 (“[A] non-student, subjected to a single instance of harassment by a student, no matter how severe, cannot bring an action against the institution because there is no systemic effect on [the non-student’s] educational programs or activities.”).

95. *See id.* (justifying preclusion of nonstudents under Title IX in lieu of opening

On appeal, the Eighth Circuit declined to address whether, as a threshold requirement, a plaintiff must be a student in order to claim recovery under Title IX.<sup>96</sup> Instead, the court assumed *arguendo* that the plaintiff's status as a nonstudent did not preclude her from asserting a Title IX harassment claim, and heard the complaint on its merits.<sup>97</sup> The Eighth Circuit found that, because Culver-Stockton College had no prior basis for anticipating the sexual assault, the nonstudent-plaintiff failed to satisfy the deliberate indifference element of a Title IX claim.<sup>98</sup> The court also noted that although the nonstudent-plaintiff informed the school of the assault immediately after it occurred, the actual knowledge element requires the funding recipient to have prior notice of a substantial risk of peer-harassment.<sup>99</sup> Finally, the court remarked that a single grievance, no matter how individually heinous, does not adequately assert the kind of severe, pervasive, and objectively offensive discrimination required under the *Davis* standard for peer-harassment claims.<sup>100</sup> Though the Eighth Circuit ultimately

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floodgates). The Eastern District had no interest in shouldering a massive expansion of collegiate liability, especially when no previous case law was on-point with the issue, and the Supreme Court had been clear in its instructions in *Davis*: "Accepting [Plaintiff K.T.'s] argument would impermissibly expand the law's scope beyond the limited right of action recognized by the Supreme Court [in *Davis*] that requires a 'systemic effect on educational programs or activities.'" *See id.* (quoting *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652–53 (1999)).

96. *See K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017) (acknowledging that both parties disputed whether the plaintiff's nonstudent status precluded her from asserting a Title IX claim). Though the Eighth Circuit identified the central issue as whether the nonstudent had standing to bring suit, it assumed *arguendo* that enrollment status was not a determinative factor to seek a private remedy under Title IX. *See id.* In choosing to evaluate K.T.'s claim on its merits, the Eighth Circuit declined to affirmatively decide if nonstudents could seek Title IX recovery via the *Davis* test, and left open the question of standing for nonstudent-plaintiffs. *See id.* The implications of this judicial decision are discussed further in notes *infra* 160–79 and accompanying text.

97. *See K.T.*, 865 F.3d at 1057 (evaluating plaintiff's private Title IX claim based on elements outlined in *Davis*). The Eighth Circuit considered whether Culver-Stockton College acted with deliberate indifference, whether Culver-Stockton College had actual knowledge of the discrimination, and whether the nonstudent-plaintiff experienced severe, pervasive, and objectively offensive discrimination. *See id.*

98. *See id.* at 1058 ("At most, [K.T.'s] allegations link the College's inaction with emotional trauma K.T. claims she experienced following the assault. The complaint does not, however, allege that Culver-Stockton's purported indifference 'subject[ed] [K.T.] to the harassment.'") (quoting *Davis ex rel. Lashonda D. v. Monroe*, 526 U.S. 629, 644 (1999) (alteration in the original)). In other words, the alleged deliberate indifference on the part of the institution must cause the assault, and it is not sufficient if the deliberate indifference is a mere reflection of the school's after-the-fact response to the plaintiff's complaint of the assault. *See id.*

99. *See id.* at 1058–59 (explaining requisite standard to satisfy actual knowledge element of private Title IX claim). The court noted that the plaintiff needed to provide more than a single post-incident notice of her sexual assault in order to satisfy the actual knowledge element. *See id.* In the Eighth Circuit, "actual knowledge may be established where the recipient has *prior knowledge* of (1) harassment previously committed by the same perpetrator and/or (2) previous reports of sexual harassment repeatedly occurring on the same premises." *Id.* (citing *Ostrander v. Duggan*, 341 F.3d 745, 751 (8th Cir. 2003) (alteration in original)). Because the plaintiff's complaint lacked any assertion that the college knew she faced a risk of sexual assault or harassment on their campus during her visit, she did not fulfill the actual knowledge element. *See id.*

100. *See id.* at 1059 ("Although we are sympathetic to K.T.'s circumstances and agree

halted the nonstudent-plaintiff's suit for the stated reasons, its refusal to categorically preclude nonstudents from bringing suit axiomatically implied that if nonstudent-plaintiffs satisfy the elements of a peer-harassment claim they may bring a private claim under Title IX.<sup>101</sup>

### III. WEATHER REPORT: THE FACTS OF *DOE v. BROWN UNIVERSITY*

In September 2017, the District Court of Rhode Island faced the very same question the Eighth Circuit declined to address only a few weeks prior in *K.T.*: whether nonstudents have standing to bring a private right of action under Title IX against educational institutions.<sup>102</sup> Jane Doe was a freshman student at Providence College in Providence, Rhode Island.<sup>103</sup> In November 2013, three Brown University football players drugged Jane Doe at a bar in Providence before taking her back to Brown University's campus where they sexually assaulted her.<sup>104</sup> Several days after the incident, Jane Doe received medical treatment and underwent laboratory tests at a Massachusetts hospital.<sup>105</sup> She reported the assault to both Providence Police and Brown University Police in February 2014.<sup>106</sup>

In the fall of 2014, after Jane Doe made several requests to the administration, Brown University finally agreed to conduct an inquiry into her

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that she has alleged opprobrious misconduct on the part of the fraternity member, K.T.'s singular grievance on its own does not plausibly allege pervasive discrimination as required to state a peer harassment claim."'). Notably, in its discussion of this element, the court did not place significant emphasis on the fact that the discrimination must affect access to an educational program or activity. *See id.* Rather, it highlighted the need for a plaintiff to prove severe, pervasive, and objectively offensive discrimination. *See id.* Additionally, the court remarked that under the *Davis* standard, a singular grievance of harassment, on its own, is not enough to have the systemic effect of denying the victim equal access to an education program or activity, thereby implying that further evidence of the adverse effects suffered by a survivor are necessary for a successful Title IX claim. *See id.*; *see also Davis*, 526 U.S. at 653 (noting relationship between victim and harasser necessarily affects the extent to which the misconduct can be said to breach Title IX standards). In other words, though student-on-student harassment is actionable under Title IX, the Court in *Davis* stated that it is less likely to disrupt a student's educational benefits and systemically affect educational programs or activities than would teacher-on-student misconduct as in *Gebser*. *See id.*

101. For a further discussion on the implications of the Eighth Circuit's reasoning in *K.T.*, see *infra* notes 160–79 and accompanying text.

102. *See Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 561 (D.R.I. 2017) ("[C]an a Providence College student who was sexually assaulted by a Brown student on Brown's campus bring a Title IX damages suit against Brown alleging deprivation of an educational opportunity at Providence College?"), *aff'd*, 896 F.3d 127 (1st Cir. 2018).

103. *See id.* at 558 (stating Jane Doe's enrollment at Providence College at time of incident).

104. *See id.* (describing how Jane Doe was taken from bar by taxi back to Brown University's campus).

105. *See id.* (explaining lab tests later confirmed Jane Doe had common-date rape drug in her system at time of incident).

106. *See id.* (recounting public safety and law enforcement agencies to which Jane Doe reported incident of sexual assault). Providence Police executed search warrants for cell phones and dorm rooms of suspects and found phone communications between football players referencing rape, as well as explicit photographs of Jane Doe, which were taken during assault. *See id.*

allegations under the school's disciplinary code, but not under federal Title IX standards.<sup>107</sup> Following Jane Doe's repeated questioning regarding the results of the investigation, Brown University eventually informed her in 2016 that it never completed the internal inquiry concerning her assault and had abandoned any disciplinary action against the students.<sup>108</sup> Jane Doe ultimately withdrew from Providence College, claiming that Brown's failure to pursue disciplinary action against its students allowed the students the freedom to roam the city of Providence, including Providence College, and caused her to fear for her safety.<sup>109</sup>

Jane Doe then sued Brown University and several of its administrators alleging they failed to adequately protect her under Title IX and acted with deliberate indifference by refusing to investigate or provide any other remedy for her assault.<sup>110</sup> She further claimed that because Brown University failed to respond effectively to her complaint, the undisciplined attackers were allowed free range of the local area, which in turn generated a hostile educational environment at Providence College.<sup>111</sup> Jane Doe alleged that this fear caused a substantial interference with her educational opportunities and benefits, ultimately causing her to withdraw.<sup>112</sup>

Jane Doe brought her Title IX claim in the United States District Court for the District of Rhode Island.<sup>113</sup> Pursuant to Federal Rule of Civil Procedure 12(c), Brown University moved for judgment on the pleadings and argued that because Jane Doe was not an enrolled student and did not receive any educational benefit from Brown University, she was not entitled to the University's protection under Title IX.<sup>114</sup> According to Brown University, the class of persons afforded Title

107. *See id.* at 558 (noting Brown University would not initially investigate Jane Doe's complaint until pressed, and did not investigate complaint pursuant to federal standards). Jane Doe ultimately filed a complaint against Brown University with OCR because she believed Brown University was required to address her complaint under Title IX, though the complaint was pending at time of District Court's ruling). *Id.* at 558, n.2.

108. *See id.* at 558 (describing Brown University's failure to comply with Jane Doe's request that it completed its inquiry into the alleged incident).

109. *See id.* (explaining Jane Doe's purported reasons for withdrawing from Providence College).

110. *See id.* at 558–59 (naming Brown University; Jonah Allen Ward, Senior Associate Dean of Student Life; and Yolanda Castillo-Appollonio, Associate Dean of Student Life, as co-defendants in the suit).

111. *See id.* at 559 (explaining how Brown University's alleged failure to comply with Title IX adversely affected Jane Doe). Jane Doe, though not a student at Brown University, attended Providence College, another institution of higher education located nearby. *See id.* As a result of Brown University's failure to respond to her complaint, Jane Doe alleged that she suffered fear for her safety on her own school's campus and in the general Providence area. *See id.* Because the men from Brown University who assaulted her faced no disciplinary action by their own institution, they were not prohibited from being near or contacting her. *See id.* As a result of this fear, she allegedly suffered a "hostile education environment" at Providence College, which substantially interfered with her access to educational opportunities or benefits. *See id.*

112. *See id.* (describing reasoning behind Jane Doe's allegations and subsequent withdrawal from Providence College).

113. *See id.* (noting Jane Doe also claimed violations of Rhode Island Civil Rights Act (RICRA) and Article I, Section 2 of the Rhode Island Constitution).

114. *See id.* at 559 ("A motion for judgment on the pleadings [under Rule 12(c)] is treated

IX protection is limited to the students and staff of the offending school.<sup>115</sup> Jane Doe sought to expand this class and petitioned the District Court of Rhode Island to widen the scope of the statute's protection to include nonstudents.<sup>116</sup> According to Jane Doe, the statutory language of Title IX reflects Congress's intent to protect all persons, regardless of their enrollment status, who come within the school's control.<sup>117</sup> The court ultimately agreed with Brown University; Jane Doe was not a student of the school and therefore did not fall within Title IX's private-cause-of-action umbrella of protection.<sup>118</sup>

IV. A CLOUD WITHOUT A SILVER LINING: A NARRATIVE ANALYSIS OF *DOE v. BROWN UNIVERSITY*

In support of its decision to preclude Jane Doe from the class of persons entitled to individual recovery under Title IX, the District Court of Rhode Island began its analysis by outlining the requisite elements of a Title IX claim set forth in *Davis*.<sup>119</sup> According to the court, the requisite elements assume at the outset that the plaintiff is part of a class entitled to Title IX protection.<sup>120</sup> At the time of the decision, the court noted that the relevant federal case law had only designated

much like a Rule (12)(b)(6) motion to dismiss. . . . The court must first set aside conclusory allegations and second, it must consider whether the residual facts support a 'reasonable inference that the defendant is liable for the misconduct alleged.'" (internal quotations and citations omitted)). Brown University asserted that Title IX protections are limited to student-on-student harassment when both students were enrolled at same school where harassment occurred. *See id.* at 560.

115. *See id.* (explaining the University's argument that Jane Doe did not receive any educational benefit from Brown University that would entitle her to recovery).

116. *See id.* at 560–61 (utilizing the specific selection statutory language in Title IX, as well as past precedent to expand the reach of Title IX, to bolster her argument).

117. *See id.* at 560 (explaining that Jane Doe's argument for nonstudent protection under Title IX hinges on Congress's use of general word "person" rather than more specific word "student" in written statutory text); *see also* 20 U.S.C. § 1681(a) ("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 educational program or activity receiving Federal financial assistance . . .").

118. *See Doe*, 270 F. Supp. 3d at 563 (refusing to extend Title IX protections to nonstudents).

119. *See id.* at 560 (listing requisite elements for private claim under Title IX in the First Circuit, based on requisite elements as outlined in *Davis*). In the First Circuit, a private litigant seeking a remedy under Title IX must demonstrate:

- (1) that he or she was subject to 'severe, pervasive, and objectively offensive' sexual harassment by a school peer, and (2) that the harassment caused the plaintiff to be deprived of educational opportunities or benefits . . . (3) [the funding recipient] knew of the harassment, (4) in its programs or activities and (5) it was deliberately indifferent to the harassment such that its response (or lack thereof) is clearly unreasonable in light of the known circumstances.

*Id.* (quoting *Porto v. Town of Tewksbury*, 488 F.3d 67, 72–73 (1st Cir. 2007)).

120. *See id.* at 560 (explaining that, as a threshold matter, Jane Doe must prove her standing as member of class entitled to Title IX protection). It is important to note here that several other Title IX cases in the First Circuit have required plaintiffs to establish their status as students either at the outset of the claim or as an element to the claim. *See, e.g., Porto*, 488 F.3d at 72–73 (listing plaintiff's status as a student as a requisite element to recover under Title IX); *Frazier v. Fairhaven*, 276 F.3d 52, 66 (1st Cir. 2002) (requiring that plaintiff be a student before pursuing a harassment claim).

two categories of protected individuals: students and employees.<sup>121</sup> Because the specific question of whether nonstudents have standing to bring a private Title IX claim was one of first impression, the court turned to the legislative intent, statutory language, and ultimately its own interpretation of Title IX case law for guidance.<sup>122</sup>

After reviewing both the statutory language and legislative history, the court concluded that Congress intended private enforcement of Title IX against a school to be a program-specific action.<sup>123</sup> The court reasoned that before *Cannon* made a private right under Title IX available, the statute's primary enforcement mechanism applied financial penalties to the program in violation of federal standards, and not to the school in general.<sup>124</sup> To further support its conclusion, the court also looked to statements made by United States Senator Birch Bayh,

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121. See *Doe*, 270 F. Supp. 3d at 560 (listing various cases from the First Circuit and Supreme Court involving only students and employees as plaintiffs). See generally *Davis ex rel. Lashonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (involving student-plaintiff suing school for Title IX violation); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (allowing employees to bring private right of action against school under Title IX); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (involving plaintiff who was student-applicant denied admission to university); *Frazier*, 276 F.3d 52 (1st Cir. 2002) (holding plaintiff must be student in order to initiate Title IX suit).

122. See *Doe*, 270 F. Supp. 3d at 561 (“[T]he Court turns back to the purpose of the statute and its language—who did Congress intend to protect from discrimination in educational programs based on gender; and who did it intend to punish; and to whom did the United States Supreme Court intend to give a private right of action?”).

123. See *id.* (reasoning that available federal case law and legislative history supported conclusion that Title IX is a “program-specific” remedy). The court borrowed the phrase “program-specific” from *Bell*'s discussion of administrative sanctions for schools in violation of Title IX. Compare *id.* (“The language of the statute, supported by legislative history, shows that enforcing Title IX against a school was meant to be program-specific—that is, the financial penalties were applied to the specific program where the violation occurred and not to the school in general.”), with *Bell*, 456 U.S. at 536–37 (“It is not only Title IX’s funding termination provision that is program-specific. . . Title IX’s legislative history corroborates its general program-specificity.”). Under Title IX’s enforcement provision, the termination of federal funds or denial of future grants is limited, so as to affect only the particular program found in violation of Title IX. See *Bell*, 456 U.S. at 537 (finding the portion of Title IX authorizing the issuance of financial penalties “program-specific”).

124. See *Doe*, 270 F. Supp. 3d at 561 (explaining that history of Title IX’s enforcement and federal financial mechanism justify the preclusion of nonstudent private claims). The court in *Doe* failed to expand upon what, exactly, it means when it claims that the enforcement of Title IX was meant to be program specific. See *id.* The court pointed out that the original function of the statute was to withhold federal funding from certain programs within an educational institution if it violated Title IX. See *id.* But, as Justice Stevens discussed in *Cannon*, Title IX was expanded to serve two underlying purposes: withholding of federal financial endorsement from schools that engage in discriminatory practices; and providing protection for individuals who were victims of such practices. See *Cannon*, 441 U.S. at 704. For further discussion on *Cannon*, see *supra* notes 55–62 and accompanying text. While administrative sanctions and civil suits under Title IX are not completely unrelated remedies, the Supreme Court has made clear that they are two distinct modes of enforcement under Title IX that serve two separate purposes. See *Doe*, 270 F. Supp. 3d at 561. In this case, the court declined to extend a private remedy to nonstudents in part because the administrative remedy has historically targeted specific programs in which students were enrolled. See *id.* Apparently, the District Court of Rhode Island cross-contaminated those purposes; it used the program-specific nature of Title IX administrative sanctions to undermine the implied availability of a private remedy. See *id.*

Jr., of Indiana, the primary author of Title IX, identifying the three kinds of discrimination that the Act intended to target: (1) discrimination in admission to an institution, (2) discrimination of available services or studies within an institution post-admission, and (3) discrimination in employment within an institution.<sup>125</sup> Senator Bayh's explanation of the Act's purpose, as interpreted by the court, indicated that Title IX protections have historically been limited to admitted students and employees.<sup>126</sup>

Relying on Title IX's statutory language, the court further refuted Doe's attempt to expand the class of persons entitled to protections under Title IX.<sup>127</sup> The court conceded that in *Bell*, the Supreme Court placed significant emphasis on the use of the word "person" instead of "student" in the phrasing of the Act.<sup>128</sup> While the Court liberally construed the word "person" to include both students and employees in *Bell*, the court in *Doe* distinguished *Bell*'s expansive construction for two reasons.<sup>129</sup> First, the court recognized that the controversy in *Bell* was not over a private right of action under Title IX, but whether Title IX prohibits education programs from engaging in discriminatory employment practices.<sup>130</sup> Second, in addition to noting the different central legal claims in

125. See *Doe*, 270 F. Supp. 3d at 561 (using Senator Bayh's statements to support proposition that Title IX intended to protect only admitted students) (citing *Bell*, 456 U.S. at 526 (quoting 118 CONG. REC. 5812 (1972))). Senator Bayh outlined three different kinds of discrimination he believed Title IX would address:

We are dealing with discrimination in admission to an institution, *discrimination of available services or studies within an institution once students are admitted* and discrimination in employment within an institution, as a member of a faculty, or whatever.

*Id.* (citing *Bell*, 456 U.S. at 526 (internal quotation marks and citations omitted)).

126. See *id.* (noting Senator Bayh's explanation of Title IX states that Title IX intended to only protect students admitted to offending institutions, save his mention of discrimination against employees of those institutions).

127. See *id.* at 562–63 (refusing to adopt Jane Doe's stance that word "person" used in Title IX can be expanded to include non-student plaintiffs); see also *supra* notes 63–68 and accompanying text for further discussion of the word "person" by the Supreme Court in *Bell*.

128. See *Doe*, 270 F. Supp. 3d at 563 ("The [Supreme] Court concluded that because Title IX proscribes employment discrimination in schools, employees of those schools are covered in 'persons.'"); see also *Bell*, 456 U.S. at 520–21 (noting that "person" implies broad directive, appears to include both students and employees). Additionally, the Court in *Bell* left the door open to expand the scope of "person" even further, by stating that, "Under that provision, employees, like other 'persons,' may not be 'excluded from participation in,' 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support." *Bell*, 456 U.S. at 520. This quote, in particular, implies that the Court considered the possibility of other persons beyond students and employees deserving protection under Title IX, and that being admitted to or enrolled in a program is not a requisite characteristic to belong to class of recovery. See *id.*

129. See *Doe*, 270 F. Supp. 3d at 562–63 (noting there was no question as to employees' connection to educational institution in *Bell*, nor did *Bell* address validity of private right of action by employees against educational institution under Title IX).

130. See *id.* (reasoning controversy at heart of *Bell* is incomparable to *Doe* controversy over nonstudent standing in private suits under Title IX). The District Court of Rhode Island's primary basis for rejecting the Bell court's reasoning in expanding the scope of the word "person" was the incomparable natures of the cases. See *id.* *Bell* involved the validity of Department of Education regulations that prohibited federally funded education programs from discriminating on the basis of gender with respect to employment. See *id.*; *Bell*, 456 U.S. at 514 (describing issue of case, which centered on legality of regulations issued pursuant to Title

each case, the court pointed out that the complaining employees in *Bell* actually worked for the offending school and therefore had a direct relationship with the institution, unlike the nonstudent-plaintiff in *Doe*.<sup>131</sup>

The court also looked to other federal case law that, while not directly on point, adumbrated the proposition that Title IX is limited exclusively to students attending the offending school.<sup>132</sup> The most important of these case discussions was the court's interpretation of *K.T.*<sup>133</sup> Notably, the District Court of Rhode Island adopted the reasoning in the opinion issued by the Eastern District of Missouri instead of the more recent holding published by the Eighth Circuit.<sup>134</sup> Drawing parallels from the Eastern District's classification of the plaintiff in *K.T.* as a nonstudent, the District Court of Rhode Island focused on the fact that Doe was not a student at Brown University.<sup>135</sup> Therefore, the court reasoned, its actions or omissions could not have prevented Doe from getting an education at Providence College, where she was enrolled.<sup>136</sup> Ultimately, the court found the Eastern District of Missouri's reasoning persuasive, and held that nonstudents cannot suffer deprivations from programs or activities at a school they do not attend.<sup>137</sup> Therefore, according to the District of Rhode Island, nonstudents do not have standing to bring private Title IX claims against those schools.<sup>138</sup>

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IX's protection from discriminatory practices by educational institutions). In *Doe*, the issue was not the validity of regulatory guidance as grounds for withholding funds, rather, it was whether the class of persons entitled to recovery under Title IX should be expanded to nonstudents. *See Doe*, 270 F. Supp. 3d at 563.

131. *See id.* (noting that employees in *Bell* had stronger relationship with offending institution than Jane Doe had with Brown University).

132. *See id.* at 561 (citing the Supreme Court's decision in *Davis* and the First Circuit's decision in *Frazier* as examples of student-centric Title IX litigation). In addition to noting that *Frazier* required a plaintiff to allege status as a student, the *Doe* court quoted the Supreme Court in *Davis*, and emphasized that the plaintiff's status in *Davis* as a student implicated the availability of a private Title IX claim to admitted students only: "If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference subjects its students to harassment." *See id.* (quoting *Davis ex rel. Lashonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) (internal quotation marks omitted)).

133. For further discussion on the reasoning employed by the Eastern District Court of Missouri and the Eighth Circuit in *K.T.*, see *supra* notes 85–101 and accompanying text.

134. *See Doe*, 270 F. Supp. 3d at 562, n.7 (noting "The Eighth Circuit Court of Appeal recently upheld *K.T.* on the merits—however, that Court did not address whether Title IX applied to a non-student at the school, but assumed it did in agreeing with the district court's analysis of the plaintiff's failure to state a claim on the merits."). For further clarification on the Eighth Circuit's *arguendo* approach to the question of nonstudent standing for Title IX claims, see *supra* notes 85–101 and accompanying text.

135. *See Doe*, 270 F. Supp. 3d at 562 (adhering to Eastern District of Missouri's logic in determining that lack of relationship between Brown University and Doe was a dispositive factor). Of particular importance in *Doe* was the Eastern District of Missouri's finding that "because a non-student does not suffer from a systemic effect on educational programs or activities at a school she does not attend, she has no right of action against that school under Title IX." *See id.* (citing *K.T. v. Culver-Stockton Coll.*, No. 4:16-CV-165 CAS, 2016 WL 4243965 at \*6 (E.D. Mo. Aug. 11, 2016)).

136. *See id.* (finding that Brown University did not have control or influence over educational programs in which Jane Doe was enrolled).

137. *See id.* at 564 ("[L]egal precedent allowing for a private right of action for damages is limited to certain situations. The Court finds that Ms. Doe's case is not among those scenarios.").

138. *See id.* at 563 ("[Jane Doe's] federal claim under Title IX fails to state a claim for



V. WHEN IT RAINS, IT POURS: A CRITICAL ANALYSIS OF *DOE v. BROWN UNIVERSITY*

Despite the District Court of Rhode Island's insistence that its holding in *Doe* honored the statutory language and legislative intent of Title IX, there are other possible interpretations of federal case law and legislative history that lead to a different conclusion.<sup>139</sup> The court's decision has serious practical repercussions by allowing schools to negligently investigate and adjudicate sexual misconduct claims involving nonstudents—without being held judicially accountable.<sup>140</sup> Courts should abandon *Doe*'s blanket preclusion of nonstudent-plaintiffs in Title IX actions and allow them to bring claims against educational institutions.<sup>141</sup> The implications of the *Doe* decision are not only inconsistent with the overall intent of Title IX, but potentially jeopardizes the health and safety of students and college communities.<sup>142</sup>

A. *Updated Forecast: Revisiting Title IX's History*

When a private right of action under Title IX was first introduced in *Cannon*, the Supreme Court stated that the creation of a private remedy served one of two legislative purposes underlying the passage of Title IX: to provide individuals effective protection against discriminatory practices.<sup>143</sup> With this purpose in mind, *Doe*'s denial of a private remedy to nonstudents is in direct contradiction to the very justification used in *Cannon* to create a mechanism for relief under

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which relief can be granted and therefore it is dismissed.”). The court noted that because Jane Doe was never a student at Brown University, it was not possible for her to lose any benefits or opportunities she never had access to in the first place. *See id.* at 562.

139. For further discussion of how, contrary to the District Court of Rhode Island's assertion, federal case law and congressional material can be interpreted to support Title IX protections for nonstudent-plaintiffs, see *infra* notes 140–79 and accompanying text.

140. For further discussion of the implications of the *Doe* decision, see *infra* notes 143–79 and accompanying text.

141. For further discussion of the Eighth Circuit's rationale in *K.T.*, see *supra* notes 85–101 and accompanying text.

142. *See Doe*, 270 F. Supp. 3d at 564 (“This is a difficult conclusion to reach in the face of Ms. Doe's arguments that Brown and other schools may act or continue to act with deliberate indifference to sexual harassment and violence on its campus.”). In its concluding statements, the District Court of Rhode Island acknowledged its holding in *Doe* may tacitly permit schools to ignore Title IX complaints by nonstudents and allow those schools to escape accountability when they do. *See id.* It is no great leap to assume that a rule which excuses less-than-deliberately indifferent administrative responses to Title IX complaints has health and safety implications for students and nonstudents, alike. *See id.*

143. *See Cannon v. Univ. of Chi.*, 441 U.S. 667, 704 (1979) (claiming second reason underlying passage of Title IX was to “provide individual citizens effective protection against [discriminatory] practices.”). The Court noted that the introduction of a private right of action under Title IX was necessary to accomplish its underlying statutory purpose. *See id.* at 703. Furthermore, the Court stated that at the time *Cannon* was decided, the inclusion of a private remedy under Title IX was also supported by the Department of Health, Education and Welfare. *See id.* at 706. The agency took “the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes.” *Id.* at 706–07. For further discussion of *Cannon* and the underlying purposes of Title IX, see *supra* notes 55–62 and accompanying text.

Title IX.<sup>144</sup> The District Court of Rhode Island, however, did not rely on the legislative intent the Supreme Court articulated in *Cannon*, but instead engaged in its own inquiry regarding Title IX's legislative history, relying heavily on select comments made by Senator Bayh.<sup>145</sup>

The court conceded that while past statements of a single senator can hardly suffice to provide a comprehensive view of congressional intent, Senator Bayh's position as the sponsor and author of the statute carried considerable weight.<sup>146</sup> The difficult reality is that Congress did not debate the scope of Title IX at any length, thus, Senator Bayh's comments on the topic carry a high degree of significance.<sup>147</sup> Still, upon further review of the Congressional Record, Senator Bayh's statements indicate that Congress envisioned Title IX as an expansive remedy that would address extensive discrimination at educational institutions.<sup>148</sup>

Contrary to *Doe*'s assertions, Senator Bayh's comments do not support the

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144. Compare *Doe*, 270 F. Supp. 3d at 564 (“This is a case containing very serious allegations of student conduct on a college campus in Rhode Island. Nevertheless, laws put into place to protect students from sexual discrimination in educational programs were not meant to address all instances of sexual assault occurring in the college environment . . . legal precedent allowing for a private right of action for damages is limited to certain situations.”), with *Cannon*, 441 U.S. at 708 (“Since the Civil War, the Federal Government and the federal courts have been the primary and powerful reliances in protecting citizens against [invidious] discrimination [including that on the basis of sex.]”) (internal quotations omitted). The Supreme Court in *Cannon* set forth a position that the federal court system acts as a barrier between individuals and institutions who might subject them to discrimination. See *id.* In declining to extend Title IX protection to victims of sex discrimination, merely because of their enrollment status, the District Court of Rhode Island did not follow the custodial principle proffered by the Supreme Court in *Cannon*. See *Doe*, 270 F. Supp. 3d at 564 (finding Jane Doe's complaint not among scenarios where Title IX protection applies).

145. Compare *Doe*, 270 F. Supp. 3d at 561-62 (interpreting only statements made by Senator Bayh during debate about Title IX's passage and relying almost exclusively on *Davis*, *Gebser*, and *Bell* cases), with *Cannon*, 441 U.S. at 694. (“Far from evidencing any purpose to deny a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy.”). In *Cannon*, the Court began its dive into the history of Title IX by first noting that its statutory language was intentionally patterned after Title VI—and that “the drafters of Title VI explicitly assumed that it would be interpreted and applied as Title VI had been.” See *Cannon*, 441 U.S. at 694-96. The similarities between these Title IX and Title VI is, in part, what led the Court to introduce an implied right of action under Title IX, as one existed under Title VI. See *id.* at 699-703. Finally, the Court discussed the legislative intent behind Title IX by detailing statements made about the purposes of the act during the Congressional debates surrounding its passage. See *id.* at 703-08.

146. See *Doe*, 270 F. Supp. 3d at 561 (identifying Senator Bayh as important source because he was the primary author and sponsor of Title IX in Senate), *aff'd*, 896 F.3d 127 (1st Cir. 2018). The District Court did not elaborate on why it gave significant weight to Senator Bayh's comments, other than to say, “Senator Bayh's remarks, as those of the sponsor and author of the language ultimately enacted, are an authoritative guide to the statute's construction.” See *id.*

147. See *Cannon*, 441 U.S. at 694, n.16, 696, n.19; 701, n.30 (showing that Supreme Court heavily relied on Senator Bayh's comments in determining purposes behind Title IX).

148. See 118 CONG. REC. 5803 (1972) (“[The Amendment] is broad, but basically it closes loopholes in existing legislation. . .”). Congress issued such expansive language because, according to Senator Bayh, sex discrimination had reached into so many facets of women's lives that the only appropriate “antidote” to the problem was a comprehensive amendment. See *id.* at 5804. (“It is difficult to indicate the full extent of discrimination against women today.”).

exclusion of persons from Title IX protection based on enrollment status.<sup>149</sup> In fact, on several occasions, Senator Bayh referred to Title IX in a manner that implied its broad application: “[A] strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship in America.”<sup>150</sup> This statement is one of several instances in the Congressional Record where Senator Bayh impresses the point that Title IX was intentionally drafted with broad language so it could be construed liberally.<sup>151</sup> This pronouncement, and others made by Senator Bayh, demonstrate an intent to protect all persons, particularly women but not exclusively students, from educational institutions that employ harmful discriminatory practices.<sup>152</sup>

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149. *See id.* at 5807 (“The amendment is designed to expand some of our basic civil rights and labor laws to prohibit the discrimination against women which was been so thoroughly documented.”). Importantly, though the proposed language of Title IX directs that no “person” in the United States shall be subject to discrimination on the basis of sex, Senator Bayh refers constantly to the plight of American “women” in 1970 who sought to advance their educational and employment opportunities. *See id.* Though not explicitly, Senator Bayh interpreted the term “person” as the functional equivalent of the term “woman.” *See id.* The implicit meaning behind Senator Bayh’s use of the word “person” is particularly instructive in the disagreement between Jane Doe and the District Court of Rhode Island over the interpretation of the word “person.” *See Doe*, 270 F. Supp. 3d at 562. Senator Bayh’s use of the word person also reflects that the term’s intended class of claimants has changed over time. *Compare* 118 CONG. REC. 5807 (1972) (demonstrating Senator Bayh’s use of the word “women” to denote intended class persons entitled to Title IX protection), *with Doe*, 270 F. Supp. 3d at 558 (setting forth Jane Doe’s belief that “person” should include “persons experiencing gender discrimination who are not students or staff at the offending school.”). For further discussion of the parties’ respective arguments regarding the interpretation of the word “person” in the context of Title IX, see *supra* notes 114–31. When *Cannon* first introduced a private right of action under Title IX, the Supreme Court neither stated nor implied that the right to bring a claim hinged on plaintiff’s status as a student. *See Cannon*, 441 U.S. at 709. In fact, the Court in *Cannon* introduced a private right of action to provide relief to a nonstudent who was denied admission to an educational institution. *See id.* at 680. Admittedly, *Cannon* did not contemplate Title IX’s modern applicability to sexual harassment and assault, and therefore is not the controlling precedent for peer-harassment suits. *See id.* Still, the court’s statutory interpretation of the purposes underlying Title IX is instructive. *See Doe*, 270 F. Supp. 3d 559–61 (citing *Cannon* in analysis of decision on four separate occasions). Furthermore, though the Supreme Court emphasized the “program-specific nature of Title IX” in *Bell*, the Court still noted that, “If we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.” *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). This language implies, as in *Cannon*, that Title IX and its statutory language, including the word “person,” should be construed generally and without significant limitations. *See generally id.* (advocating for a more inclusive interpretation of the word “person” in Title IX’s statutory language).

150. *See* 118 CONG. REC. 5804 (1972) (statement by Senator Bayh).

151. *See, e.g., id.* at 5803, 5804, 5807, 5808 (providing several statements by Senator Bayh during debate on Title IX’s passage, in which he advocated for comprehensive protection against discrimination by educational institutions).

152. *See id.* at 5808 (concluding that impact of Title IX is meant to be far-reaching and functional). In closing his presentation of Title IX to the Senate floor, Senator Bayh noted the relevant legislative history and important social backdrop behind the drafting of the Act:

[The] simple, if unpleasant, truth is that we still do not have in law the essential guarantees of equal opportunity in education for men and women. When I proposed an amendment similar to this last August it was ruled ‘nongermane.’ Now I am coming back to the Senate with this comprehensive approach . . . .

As both the Supreme Court in *Cannon* and Senator Bayh's comments articulate, the overall purpose of Title IX is to deter gender-based discrimination and create a nonhostile educational environment that offers opportunities and benefits for all *persons* who come into contact with educational institutions.<sup>153</sup> If a nonstudent is denied the ability to seek a remedy against an institution that failed to investigate, adjudicate, or report a sexually heinous incident, then Title IX cannot accomplish the broad custodial objective Congress sought in its passage of the Act.<sup>154</sup> By precluding nonstudents from the class of persons able to recover under Title IX in *Doe*, the District of Rhode Island failed to provide adequate shelter from unjust and biased institutional procedures.<sup>155</sup>

Not only did the District Court of Rhode Island's holding in *Doe* fail to adhere to the integrity and purpose of Title IX, but in reaching that holding it also failed to adequately apply the Supreme Court's peer-harassment analysis prescribed in *Davis*.<sup>156</sup> *Davis* is undoubtedly the controlling precedent for evaluating peer-harassment claims, but the District Court of Rhode Island required *Doe* to allege her status as an enrolled student, an element not explicitly articulated in *Davis*.<sup>157</sup> In contrast to the District Court of Rhode Island's inconsistent judicial interpretation, the Eighth Circuit properly applied the test from *Davis* in *K.T.*<sup>158</sup> The court's silence on nonstudent standing not only

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*Id.*

153. *See id.* (stating protection against discrimination by educational institutions must be extensive); *see also Cannon*, 441 U.S. at 704 (describing the second purpose of Title IX as, "to provide individual citizens effective protection against [discriminatory] practices."); 20 U.S.C. § 1681(a) (2018) (establishing that no "person" be subject to discrimination on basis of sex).

154. *Cf.* 118 CONG. REC. 5803–08 (expressing sentiments by Senator Bayh, in which he stated Title IX could provide protection against widespread discrimination by educational institutions, particularly for women).

155. *See Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 564 (D.R.I. 2017) (denying Jane Doe private method of recovery under Title IX and acknowledging her only recourse for Brown University's deliberate indifference was pending administrative complaint), *aff'd*, 896 F.3d 127 (1st Cir. 2018).

156. *See id.* at 560 ("The elements a plaintiff must prove assume that Ms. Doe meets the most basic criteria of a Title IX claimant, that she is part of a class of persons entitled to Title IX protection."). The District Court of Rhode Island cited several cases that acknowledge only students and employees as claimants. *See id.* In a string cite, the court identified *Frazier*, in which the First Circuit held a plaintiff must allege that they are a student in order to proceed with a private right of action under Title IX. *See id.* (citing *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002)). There exists tension, then, not only between the First Circuit and the Supreme Court's requisite elements for peer-harassment claims, but also within the First Circuit itself. *See id.* at 561 (examining Title IX plaintiff's enrollment status as threshold matter related to standing). *But see Frazier*, 276 F.3d at 66 (incorporating Title IX plaintiff's enrollment status as element of *Davis* test). The District Court of Rhode Island treated the problem of *Doe*'s nonstudent status as a threshold issue rather than evaluating the merits of *Doe*'s claim. *See Doe*, 270 F. Supp. 3d at 561.

157. *See id.* (explaining that inferences from federal case law, particularly *Davis*, support limiting peer-harassment claims to students only). In *Davis*, the Court never explicitly required a plaintiff to be a student in order to bring a Title IX claim, but the District Court of Rhode Island reasoned that the Supreme Court's continuous reference back to the school's own students highlighted its intention to apply a private right of action under Title IX only to students. *See id.*

158. *See K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057–58 (8th Cir. 2017)

followed precedent but also contemplated the underlying purpose of a private Title IX action.<sup>159</sup>

B. *Tornado Warning: The Dangers of Doe v. Brown University*

The *K.T.* court's application of *Davis* to a nonstudent Title IX claim reflects more than mere compliance with federal precedent.<sup>160</sup> The legislative history and judicial interpretation of Title IX discussed in this Note demonstrates that the purpose of providing a private right of action under Title IX is to protect individuals from an educational institution's discriminatory practices.<sup>161</sup> The Eighth Circuit did not address whether nonstudents have standing to recover under Title IX, leaving a sliver of hope for nonstudent-plaintiffs who seek to bring claims.<sup>162</sup> The unfortunate reality, however, is that even if nonstudents did have standing, the high standard of the *Davis* test makes it incredibly difficult for a nonstudent-plaintiff to prove the requisite elements successfully.<sup>163</sup> Still, *K.T.*'s refusal to definitively settle on the issue of nonstudent standing leaves open a window, albeit a narrow one, of recovery for nonstudent-plaintiffs.<sup>164</sup>

The blanket preclusion in *Doe* blindly removes a private remedy under Title IX from nonstudent-plaintiffs, regardless of any distinguishing facts that might sustain a peer-harassment claim; it wields *Davis* against nonstudents like a blunt instrument.<sup>165</sup> The Eighth Circuit approached the claim in *K.T.* by holding that

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(applying *Davis* to *K.T.*'s Title IX claim).

159. See generally *id.* (demonstrating that evaluating nonstudent's peer-harassment claim expands Title IX protection). As stated repeatedly in this Note, a private right of action was implied by the text of Title IX to carry out the purpose of protecting individuals from discriminatory practices. For a discussion of the legislative purposes identified in *Cannon* and comments made by Senator Bayh regarding the expensive application of Title IX, see *supra* notes 55–62, 143–55 and accompanying text.

160. For a discussion of how the Eighth Circuit's holding in *K.T.* implicates an expansion of the class of persons able to bring private claims under Title IX for peer harassment see *infra* notes 162–73 and accompanying text.

161. For a discussion of the protective, custodial purpose behind the allowance of private Title IX remedies, see *supra* notes 139–59 and accompanying text.

162. See *K.T.*, 865 F.3d at 1056–57 (deciding to ignore the question of nonstudent-plaintiff standing). It is important to note that the Eighth Circuit was fully aware of the legal reasoning previously employed in *K.T.* by the Eastern District of Missouri. See *id.* The Eighth Circuit very well could have agreed with the Eastern District and concluded that a nonstudent cannot, as a matter of law, bring a Title IX claim against an educational institution they do not attend. See *id.* at 1056. Instead of precluding all nonstudents from bringing Title IX claims at the outset, the Eighth Circuit made a conscious decision to review the plaintiff's complaint on the merits. See *id.* at 1057. The court ultimately found that the plaintiff's complaint failed to state a claim of peer harassment under Title IX, but it never revisited the issue of nonstudent standing. See *id.* at 1059.

163. For a discussion on how the plaintiff in *K.T.* lost her peer-harassment claim under Title IX on the merits, see *supra* notes 85–101 and accompanying text. For a discussion on the high standard established by the Supreme Court in *Davis*, see *supra* notes 69–84.

164. See *infra* notes 166–71 and accompanying text for an explanation of how the Eighth Circuit's holding in *K.T.* may permit recovery for nonstudents.

165. See *Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 564 (D.R.I. 2017) (issuing a general preclusion of nonstudent Title IX claims), *aff'd*, 896 F.3d 127 (1st Cir. 2018). Instead of noting Title IX's historically expansive application and judicial interpretation, the District Court of Rhode Island decided to issue a blanket denial of recourse to nonstudents under Title IX:

the nonstudent-plaintiff did not satisfy an element of the *Davis* test, rather than deciding on the issue of nonstudent standing.<sup>166</sup> The school had no prior basis for anticipating the sexual harassment, and because a school's deliberate indifference to actual knowledge of discrimination is necessary to bring a claim, the suit could not stand.<sup>167</sup> Although the Eighth Circuit chose to avoid the question of nonstudent standing in *K.T.*, the case is an example of how nonstudents could possibly bring a claim if they are allowed to demonstrate the standards proffered by *Davis*.<sup>168</sup>

For instance, if a student with a record of sexual misconduct assaulted a nonstudent, and the nonstudent could show that the educational institution had prior knowledge of that student's conduct and failed to address the allegations in a manner that could have prevented a future assault, then the nonstudent could potentially establish the actual knowledge and deliberate indifference elements under *Davis*.<sup>169</sup> Even in these limited circumstances, nonstudents would struggle to recover because of the difficulty in demonstrating the final element: the misconduct was so pervasive, severe, and offensive that it substantially affected their ability to receive an education at an institution they do not attend.<sup>170</sup> So, had

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"[L]aws put into place to protect students from sexual discrimination in educational programs were not meant to address all instances of sexual assault occurring in the college environment." *Id.* For a further discussion of the District Court of Rhode Island's reasoning and holding in *Doe*, see *supra* notes 119–38 and accompanying text.

166. See *K.T.*, 865 F.3d at 1057. (avoiding question of nonstudent-plaintiff standing in Title IX cases instead addressing question of whether *K.T.* stated plausible claim for violation of Title IX).

167. See *id.* at 1057–58 (noting that school's deliberate indifference must subject students to alleged suffered harassment, of which school must have had actual knowledge, in order for claim to stand).

168. Cf. *id.* (engaging in *Davis* peer-harassment analysis). Because the Eighth Circuit chose to address the plaintiff's claims on the merits rather than preclude her from bringing a claim based solely upon her nonstudent status, it is still possible that a nonstudent may plead the requisite elements of a peer-harassment claim in the Eighth Circuit and potentially recover from an educational institution. Cf. *id.*

169. For a discussion of the elements and practical application of the *Davis* decision, see *supra* notes 69–84 and accompanying text. Nonstudents would likely be able to recover only if the student who harassed them was a known and recorded serial harasser. See *K.T.*, 865 F.3d at 1058 (noting that harassment committed by the same perpetrator can establish actual knowledge). Such knowledge might only exist when the student has been reported to the school by other survivors, establishing a sufficient record of offensive conduct to demonstrate actual before-the-fact knowledge of the discriminatory conduct. See *id.* at 1059 ("K.T.'s complaint is limited to an allegation of a single sexual assault. . . K.T.'s singular grievance on its own does not plausibly allege pervasive discrimination as required to state a peer harassment claim."); see also *Ostrander v. Duggan*, 341 F.3d 745, 751 (8th Cir. 2003) (suggesting actual knowledge can be established by recipient's prior knowledge of (1) harassment committed by same offending student or (2) previous reports of sexual harassment occurring on the same premises).

170. See *Walker supra* note 2, at 110 (noting difficulty of holding institutions liable in light of requirement that alleged harassment was "severe, pervasive, and objectively offensive"). *Walker* also noted that lower courts have routinely disposed of Title IX suits on the ground that the alleged harassment did not amount to the high standard articulated in *Davis*, and that in general, Title IX claims rarely survive the pre-trial motion stage of litigation. See *id.* at 127–28. The *Davis* test practically "immunizes" schools from liability in Title IX suits, and seriously cripples the possibility for successful non-student complaints, even more so than it already cripples enrolled student complaints. See *id.* at 99. Nevertheless, the high burden may stymie criticism by those who think allowing nonstudents to bring suit under Title IX

the court in *Doe* avoided the issue of nonstudent standing like the court in *K.T.*, the extent of Title IX's shelter still would have been minimal.<sup>171</sup>

Nonetheless, allowing nonstudents to bring suit under Title IX better honors and reflects the underlying purpose of the Act rather than a blanket preclusion of nonstudent-plaintiff claims, like the one issued in *Doe*.<sup>172</sup> Under *Doe*, even if a nonstudent could prove the requisite elements of the *Davis* test, a nonstudent could not bring a Title IX claim in the District Court of Rhode Island.<sup>173</sup> This holding gives colleges and universities both leash and license to negligently investigate claims, as well as leniently discipline their students when they assault nonstudents.<sup>174</sup> Because there is no looming threat of private suit, there is little incentive for schools to remedy their Title IX response procedures for nonstudents.<sup>175</sup>

Without a federal mandate to respond to nonstudent assaults, schools

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would expose colleges and universities to unprecedented liability. See *K.T. v. Culver-Stockton Coll.*, No. 4:16-CV-165 CAS, 2016 WL 4243965 at \*6 (E.D. Mo. Aug. 11, 2016) (arguing that expansion of plaintiff class would impermissibly expand the scope of Title IX). This is also where the unique facts of *Doe* are instructive, and the highly interconnected nature of American universities becomes relevant. See *Doe*, 270 F. Supp. 3d at 558–59 (arguing alleged sexual assault caused plaintiff to drop out because of close proximity of Providence College and Brown University). For a discussion of how colleges and nonstudent communities are both related and intertwined see *supra* notes 13–20 and accompanying text. *Doe* argued that because the schools were located in close proximity, she reasonably feared for her safety in the surrounding area after Brown failed to discipline her alleged attackers; this fear resulted in a hostile educational environment at her nearby school, Providence College. See *Doe*, 270 F. Supp. 3d at 558–59. Although a discussion advocating for the expansion of the *Davis* test—specifically, the expansion of the “objectively offensive conduct” prong—is outside the scope of this Note, future judicial interpretation might consider expanding Title IX's reach to protect where the substantial effects of harassment are felt, not just where the harassment occurred. See, e.g., *id.* (acknowledging Jane Doe's education was affected, but that education was provided by Providence College, not Brown University).

171. See *Doe*, 270 F. Supp. at 564. (acknowledging at end of *Doe* opinion that ramifications of decision would allow schools to act, or continue to act, with deliberate indifference to reports of sexual misconduct committed against nonstudents). Still, despite the dangerous implications of the *Doe* decision on nonstudents, it would be difficult for nonstudents to show that they were deprived of an educational program they had no access to in the first instance. See, e.g., *K.T.*, 865 F.3d at 1059 (stating single incident of sexual misconduct could not have had “systemic effect” on K.T.'s education at school she did not attend).

172. Compare *id.* at 1057 (overlooking issue of nonstudent standing for Title IX claims, thereby leaving open possibility for nonstudent to bring claim according to *Davis* test), with *Doe*, 270 F. Supp. 3d at 563 (categorically excluding nonstudents from private right of action under Title IX, even if allegations of noncompliance are accepted by court as true).

173. See *Doe*, 270 F. Supp. 3d at 563 (deciding court need go no further in analysis of Title IX claim if plaintiff is nonstudent).

174. See *id.* at 558 (“In 2016, after Ms. Doe's repeated inquiries with appropriate persons at Brown, Brown informed her that it never completed the inquiry concerning her assault and abandoned any disciplinary action against the three Brown students.”).

175. See *id.* at 564 (pointing out OCR complaint filed by *Doe* still pending at time of suit, which could force Brown University to face penalties). The District Court of Rhode Island, in denying *Doe*'s private Title IX claim, also pointed out that an administrative remedy still exists: “Title IX is an administrative enforcement statute and contains directives to ensure that schools comply with its mandate against discrimination in education through funding restrictions.” *Id.* For a further discussion of why Title IX plaintiffs prefer bringing private actions rather than relying on administrative remedies, see *supra* notes 49–62 and accompanying text.

endanger the safety of campus visitors as well as other enrolled students.<sup>176</sup> If nonstudents lack a private method of accountability to pressure educational institutions to investigate these claims under Title IX, predatory students may be permitted to continue their behavior against nonstudents without discipline.<sup>177</sup> Nonstudents should have standing to bring a claim under Title IX to more effectively protect against discriminatory behavior perpetrated by both students and educational institutions.<sup>178</sup> If confronted with similar facts to those in *Doe* and *K.T.*, courts should allow nonstudent-plaintiffs to demonstrate—and satisfy—the elements required by *Davis*, rather than issuing a blanket preclusion.<sup>179</sup>

#### VI. THE SUN WON'T COME OUT TOMORROW: THE IMPACT OF *DOE* v. *BROWN* UNIVERSITY

Although the aftershocks of the *Doe* decision are currently limited to the First Circuit, the practical consequences of this decision on student safety and institutional responsibility should cause widespread concern.<sup>180</sup> It is likely federal courts across the United States will continue to encounter Title IX cases with nonstudent-plaintiffs; the interconnected nature of college campuses and current social climate almost guarantees it.<sup>181</sup> Nonstudents are still vulnerable to sexual assault and harassment from students at educational institutions even if they are not enrolled at or employed by those institutions.<sup>182</sup> If a school does not

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176. For further discussion of the underlying purposes of Title IX, see *supra* notes 55–62, 139–59 and accompanying text.

177. See *Doe*, 270 F. Supp. 3d at 558 (explaining students who allegedly assaulted Jane Doe did not face discipline, despite Jane Doe's repeated efforts to pressure Brown University to complete inquiry into sexual misconduct incident). As evidenced in the *Doe* case, Brown University did not feel obligated to respond to a nonstudent Title IX complaint; a lack of private enforcement meant there was no way for Jane Doe to ensure that the students who assaulted her suffered consequences. See *id.* For a further discussion of Brown University's refusal to take action against Doe's alleged attackers, see *supra* notes 107–08 and accompanying text.

178. For a critical analysis of *K.T.* and further discussion of how the Eight Circuit's refusal to outright deny standing to nonstudents implicitly allows nonstudents to bring private Title IX suits, see *supra* notes 160–71 and accompanying text.

179. See *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (8th Cir. 2017) (allowing private Title IX suit for nonstudents so long as *Davis* requirements are satisfied); see also *supra* notes 160–78 and accompanying text for this Note's advocacy for allowing standing for nonstudents over the reasoning employed in *Doe*.

180. See Thacker, *supra* note 11, at 701 (noting that educational institutions have custodial and tutelary powers); see also *supra* notes 13–19 for information regarding nonstudents' relation to colleges and universities, specifically the number of visitors on college campuses, the public nature of higher education, and the effect of educational institutions on surrounding communities.

181. For a comprehensive review of the current socio-political climate surrounding recent uproar over high-profile sexual misconduct allegations see *supra* notes 2–12. For a discussion of the uniquely public nature of American colleges and universities, and the implications of permeable campus borders. see *supra* notes 13–19.

182. See, e.g., *K.T.*, 865 F.3d at 1056 (addressing complaint brought by nonstudent-plaintiff who was assaulted by enrolled student after visiting campus and attending party); *Doe*, 270 F. Supp. 3d at 563–64 (addressing complaint brought by nonstudent-plaintiff who was assaulted by enrolled student on campus after meeting enrolled student at local bar).



administer proper Title IX procedures to a nonstudent sexual misconduct complaint, under *Doe* there is no impending threat of legal recourse, and therefore, little incentive for schools to amend their Title IX response protocol.<sup>183</sup> An educational institution's unwillingness to administer its Title IX policy to nonstudents is particularly problematic given the severely underreported nature of sexual offenses, especially on college campuses, where incidents of sexual misconduct also occur in high concentration.<sup>184</sup>

Even if a nonstudent does step forward to report an incident to a school, a school's failure to respond to that report can have harmful ramifications on other students or employees if the same offender later repeats sexual misconduct.<sup>185</sup> A lack of private enforcement for nonstudents means there is no way to ensure educational institutions follow through with Title IX protocol, unless that nonstudent files a complaint with OCR.<sup>186</sup> In dismissing nonstudent Title IX claims, educational institutions may very well generate the hostile educational environments Title IX was intended to remedy.<sup>187</sup> The current interpretation of

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183. See Kelley Taylor, *Evaluating the Varied Impacts of Title IX*, INSIGHT INTO DIVERSITY WEBSITE (July 5, 2016), <https://www.insightintodiversity.com/evaluating-the-varied-impacts-of-title-ix/> [<https://perma.cc/H5TP-F7PJ>] (“[S]ince Title IX was passed, no school has lost federal funds due to a violation of the statute. . . federal funding has reportedly been made conditional on institutions remedying identified problems through resolution agreements with the OCR.”). As Taylor noted, of the two original enforcement mechanisms under Title IX—OCR administrative complaints and private legal suits—the OCR method of enforcement is feeble. See *id.* As a result, the only remaining method of accountability is to bring a legal claim as a Title IX plaintiff. Cf. *id.*

184. See *Fast Facts College Crime*, NATIONAL CENTER FOR EDUCATION STATISTICS (NCES), <https://nces.ed.gov/fastfacts/display.asp?id=804> [<https://perma.cc/2GBB-R8CQ>] (last visited May 4, 2019) (finding out of 27,500 on-campus criminal incidents reported to police and security in 2015, 8,000 were forcible sex offenses.); *Sexual Assault Statistics*, NATIONAL SEXUAL VIOLENCE RESOURCE CTR. (NSVRC), <https://www.nsvrc.org/statistics> [<https://perma.cc/2896-HF29>] (last visited May 4, 2019) (showing sexual assault is most underreported crime, with approximately 63% of sexual assaults projected to be unreported). Furthermore, the NSVRC estimated that more than 90% of sexual assaults on college campuses go unreported. See *Sexual Assault Statistics*, *supra*.

185. See David Lasiak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 78 (2002) (finding out of 2,000 men that were polled, 120 men self-reported acts constituting the legal definition of rape or attempted rape, and 76 reported committing repeat rapes). As demonstrated by these statistics, it is not uncommon for rapists to commit multiple offenses. See *id.* If schools do not investigate sexual assault claims made by nonstudents, then it is possible repeat offenders may go uninvestigated, undisciplined, and as a result, can offend again. See Sarah Silverhardt, *Giving Serial Rapists a Permanent Mark on Campus*, JURIST (Aug. 30, 2017, 12:54 PM), <https://www.jurist.org/commentary/2017/08/sarah-silverhardt-college-campuses-serial-rapists/> [<https://perma.cc/4DXD-HKAF>] (“Under Title IX, two particular flaws significantly contribute to the continuous serial rape problem.”). According to Silverhardt, the first flaw is “non-existent information sharing [about known sexual offenders] between post-secondary campuses.” See *id.* The second flaw is “the lenient punishment implemented by the schools for Title IX violations. . . such as sensitivity training, book report assignments or probation from extracurricular activities. . . The most severe punishment is expulsion, which is uncommon, and at some schools, nonexistent.” See *id.*

186. For explanation of why an OCR complaint is an inadequate administrative remedy, and the reasoning behind the Supreme Court's decision to introduced a private right of action under Title IX in *Cannon*, see *supra* notes 46–62 and accompanying text.

187. See 118 CONG. REC. 5803–08 (1972) (describing severe degree of hostile sex

the statute insulates a culture of complicity among people who have the power and responsibility to protect the community—not just their own students or employees.<sup>188</sup> Aside from leaving visitors vulnerable to harassment and assault on college campuses, *Doe* takes away the most powerful legal mode of recourse a person has after they are sexually violated: Title IX.<sup>189</sup>

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discrimination within educational institutions and need for comprehensive reform via passage of Title IX). For discussion regarding the health and safety impacts in dismissing nonstudent-plaintiff Title IX claims see *supra* notes 180–86.

188. See, e.g., *Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 563–64 (D.R.I. 2017) (explaining Brown University continually ignored Jane Doe’s inquiries into pending sexual misconduct complaint at school, and once investigation was finally initiated, did not comply with Title IX standards), *aff’d*, 896 F.3d 127 (1st Cir. 2018); *id.* at 564 (conceding that holding in present case would allow deliberately indifferent school administrators to escape accountability by nonstudents).

189. See *id.* at 563–64 (dismissing Doe’s state law claims under Rhode Island Civil Rights Act and Rhode Island Constitution). Title IX is a substantial federal resource for victims of sex discrimination; it is codified within the 1972 Educational Amendment to the Civil Right Acts and provides not only an administrative mode of recovery, but also an implied private cause of action that can be invoked by individuals against massive educational institutions. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–70 (1979) (explaining legislative history and legal power of Title IX, in addition to emphasizing importance of offering private remedy so as to effect Title IX’s statutory purpose).

