DOE V. SCHOOL DISTRICT NO. 1: STRENGTHENING TITLE IX PROTECTIONS IN THE TENTH CIRCUIT

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ABSTRACT

Title IX of the Education Amendments of 1972 (Title IX) provides students with protections from discrimination on the basis of sex in education programs, including student-on-student harassment.[1] The Tenth Circuit Court of Appeals has recently strengthened Title IX protections for student victims of sexual assault who report their assaults to appropriate school authorities.[2] In its recent decision in *Doe v. School District No. 1*, the Tenth Circuit made two critical clarifications to Title IX that provides students in the Tenth Circuit with greater protections from student-on-student harassment.[3] This Article will first provide an overview of Title IX, the statutory language, and the development of case law from the U.S. Supreme Court and the Tenth Circuit interpreting and applying Title IX protections. In Part III, this Article will discuss the Tenth Circuit case *Doe v. School District No. 1*. It will begin with an overview of the factual allegations as alleged in the operative complaint. Part III will then move to discuss the legal issues raised by the school district's motion to dismiss and Ms. Doe's response. Next, the Part will discuss the district court's order granting the school district's motion to dismiss. Part III will then discuss Ms. Doe's appeal, the arguments raised in the briefing, including the supplemental briefing ordered by the Tenth Circuit, and the Tenth Circuit's opinion reversing the district court. The final Part of this Article will discuss *Doe*'s impact and how *Doe* strengthens the protections of Title IX for students in the Tenth Circuit.

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1. *See* Doe v. Sch. Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020).
2. *See id.*
3. *See id.* at 1310–11, 1313–14.

INTRODUCTION

Title IX of the Education Amendments of 1972 (Title IX) prohibits sex-based discrimination in education settings.[4] As this Article will discuss, building on a body of case law from the U.S. Supreme Court and the Tenth Circuit, the recent Tenth Circuit decision in *Doe v. School District No. 1* makes important clarifications to Title IX that provides students in the Tenth Circuit with greater protections from student-on-student harassment.[5] This Article will begin by exploring the contours of Title IX through its statutory language and the development of Supreme Court and the Tenth Circuit case law. This Article will then provide an in-depth discussion of *Doe*, including the factual allegations as alleged in the operative complaint, the school district's motion to dismiss, and the district court's order. This Article will then explore Ms. Doe's appeal to the Tenth Circuit, the arguments raised in the parties' briefs, and the Tenth Circuit's decision. Finally, this Article will conclude with an examination of *Doe*'s impact and the ways students in the Tenth Circuit stand to benefit from stronger Title IX protections.

4. *See* 20 U.S.C. § 1681(a).
5. *See Doe*, 970 F.3d at 1300.

I. TITLE IX

A. The Statute

Title IX provides protection from sex-based discrimination in education settings.[6] The statute provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[7] Most prominently and most relevantly to this Article, Title IX prohibits sex discrimination in schools, including public universities and colleges and elementary and secondary schools.[8] This focus is reflected in the statute's definition of "program or activity," which includes "a college, university, or other post-secondary institution, or a public system of higher education; or . . . a local education agency (as defined in section . . . 7801 of this title), system of vocation education, or other school system."[9] The statute's definition of "program or activity" also includes state and local departments and agencies, state and local entities, and even private organizations that receive federal financial assistance.[10] Title IX's definition of "program or activity" does not include entities controlled by a religious organization if the statute's prohibition on sex discrimination "would not be consistent with the religious tenets" of the religious organization.[11]

B. Supreme Court Case Law

1. *Franklin v. Gwinnett County Public School*[12] and *Gebser v. Lago Vista Independent School District*[13]

Since its enactment, the Court has interpreted the scope and reach of Title IX protections.[14] In 1992, the Court held in *Franklin* that Title IX's prohibitions on sex-based discrimination are enforceable through an implied right of action for damages from intentional discrimination.[15] After holding that Title IX provides plaintiffs with a private cause of action to enforce its prohibitions on sex-based discrimination,[16] the Court needed to define the scope and contours of school liability. The Court had an opportunity to do so six years later in *Gebser*.[17] In *Gebser*, the Court considered a student's claim alleging that a teacher sexually harassed her and entered

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6. 20 U.S.C. § 1681(a).
7. *Id.*
8. *See id.* § 1687(2).
9. *Id.* (internal footnote omitted).
10. *Id.* § 1687(3).
11. *Id.*
12. 503 U.S. 60 (1992).
13. 524 U.S. 274 (1998).
14. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999) (discussing cases interpreting Title IX).
15. *See* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992).
16. *Id.* at 70–71.
17. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

into a sexual relationship with her.[18] The Court rejected theories of liability based on respondeat superior and constructive notice and instead concluded that Title IX's cause of action requires that an "appropriate person" has actual knowledge of the harassment and is deliberately indifferent to it.[19] An appropriate person is someone who, at a minimum, has authority to institute corrective measures to end the discrimination.[20] Thus, in its holding in *Gebser*, the Court made clear that Title IX provides students a private cause of action for damages for incidents of sexual harassment involving teachers when an appropriate person has actual knowledge and fails to adequately respond.[21]

2. *Davis v. Monroe County Board of Education*[22]

Following *Gebser*, the Supreme Court clarified the scope of Title IX's private cause of action.[23] In the seminal case *Davis*, the Court extended Title IX's private cause of action to student-on-student harassment.[24] In *Davis*, the plaintiff brought suit against her school district alleging that she was subjected to sexual harassment from a classmate over the course of many months.[25] The plaintiff alleged that she reported the incidents of sexual harassment to teachers and that the school principal was also aware of the harasser's inappropriate sexual conduct.[26] The plaintiff alleged that, despite their knowledge of the ongoing sexual harassment, the school principal and the teachers took no disciplinary action against the harasser nor made any attempts to separate the plaintiff and the harasser.[27]

While the school district in *Davis* urged the Court to reject Title IX liability for student-on-student harassment, the Court held that Title IX's private cause of action can include liability for student-on-student harassment in certain circumstances and discussed the limitations the statute places on liability for student-on-student harassment.[28] First, the Court reiterated its conclusion in *Gebser* that a school district's deliberate indifference to known acts of harassment constitutes intentional discrimination.[29] Second, the Court emphasized that liability is limited to circumstances in

18. *Id.* at 277–78.
19. *Id.* at 289.
20. *Id.*
21. *See id.* at 288–90.
22. 526 U.S. 629 (1999).
23. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) (extending Title IX's private cause of action to student-on-student harassment); *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (extending Title IX's private cause of action to claims of retaliation).
24. *Davis*, 526 U.S. at 643.
25. *Id.* at 633–35.
26. *Id.* at 634.
27. *Id.* at 635.
28. *Id.* at 643.
29. *Id.*

which the school district has substantial control over both the harasser and the context and setting of the harassment.[30]

The Court further clarified the limitations on school district liability under Title IX for student-on-student harassment.[31] First, the Court examined what the "deliberate indifference" standard—the standard established by the Court in *Gebser*—required.[32] The Court noted that deliberate indifference would, at a minimum, "cause students to undergo harassment or make them liable or vulnerable to it."[33] The Court emphasized that school officials and administrators will continue to be allowed flexibility in responding to student misconduct, and that their response will only be deemed deliberately indifferent when it is clearly unreasonable in light of the known circumstances.[34] The Court also examined the severity of the student-on-student harassment necessary to subject the school district to liability under Title IX.[35] The Court noted that whether incidents of student-on-student sexual harassment will rise to the level of severity required by Title IX will depend "on a constellation of surrounding circumstances, expectations, and relationships, including but not limited to, the ages of the harasser and the victim and the number of individuals involved."[36] The Court warned that children often behave in a manner that would not be acceptable among adults and that "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to" students are common among school-age children.[37] However, Title IX liability does not extend to simple acts of teasing and name-calling even when those incidents target gender differences.[38] Title IX liability only extends to harassment "where the behavior is so severe, pervasive, and objectively offensive that it denies the victims . . . equal access to education."[39]

3. *Jackson v. Birmingham Board of Education*[40]

Following *Davis*, the Supreme Court continued to expand on its understanding of Title IX's coverage. In *Jackson*, the Court examined a claim from a teacher who complained to his supervisors that the girls' basketball team was not receiving equal funding or equal access to athletic equipment and facilities within the school district.[41] After complaining of the unequal treatment, the plaintiff began receiving negative evaluations, and the district terminated his coaching duties.[42] The Court concluded that

30. *Id.* at 644–45.
31. *Id.* at 645–46, 648–49, 651–52.
32. *Id.* at 645.
33. *Id.* (alteration and internal quotations omitted).
34. *Id.* at 648–49.
35. *Id.* at 651–52.
36. *Id.* at 651 (internal citation and quotations omitted).
37. *Id.* at 651–52.
38. *Id.* at 652.
39. *Id.*
40. 544 U.S. 167 (2005).
41. *Id.* at 171.
42. *Id.* at 172.

Title IX's prohibition on sex discrimination extended to retaliation claims.[43] The Court reasoned:

> Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.[44]

II. HISTORY OF TITLE IX IN THE TENTH CIRCUIT

Following *Jackson*, the Supreme Court's understanding of the broad contours of Title IX liability came into focus. Title IX provides a private right of action for claims of student-on-student harassment and retaliation.[45] Lower courts, including the Tenth Circuit, were required to apply those broad contours and further refine the limits of Title IX liability.[46]

A. Murrell v. School District Number 1[47]

The Tenth Circuit first applied the Supreme Court's Title IX framework for student-on-student harassment in *Murrell*.[48] In *Murrell*, a student with disabilities alleged that a fellow special education student with a history of inappropriate sexual behavior sexually assaulted her on multiple occasions.[49] Teachers and school officials were made aware of the perpetrator's attacks on the plaintiff, including the principal who was informed of the sexual assaults by the plaintiff's mother but refused to take measures to investigate the allegations or punish the perpetrator.[50] The Tenth Circuit concluded that the plaintiff stated a valid Title IX claim.[51] Applying the Supreme Court's analysis in *Davis*, the Tenth Circuit identified four elements a plaintiff must demonstrate to bring a student-on-student sexual harassment claim.[52] A plaintiff "must allege that the district (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by

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43. *Id.* at 173–74.
44. *Id.* (internal citations omitted).
45. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) (extending Title IX's private cause of action to student-on-student harassment); *see also Jackson*, 544 U.S. at 173–74 (extending Title IX's private cause of action to claims of retaliation).
46. *See, e.g.*, Day v. Career Bldg. Acad., No. 18-cv-00837-RM-KMT, 2021 U.S. Dist. LEXIS 178345, at *16 (D. Colo. Sept. 20, 2021); Schrader v. Emporia State Univ., No. 19-2387-DDC-TJJ, 2021 U.S. Dist. LEXIS 179378, at *59 (D. Kan. Sept. 21, 2021).
47. 186 F.3d 1238 (10th Cir. 1999).
48. *Id.*
49. *Id.* at 1243.
50. *Id.* at 1243–44.
51. *See id.* at 1249.
52. *Id.* at 1246.

the school."[53] The court concluded that the allegations that both the school principal and teachers had sufficient authority to take corrective action regarding the harasser were sufficient for the plaintiff to meet the actual knowledge requirement.[54] The court also concluded that the allegations sufficiently alleged that the school officials were deliberately indifferent by failing to investigate the plaintiff's complaints and discipline the perpetrator, failures which the court held were clearly unreasonable in light of the known circumstances.[55]

B. Escue v. Northern Oklahoma College[56]

Following *Murrell*, students in the Tenth Circuit had additional clarity on the specific requirements for bringing a student-on-student sexual harassment claim under Title IX. In *Escue*, the Tenth Circuit expanded on what knowledge is necessary to satisfy the "actual knowledge" requirement.[57] *Escue* involved a student at Northern Oklahoma College who complained that a professor sexually harassed her in 2002.[58] The plaintiff alleged that the professor made inappropriate sexual comments and inappropriately touched her and that after she was inappropriately touched, she and her father met with the college president to discuss the allegations against the professor.[59] Following this conversation, the college transferred the plaintiff out of the professor's classes, allowed her to finish the course with her current grade, and began an investigation into her allegations.[60] After the investigation, the college decided that it would terminate the professor at the end of the semester.[61]

The court concluded that the college's response following the plaintiff's conversation with the president was not deliberately indifferent.[62] However, the plaintiff in *Escue* presented another theory of liability.[63] The plaintiff argued that the college's knowledge of previous complaints against the same professor satisfied the actual knowledge requirement.[64] The court concluded these prior complaints were insufficient to provide the college with the actual knowledge required to state a Title IX claim.[65] The court reasoned that the actual knowledge element requires knowledge of a substantial risk of sexual harassment.[66] The prior complaints regarding the professor were too dissimilar and too much time had passed for them

53. *Id.* at 1247.
54. *Id.*
55. *Id.* at 1246–47.
56. 450 F.3d 1146 (10th Cir. 2006).
57. *Id.*
58. *Id.* at 1149.
59. *Id.* at 1150.
60. *Id.*
61. *Id.*
62. *Id.* at 1155.
63. *Id.* at 1152–53.
64. *Id.*
65. *Id.* at 1153–54.
66. *Id.* at 1154.

to provide the college with knowledge that there was a substantial risk of sexual harassment.[67]

C. Rost v. Steamboat Springs RE-2 School District[68]

The Tenth Circuit continued to refine and apply the Supreme Court's Title IX framework following *Escue*. In *Rost*, a disabled student at Steamboat Springs Middle School was "coerced into performing various sexual acts with a number of boys," and the harassment continued into the plaintiff's freshman year at Steamboat Springs High School.[69] In the winter of the plaintiff's freshman year, she confided to a school counselor that several students coerced her into sex.[70] The counselor first directed the plaintiff to the school resource officer, who spoke with the plaintiff, and then informed the high school principal of the allegations.[71] The principal determined that most of the allegations occurred off school grounds and before the students were in high school.[72] Therefore, he determined that rather than a district-led investigation, the school resource officer, a police officer, would investigate the sexual assaults.[73] The plaintiff and her mother did not cooperate with the officer's investigation, and the district attorney declined to prosecute any students based on the officer's report because he was concerned that it would be difficult to prove the sexual activity was not consensual.[74] The school did not investigate the allegations, but the principal maintained daily communications with the school resource officer.[75] The district did not discipline any of the male students involved.[76]

The Tenth Circuit determined that the school district's response was not deliberately indifferent.[77] The court held that it was not clearly unreasonable for the district to allow the school resource officer to take the lead on the investigation and to defer to the officer's report.[78] The district's decision not to discipline the students was not clearly unreasonable due to the difficulty in proving the sexual activity was not consensual, the victim's refusal to cooperate with the officer's investigation, and the fact that many of the incidents occurred off school grounds.[79]

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67. *Id.*
68. 511 F.3d 1114 (10th Cir. 2008).
69. *Id.* at 1117.
70. *Id.*
71. *Id.* at 1117–18.
72. *Id.* at 1118.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1121–23.
77. *Id.* at 1121–24.
78. *Id.* at 1121–22.
79. *Id.* at 1123.

D. J.M v. Hilldale Independent School District No. 1-29[80] *and* Farmer v. Kansas State University[81]

The Tenth Circuit continued to apply the Title IX framework and further refine the requirements of actual knowledge and deliberate indifference. For example, in *J.M.*, the Tenth Circuit applied the standards to a claim that a teacher had an inappropriate sexual relationship with a student.[82] A student reported that he saw a female student on the bed in a teacher's hotel room during an out-of-state trip and said he thought the teacher was a pedophile.[83] The assistant principal did not believe the report and cautioned the student against making allegations that the teacher was a pedophile.[84] The assistant principal passed the information on to the principal, but nothing happened in response to the report until the parents of another female student brought evidence that the teacher was involved in an inappropriate sexual relationship with their daughter.[85] The Tenth Circuit applied the actual knowledge and deliberate indifference standards and determined that the school district violated Title IX.[86] First, the court rejected the school district's comparison to *Escue* and noted that the report that the teacher was seen with a female student on his bed in his hotel room was sufficient to provide actual knowledge of an inappropriate sexual relationship between the student and the teacher.[87] Next, the court rejected the school district's argument that the assistant principal was not deliberately indifferent because he sincerely did not believe the report.[88] The court found the argument unpersuasive because no school official conducted any assessment of the plausibility of the report or any investigation into the charges.[89] Such a complete lack of response was deliberately indifferent.[90]

In *Farmer*, the Tenth Circuit clarified what a plaintiff must plead to satisfy the deliberate indifference standard.[91] The issue in *Farmer* was whether the plaintiff must plead that the defendant's deliberate indifference actually caused them to experience additional harassment or an additional assault.[92] The Tenth Circuit clarified that the deliberate indifference standard articulated in *Davis* only requires plaintiffs to plead that the defendant's deliberate indifference made them vulnerable to harassment and

80. 397 Fed. App'x. 445 (10th Cir. 2010).
81. 918 F.3d 1094 (10th Cir. 2019).
82. 397 Fed. App'x. at 447–48.
83. *Id.* at 447.
84. *Id.*
85. *Id.*
86. *See id.* at 450–54.
87. *Id.* at 450–53.
88. *Id.* at 453–54.
89. *Id.* at 454.
90. *Id.*
91. *Id.* at 1103–04.
92. *Id.* at 1104.

rejected the university's argument that plaintiffs must plead a subsequent assault or subsequent harassment.[93]

III. *DOE V. SCHOOL DISTRICT NUMBER 1*[94]

The Tenth Circuit further refined its understanding of the scope of Title IX protections and answered lingering questions in *Doe*.[95] In reversing the district court's order granting the school district's motion to dismiss, the *Doe* court held that: (1) retaliatory student-on-student harassment—that is harassment in retaliation for reporting a sexual assault—is actionable under Title IX, and (2) a school district's response must be calculated to end the harassment and if that response is not working, the district must consider different measures.[96] These two important clarifications to Title IX's reach have the potential to provide students in the Tenth Circuit with greater protections from student-on-student harassment. This Section will first examine the factual allegations in *Doe*, which were accepted as true for purposes of the Federal Rule of Civil Procedure 12(b)(6) motion to dismiss.[97] Next, this Section will discuss the school district's motion to dismiss, Ms. Doe's response to the motion, and the District Court's order granting the motion. This Section will then discuss the appeal, the parties' briefing, and the supplemental briefing. Finally, this Section will examine the Tenth Circuit's opinion.

A. Factual Allegations

The following account of Ms. Doe's allegations—accepted as true for the motion to dismiss—is taken from the operative pleading, the Amended Complaint.[98]

Ms. Doe enrolled as a student at East High School (EHS) on July 1, 2015.[99] On March 12, 2016, when Ms. Doe was fourteen years old, another EHS student, identified in the pleadings as "STUDENT 1," sexually assaulted Ms. Doe in STUDENT 1's parents' basement.[100] Ms. Doe reported the assault to her sister that evening, and her sister photographed the bruises on Ms. Doe's body.[101] "On Monday, March 14, 2016, Ms. Doe was in her EHS art class and saw STUDENT 1."[102] She became distraught and began crying.[103] Ms. Doe went to the restroom where her friend found her crying.[104] After Ms. Doe told her friend why she was crying, her friend

93. *Id.*
94. 970 F.3d 1300 (10th Cir. 2020).
95. *Id.*
96. *Id.* at 1310–11, 14.
97. *Id.* at 1308–09.
98. Amended Complaint at 3–22, Doe v. School Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020) (No. 1:18-cv-03170-RM-STV).
99. *Id.* at 3.
100. *Id.*
101. *Id.*
102. *Id.* at 4.
103. *Id.*
104. *Id.*

suggested Ms. Doe report what happened to school officials.[105] Ms. Doe first went to a dean at EHS, who then directed her to a school psychologist.[106] Ms. Doe told the school psychologist about the rape and showed her the bruises.[107] When the psychologist asked Ms. Doe if she would like to press charges, Ms. Doe did not understand what she meant, and the psychologist failed to explain.[108] Ms. Doe and her mother both explained that they wanted the rape documented in the school district's database, Infinite Campus, but the school did not document the assault.[109] The school dean falsely told Ms. Doe that if she talked to STUDENT 1 again, Ms. Doe would not be able to press charges.[110] Ms. Doe alleged that each of the school officials she reported the assault to were mandatory reporters, required to make their own report of the assault.[111] Ms. Doe alleged that not one school official reported the incident to law enforcement or to the school resource officer.[112] Ms. Doe's parents met with school officials, who tried to talk the parents out of pressing charges.[113]

On March 15, Ms. Doe reported that she faced backlash from peers who heard about the assault.[114] The dean told Ms. Doe not to tell anyone about it and to treat the rape as a secret between her, Ms. Doe, and STUDENT 1.[115] She again repeatedly discouraged Ms. Doe and her family from contacting the police and pressing charges.[116] On March 17, Ms. Doe met with the school psychologist because she had been experiencing conflicts since March 14—the day she reported her assault.[117] Ms. Doe was struggling with the fallout of her friendships.[118] Despite having the authority to suspend or expel a student for any behavior on or off school property that is detrimental to the welfare or safety of other students or school personnel, the school did not take disciplinary action against STUDENT 1.[119] From March 14 through March 21, Ms. Doe reported "growing tensions [with] fellow students, her anxiety about being at school, her fears for the future, and her nightmares and lack of sleep."[120]

Ms. Doe began engaging in self-harm by cutting herself.[121] The school psychologist refused Ms. Doe's request to have her sister present when filling out a safety plan form to address Ms. Doe's self-harming

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 5–6.
112. *Id.* at 6.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 7.
118. *Id.*
119. *Id.*
120. *Id.* at 8.
121. *Id.*

behavior, did not inform Ms. Doe's parents that a safety plan was requested, told Ms. Doe she could not return to class until she completed the safety plan, and failed to provide Ms. Doe the weekly check-ins she was promised.[122] On April 6, Ms. Doe reported to the school psychologist that she was continuing to experience conflicts with her peers.[123] "Rather than taking any disciplinary actions against these peers or referring the matter to" school officials in charge of discipline, the school psychologist simply discussed strategies for Ms. Doe to manage conflicts with female peers.[124] That same day, a teacher informed the school psychologist that Ms. Doe had a rough week with student gossip.[125] On April 8, the school psychologist informed the dean that Ms. Doe was continuing to have problems with STUDENT 1 and that STUDENT 1's friends were harassing Ms. Doe with various comments, including telling her, "[w]e took a vote and we all agreed that you'll lose your virginity first."[126] On that same day, Ms. Doe again reported self-harm to the school psychologist.[127] The only action the school took to address the harassment that Ms. Doe experienced from STUDENT 1 and his friends was having the school dean talk to the students.[128] In an April 13 email exchange, the school psychologist and school dean expressed their expectation that "things may continue as usual."[129] By the end of the 2015–2016 school year, no Title IX investigation had been initiated and no disciplinary action had been taken against STUDENT 1, his friends, or anyone else for their harassment of Ms. Doe.[130]

Ms. Doe alleged that the harassment continued during the next school year.[131] "On September 1, there were additional reports that Ms. Doe was being bullied [because] of the rape.[132] On November 28 and 29, there were additional reports that Ms. Doe had ongoing conflicts with other students."[133] In December, Ms. Doe considered switching schools.[134] On January 19, 2017, Ms. Doe and her sister made an anonymous "Safe2Tell" report describing excessive bullying and blackmailing by a close friend of STUDENT 1.[135] Safe2Tell reports are delivered to the school principal.[136]

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122. *Id.*
123. *Id.* at 9.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 9–10. The complaint notes that in response to the school psychologist reporting that Ms. Doe asked, "If I have an opportunity to talk to him [STUDENT 1], I shouldn't?" and noting that "things may continue as usual," the dean responded with "Stop it! NO!! :-)." The complaint explains ":-)" is an emoticon representing a smiley face, suggesting the dean's initial protestations of "Stop It! NO!!" were in jest.
130. *Id.* at 10.
131. *Id.* at 10–11.
132. *Id.* at 10.
133. *Id.*
134. *Id.* at 11.
135. *Id.*
136. *Id.*

On January 20, 2017, Ms. Doe met with another school dean in charge of discipline and an assistant principal.[137] She described the constant bullying and harassment she experienced to him, including students making drawings of Ms. Doe telling her to kill herself, calling her names, starting rumors, and making rape jokes.[138] She also reported that a student shoved her at lunch and called her a "dirty slut," another student constantly made rape jokes at her, and several students pulled on her backpack and drew pictures of her killing herself.[139] One student contacted Ms. Doe and asked if she wanted to sexually experiment with him.[140] The dean took no disciplinary action against any of the students bullying Ms. Doe, and the bullying continued.[141] On January 25, Ms. Doe met with the dean and provided copies of numerous pictures and social media exchanges, as well as the names and phone numbers of students who harassed her.[142] The dean only briefly glanced at the materials Ms. Doe provided, placed everything in the filing cabinet, and did not use the information for investigatory or disciplinary purposes.[143] A suicide risk review was conducted on January 25.[144]

A school counselor passed on additional concerns about harassment of Ms. Doe to the dean on January 31.[145] The dean said he would speak with the students.[146] From late January through February, Ms. Doe met with the dean "several times to report the bullying and harassment, including threats that she should watch her back if she does not 'want to die[,]' . . . that she would be 'beat up,'" and that a friend of STUDENT 1 was intimidating Ms. Doe's friend.[147] The dean met with Ms. Doe and her parents, who expressed frustration the school had done nothing to address the harassment, but the dean told them that he could not do anything about it and that "being an asshole isn't a crime."[148] Ms. Doe would eat lunch mostly by herself in counselors' offices or teachers' rooms.[149]

On April 7, a teacher emailed concerns about Ms. Doe to the dean.[150] On April 28, after Ms. Doe confided in the teacher about her struggles with harassment, they met with a counselor.[151] Both the teacher and the counselor were upset that the dean was not taking proper action to stop the

137. *Id.*
138. *Id.*
139. *Id.* at 12.
140. *Id.*
141. *Id.* at 13.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 14.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 15.
151. *Id.*

harassment, and they brought in another dean to meet with them and Ms. Doe.[152]

In early May, Ms. Doe's mother informed school officials that Ms. Doe would not be returning to the school.[153] Despite a school counselor telling Ms. Doe's mother that the school could freeze Ms. Doe's grades for the semester and award her full credit, the principal was opposed to that arrangement.[154] Instead, Ms. Doe was required to come in before and after school to get her work done.[155] Ms. Doe would come in sometimes as early as 5:30 a.m. until the beginning of the school day or from 5 p.m. to 7 p.m. to finish her schoolwork and maintain her high grades.[156] Ms. Doe did not want to be in the school building because she did not feel safe there.[157] Despite all the unnecessary challenges this arrangement posed, Ms. Doe completed the final weeks of school and achieved a 4.0 GPA.[158] By the time the 2016–2017 school year ended, not one dean, principal, or school official had initiated a Title IX investigation or taken disciplinary action against STUDENT 1 or his friends for their continued harassment of Ms. Doe.[159]

B. The Motion to Dismiss, Response, and District Court Order

Based on the above allegations, the school district filed a motion to dismiss Ms. Doe's Title IX claim pursuant to Rule 12(b)(6) for failure to state a claim.[160] Ms. Doe and the school district disagreed about whether Ms. Doe adequately pleaded a Title IX violation using the framework developed by the U.S. Supreme Court and the Tenth Circuit.[161] The school district's motion, Ms. Doe's briefing, and the court's order highlight that, despite the extensive body of case law developed by the Supreme Court and the Tenth Circuit, neither the Supreme Court nor the Tenth Circuit have answered some important questions about Title IX's scope. As illustrated by the parties' arguments, Ms. Doe's case posed two important questions regarding the scope of Title IX protections. The first question asks how Title IX addresses allegations that include some specific, gender-related harassment, but also include harassment with no gender-specific connotations that is carried out in retaliation of a student reporting a sexual assault committed by a classmate. The second question asks whether listening to a student's report of student-on-student harassment,

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152. *Id.* at 15–16.
153. *Id.* at 16.
154. *Id.*
155. *Id.* at 18.
156. *Id.*
157. *Id.*
158. *Id.* at 19.
159. *Id.*
160. District Defendants' Motion to Dismiss at 1, Doe v. Sch. Dist. No.1, 2019 U.S. Dist. LEXIS 126269 (D. Colo. Mar. 8, 2019) (No. 18-cv-03170-RM-STV).
161. *Compare id.* at 6–12, *with* Plaintiff's Response to Defendant's Motion to Dismiss at 2–6, Doe v. Sch. Dist. No. 1, 2019 U.S. Dist. LEXIS 126269 (D. Colo. Mar. 29, 2019) (No. 18-cv-03170-RM-STV).

providing counseling, giving advice on handling the harassment, and talking to the harassers is a sufficient and not deliberately indifferent response despite failing to deter the harassment.

1. Parties' Severe, Pervasive, and Objectively Offensive Sexual Harassment Arguments

The school district argued that Ms. Doe's allegations failed to adequately state a claim for student-on-student harassment under Title IX.[162] The school district's first argument focused on the type and severity of the harassment Ms. Doe alleged.[163] The school district contended that Ms. Doe's allegations do not establish sex-based harassment that was so severe, pervasive, and objectively offensive that she was deprived access to the educational opportunities of the school,[164] an argument that can be summarized in two sentences in its motion:

> To trigger Title IX liability, a plaintiff must show that the conduct complained of was based on gender and amounted to more than mere inappropriate conduct. Conduct alleged to have general sexual overtones does not satisfy Title IX's high standard for student-on-student severe, pervasive, and objectively offensive conduct based on gender.[165]

Otherwise relying largely on persuasive authority, the school district highlighted language from *Davis* reminding courts that:

> [I]n the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.[166]

The school district argued that Ms. Doe's allegations of "backlash," "peer conflicts," and "growing tensions" were not related to her gender but were related to her reporting STUDENT 1's assault, and therefore could not satisfy Title IX's requirement that the harassment is sex-based.[167] Other allegations that do have sexual connotations, the school district argued, amounted to no more than the teasing and name-calling that does not establish Title IX liability according to the *Davis* Court.[168] Furthermore, the school district suggested that even the name-calling with sexual connotations was not directed at Ms. Doe because of her gender but again, because she reported STUDENT 1.[169]

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162. District Defendants' Motion to Dismiss, *supra* note 160, at 6.
163. *Id.* at 7–9.
164. *Id.* at 7–8.
165. *Id.* at 6–7 (internal citations omitted).
166. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999).
167. District Defendants' Motion to Dismiss, *supra* note 160, at 7–8.
168. *Id.*
169. *Id.*

Ms. Doe disputed the school district's contention that the harassment alleged was not gender-based.[170] First, Ms. Doe highlighted the factual and procedural differences from the out-of-circuit cases cited by the school district and her case.[171] In doing so, Ms. Doe relied on her own persuasive authority, a decision from the Second Circuit, *Doe v. East Haven Board of Education*,[172] involving a plaintiff who had been the victim of an off-campus sexual assault and who was subsequently harassed at school with sexual comments and names.[173] The Second Circuit found that it was reasonable to "conclude that, when a fourteen-year-old girl reports a rape and then is persistently subjected by other students to verbal abuse that reflects sex-based stereotypes and questions the veracity of her account, the harassment would not have occurred but for the girl's sex."[174]

2. Parties' Deliberate Indifference Arguments

The school district also argued that Ms. Doe's allegations failed to adequately plead that the school district was deliberately indifferent.[175] The school district's argument focuses on the steps it contends the school district, through various officials, took in response to Ms. Doe's complaints.[176] These steps included meeting with Ms. Doe and her parents, holding ongoing counseling sessions with Ms. Doe, and providing support services to Ms. Doe.[177] The school district argued that this response could not be deliberately indifferent because "[a] plaintiff must do more than allege an unthorough investigation or inadequate disciplinary consequences."[178] The school district also contended that Title IX does not entitle a student to any particular remedial demand.[179]

Ms. Doe's briefing disputed the school district's argument that its response was not deliberately indifferent.[180] Quoting *Vance v. Spencer County Public School District*,[181] Ms. Doe opened her argument by stating that "[a] minimalist response is not within the contemplation of a reasonable response."[182] Ms. Doe proceeded to highlight the failures of school officials to respond reasonably to her complaints regarding harassment and bullying, including: failing to input any information into Infinite Campus; failing to report the assault to police officers, including the school resource officer; trying to talk Ms. Doe's parents out of filing charges;

170. Plaintiff's Response to Defendant's Motion to Dismiss, *supra* note 161, at 2–4.
171. *Id.*
172. 200 Fed. App'x. 46 (2d Cir. 2006).
173. Plaintiff's Response to Defendant's Motion to Dismiss, *supra* note 161, at 3 (citing *East Haven*, 200 Fed. App'x. at 47).
174. *Id.* (quoting *East Haven*, 200 Fed. App'x. at 48).
175. District Defendants' Motion to Dismiss, *supra* note 160, at 9–12.
176. *Id.*
177. *Id.* at 9, 11.
178. *Id.* at 9.
179. *Id.* at 10 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).
180. *See* Plaintiff's Response to Defendant's Motion to Dismiss, *supra* note 161, at 6–9.
181. 231 F.3d 253, 260 (6th Cir. 2000).
182. Plaintiff's Response to Defendant's Motion to Dismiss, *supra* note 161, at 6 (quoting *Vance*, 231 F.3d at 260).

telling Ms. Doe to keep the assault between her and the perpetrator; failing to take disciplinary action against Ms. Doe's harassers; and placing the documentation of the harassment provided by Ms. Doe into a filing cabinet without reviewing it or otherwise using it for investigatory or disciplinary purposes.[183]

3. The District Court Order

The United States District Court for the District of Colorado issued its order granting the school district's motion to dismiss Ms. Doe's Title IX claim on July 30, 2019.[184] The district court agreed with the school district and found that Ms. Doe failed to adequately plead that the harassment she faced was sex-based, that it was severe, pervasive, and objectively offensive, and that the school district was deliberately indifferent to the harassment.[185] The district court's analysis largely tracked the arguments made by the school district in its motion.[186] The district court accepted the school district's argument that the harassment Ms. Doe alleged did not constitute sex-based discrimination because the other students harassed her because she accused STUDENT 1 of assaulting her, not because she was female.[187]

The district court also held that the school district was not deliberately indifferent.[188] The district court's order highlighted that school officials met with Ms. Doe and her parents after she reported the assault and met with Ms. Doe numerous times following other reports of harassment.[189] The district court noted that Ms. Doe was given advice on handling the harassment.[190] In the district court's view, this response by the school district—meeting with Ms. Doe and her parents and giving Ms. Doe advice on handling student harassment—was enough.[191] Citing *Davis*, the district court held that the school district was not required to eliminate all student-on-student harassment and even though the harassment continued, the school district was not deliberately indifferent because it did not acquiesce to the harassment "to such a degree that its response was clearly unreasonable."[192]

The district court concluded that the harassment Ms. Doe alleged was not sufficiently severe, pervasive, and objectively offensive to rise to the level of a Title IX violation.[193] The district court did not consider

183. *Id.* at 7–9.
184. Doe v. Sch. Dist. No. 1, No.1:18-cv-03170-RM-STV, 2019 U.S. Dist. LEXIS 126269, at *1 (D. Colo. July 30, 2019), *rev'd and remanded*, 970 F.3d 1300 (10th Cir. 2020).
185. *See id.* at *4–5.
186. *Compare* District Defendants' Motion to Dismiss, *supra* note 160, at 6–11, *with Sch. Dist. No. 1*, 2019 U.S. Dist. LEXIS 126269, at *4–5.
187. *Sch. Dist. No. 1*, 2019 U.S. Dist. LEXIS 126269, at *4.
188. *Id.* at *4–5.
189. *Id.* at *5.
190. *Id.*
191. *Id.*
192. *Id.* (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S 629, 648–49 (1999)).
193. *See id.*

allegations in the Amended Complaint it deemed conclusory; therefore, the remaining allegations were a handful of specific instances of harassment.[194] Thus, with only a handful of instances over a fifteen-month span, the court concluded the allegations in the Amended Complaint did not rise to the level of actionable student-on-student harassment under Title IX.[195]

C. Appellate Briefing

Ms. Doe appealed the decision to the Tenth Circuit Court of Appeals.[196] This Section will briefly discuss the parties' appellate briefing, including supplemental briefing ordered by the Tenth Circuit following oral arguments.[197]

1. The Parties' Appellate Briefs

The parties' briefs on appeal reflected the arguments made to the district court. Ms. Doe reiterated her reliance on *East Haven* for the proposition that harassment that occurs in the context of a sexual assault is sex-based.[198] Ms. Doe disputed the district court's conclusion that she failed to allege harassment that was sufficiently severe, pervasive, and objectively offensive to be actionable under Title IX.[199] Ms. Doe emphasized the various ways in which she alleged the harassment affected her, including causing her to feel fear, lose sleep, and engage in self-harm, which required the school to conduct a suicide risk assessment.[200] Citing a United States District Court for the District of Connecticut case, Ms. Doe also highlighted that her assailant's presence at the school can satisfy the severe, pervasive, and objectively offensive requirement even when it is not alleged that she had future contact with her assailant.[201] Ms. Doe again reiterated the *Vance* court's warning that a minimalist response is not within the contemplation of a reasonable response, stating:

> [A]lthough no particular response is required, and although the school district is not required to eradicate all sexual harassment, the school district must respond and must do so reasonably in light of the known circumstances . . . [w]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to

194. *Id.*
195. *Id.* at *4–5.
196. Notice of Appeal at 1, Doe v. Sch. Dist. No. 1, No. 1:18-cv-03170-RM-STV (D. Colo. Aug. 13, 2019).
197. The appellate case was docketed in the Tenth Circuit as Case No. 19-1293.
198. Appellant's Opening Brief at 10–11, Doe v. Sch. Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020) (No. 19-1293).
199. *Id.* at 12–15.
200. *Id.* at 13.
201. *Id.* at 14–15 (citing Kelly v. Yale Univ., No. 3:01-cv-1591 (JCH), 2003 U.S. Dist. LEXIS 4543 at *3, 9 (D. Conn. Mar. 26, 2003)).

> no avail, such district has failed to act reasonably in light of the known circumstances.[202]

Ms. Doe argued that the school district's responses to reports of harassment were ineffective, and their failure to recalibrate when their responses failed to deter the harassment rendered the school district deliberately indifferent.[203]

In its appellate briefing, the school district reiterated its arguments before the district court.[204] The school district argued that "[h]arassment for reporting misconduct is not the same as harassment because of gender" and maintained its contention that the harassment Ms. Doe alleged was not sex-based.[205] To bolster this argument, the school district relied on *Seamons v. Snow*.[206] *Seamons* involved a football player who was sexually assaulted by older teammates and reported the assault to the coach and school administrators.[207] After reporting the assault, the school district canceled the last game of the season.[208] The coach attempted to force the victim to apologize to his teammates, kicked him off the team, and told him he should have taken the assault like a man.[209] The *Seamons* court found that those allegations were not sufficient to show sex-based harassment because they showed that the plaintiff's treatment was because his teammates felt he had betrayed the team.[210] The school district argued that Ms. Doe's allegations were similar, reasoning that Ms. Doe was harassed because she reported the sexual assault, not because of her sex.[211] The school district also maintained its position that Ms. Doe's allegations of harassment did not rise to the level of severe, pervasive, and objectively offensive.[212] The school district further argued that Ms. Doe was not deprived of educational opportunities and benefits as a result of the harassment because she finished both school years with straight As, earning a 4.0 GPA.[213] The school district reiterated that the school district's response to reports of harassment was sufficient to avoid a finding that the school district was deliberately indifferent.[214]

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202. *Id.* at 16 (quoting Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 260–61 (6th Cir. 2000)).
203. *Id.* at 20.
204. *See* Appellee's Answer Brief at 8–30, Doe v. Sch. Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020) (No. 19-1293).
205. *Id.* at 12.
206. *Id.* at 14–15 (discussing Seamons v. Snow, 84 F.3d 1226, 1232–33 (10th Cir. 1996)).
207. *Seamons*, 84 F.3d at 1230.
208. *Id.*
209. *Id.*
210. *Id.* at 1233. Ms. Doe disputed the applicability of *Seamons* in her reply brief and distinguished the facts of her case from those in *Seamons*. *See* Appellant's Reply Brief at 7–11, Doe v. Sch. Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020) (No. 19-1293).
211. Appellee's Answer Brief, *supra* note 204, at 15.
212. *Id.* at 16.
213. *Id.* at 20.
214. *Id.* at 22–30.

2. Supplemental Briefing

Following oral arguments, the Tenth Circuit ordered the parties to provide supplemental briefing on the applicability of *Jackson* and *Feminist Majority Foundation v. Hurley*.[215] *Hurley* involved allegations from a feminist group that the group faced harassment after opposing the university's decision to allow male fraternities on campus.[216] The university's response to complaints of sexual assault and harassment included: meeting with the victims on multiple occasions to discuss the harassment; having the Title IX coordinator mediate between the rugby team, who was responsible for some of the sexual harassment, and the feminist organization; holding an open forum to discuss sexual assault on campus; imposing sanctions on members of the rugby team; having the president of the university communicate the university's policies regarding sexual assault, discrimination, and harassment to the student body; halting rugby activities and requiring rugby team members to participate in anti-sexual assault and violence training; assigning a campus police officer to cover events at which the student was speaking after a student received threats; meeting with university employees and students to discuss concerns over cyberbullying; encouraging the student body to report threatening comments made online; and holding two listening circles to discuss issues of harassing and threatening online posts.[217] Despite their multifaceted response, the *Hurley* court found the university to be deliberately indifferent because none of the university's responses were reasonably calculated to end the harassment.[218] The Fourth Circuit acknowledged that listening to reports of threats and harassment is an important first step, but it rejected the proposition that listening alone was sufficient.[219] The Fourth Circuit also expounded on the meaning of the Supreme Court's *Jackson* decision that Title IX prohibited retaliation against individuals who complain about or report sexual harassment or sex discrimination.[220] The Fourth Circuit in *Hurley* extended that rationale to retaliatory student-on-student harassment and held that a funding recipient could be liable under Title IX if it is deliberately indifferent to known instances of retaliatory harassment.[221]

The parties had different views as to the applicability of *Jackson* and *Hurley* to Ms. Doe's allegations.[222] Ms. Doe made two arguments in her supplemental briefing.[223] First, she argued that the university's responses to the harassment in *Hurley* supported her argument that the school district

215. 911 F.3d 674 (4th Cir. 2018).
216. *Id.* at 680–82.
217. *Id.* at 681–83.
218. *Id.* at 689.
219. *Id.* at 690.
220. *Id.* at 693–94 (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005)).
221. *Id.* at 694–96.
222. *Compare* Appellant's Supplemental Brief at 3–9, Doe v. Sch. Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020) (No. 19-1293), *with* Appellee's Supplemental Brief, Doe v. Sch. Dist. No. 1, 970 F.3d 1300 (10th Cir. 2020) (No. 19-1293).
223. Appellant's Supplemental Brief, *supra* note 222, at 3–8.

was deliberately indifferent to the reports of harassment in her case.[224] Ms. Doe compared the school district's response to the university's response in *Hurley*. She argued that the *Hurley* court's finding that the university was deliberately indifferent supported a finding that the school district's response to reports of her harassment was deliberately indifferent and not reasonably calculated to end the harassment.[225] Second, Ms. Doe argued that the *Hurley* court's reasoning that a school can violate Title IX through deliberate indifference to known instances of retaliatory harassment provided additional grounds for reversing the district court.[226] Ms. Doe argued that even if the district court was correct to conclude the harassment she faced was in response to her reporting the assault by STUDENT 1, such a conclusion would not insulate the school district from liability since deliberate indifference to known instances of retaliatory harassment violates Title IX.[227]

The school district did not address the *Hurley* court's conclusion that a school district can be liable if it is deliberately indifferent to known instances of retaliatory harassment.[228] Rather, the school district used its supplemental brief to reiterate its arguments that its response to Ms. Doe's reports of harassment was not deliberately indifferent and that the harassment Ms. Doe alleged was not severe, pervasive, and objectively offensive.[229]

D. The Tenth Circuit's Decision

With briefing complete, the issues facing the Tenth Circuit came into clear focus.[230] The Tenth Circuit had to answer how Title IX addresses student-on-student harassment of a student who reports a sexual assault when that harassment is made in retaliation for her report while only occasionally including explicitly sexual comments.[231] The Tenth Circuit also had to address whether the district court correctly determined that Ms. Doe failed to allege severe, pervasive, and objectively offensive harassment.[232] Finally, the Tenth Circuit had to address whether a school district that responds to reports of harassment by offering to counsel the victim and speaking to the harassers is deliberate indifference in violation of Title IX.[233]

On August 17, 2020, the Tenth Circuit issued its opinion regarding these issues.[234] Addressing the question on the nature of the harassment

224. *Id.* at 3–6.
225. *Id.* at 5–6.
226. *Id.* at 6–8.
227. *Id.*
228. *See* Appellee's Supplemental Brief, *supra* note 222, at *1–10.
229. *Id.* at 4–10.
230. *See* Appellant's Opening Brief, *supra* note 198, at 11–21; *see also* Appellant's Supplemental Brief, *supra* note 222, at 3, 6–8.
231. *See, e.g.*, Appellant's Supplemental Brief, *supra* note 222, at 6–8.
232. *See* Appellant's Opening Brief, *supra* note 198, at 12–15.
233. *See id.* at 16–20.
234. Doe v. Sch. Dist. No. 1, 970 F.3d 1300, 1310–15 (10th Cir. 2020).

Ms. Doe alleged, the Tenth Circuit held that Title IX encompasses retaliatory student-on-student harassment.[235] The Tenth Circuit held that the question of whether harassment is severe, pervasive, and objectively offensive is especially ill-suited to be decided on the pleadings of a Rule 12(b)(6) motion to dismiss and that Ms. Doe's allegations were sufficient to plead severe, pervasive, and objectively offensive harassment.[236] Finally, the Tenth Circuit held that Ms. Doe adequately alleged deliberate indifference, concluding that it was insufficient for the school district to merely provide help to the victim student in coping with the harassment and that deliberate indifference can be shown by a failure to act to end the harassment.[237]

1. Sex-Based Discrimination

The Tenth Circuit held that student-on-student harassment against a student who reported a sexual assault in retaliation for making the report is encompassed by Title IX's prohibition on sex-based harassment.[238] First, the Tenth Circuit suggested that whether the harassment Ms. Doe faced at school was motivated exclusively by a desire to retaliate for reporting that she had been sexually assaulted by STUDENT 1 was a factual question.[239] The Tenth Circuit rejected the applicability of *Seamons* and distinguished that "narrow holding under unique, peculiar facts."[240] Finally, the Tenth Circuit held that since *Jackson*, whether the harassment was motivated by Ms. Doe's reporting of her sexual assault is irrelevant.[241] The Court reasoned that the sexual assault Ms. Doe reported and complained of was sex discrimination, and "[h]ence, any harassment of her that was motivated by retaliatory animus for her complaint was an intentional response to the nature of [her] complaint and was therefore discrimination on the basis of sex."[242]

2. Severe, Pervasive, and Objectively Offensive

The Tenth Circuit also rejected the school district's argument that the harassment she alleged was not severe, pervasive, and objectively offensive.[243] The Tenth Circuit emphasized that plaintiffs are not required to provide details of each incident of harassment; it is sufficient for Ms. Doe to describe more than a half dozen of the types of statements said to her and combine that with allegations that she reported ongoing harassment to school officials.[244] The Tenth Circuit went on to note that "matters of degree—such as severity and pervasiveness—are often best left to the jury"

235. *Id.* at 1310–11.
236. *Id.* at 1311–12.
237. *Id.* at 1313–14.
238. *Id.* at 1310–11.
239. *Id.* at 1310.
240. *Id.*
241. *Id.*
242. *Id.* at 1311 (internal quotations omitted).
243. *Id.* at 1312.
244. *Id.*

and are particularly ill-suited for a Rule 12(b)(6) motion to dismiss.[245] The Tenth Circuit also had the chance to further flesh out what considerations are important in evaluating whether harassment is severe, pervasive, and objectively offensive. The Tenth Circuit noted that the impact the harassment had on Ms. Doe is relevant to the analysis of whether it was severe, pervasive, and objectively offensive.[246] Additionally, the Tenth Circuit found the fact that two teachers and a counselor were sufficiently concerned that they contacted administrators for help to be relevant evidence of the severity of the harassment.[247] The Tenth Circuit also rejected the school district's contention that the fact that Ms. Doe completed her school years with straight As and a 4.0 GPA demonstrated that she was not denied educational benefits as a result of the harassment.[248] The Tenth Circuit noted that the harassment became so intolerable that she was unable to attend classes at school, and the denial of access to classroom instruction is sufficient to show a denial of educational benefits.[249]

3. Deliberate Indifference

The Tenth Circuit held that the school district's response to Ms. Doe's harassment was deliberately indifferent.[250] The Tenth Circuit relied on *Hurley*'s reasoning in holding that "it is not enough to try to help a student cope with the misbehavior of other students."[251] The Tenth Circuit made clear that, while it was commendable that the school district provided counseling to Ms. Doe, that was not sufficient to avoid Title IX liability.[252] The court clarified that "[d]eliberate indifference may be shown by a failure to act to halt the misbehavior."[253] The court made several observations about Ms. Doe's allegations regarding the school's response to support its conclusion that the allegations were sufficient to establish deliberate indifference.[254] First, the court noted that according to the allegations, the school's only attempts to halt the harassment were that administrators said they would speak with the students who were harassing her.[255] The court observed that, despite repeated reports to school authorities, the harassment continued.[256] Therefore, school officials knew that what they were doing was not working.[257] Citing *Vance*,[258] the Tenth Circuit held that "[f]ailure of authorities to try something else can show deliberate

245. *Id.* at 1311–12.
246. *Id.* at 1312.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 1314.
251. *Id.* at 1313–14 (citing Feminist Majority Found. v. Hurley, 911 F.3d 674, 690 (4th Cir. 2018)).
252. *Id.* at 1313.
253. *Id.* at 1314.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. Vance v. Spencer Cnty. Pub. Sch. Dist. 231 F.3d 253, 262 (6th Cir. 2000).

indifference."[259] Next, the court noted that school authorities did not conduct an investigation.[260] Rejecting the school district's reliance on *Rost*, the court observed that it might have been different had the school referred the investigation to another authority, such as the police, to investigate.[261] The Tenth Circuit also credited Ms. Doe's allegations that the school failed to document the harassment and that the dean responded to Ms. Doe and her parents' complaint that nothing was being done by telling them he could not do anything about it and that being an asshole is not a crime.[262] With those observations, the Tenth Circuit concluded that Ms. Doe adequately alleged deliberate indifference and reversed the district court.[263]

IV. *DOE*'S IMPACT: STRENGTHENING TITLE IX PROTECTIONS IN THE TENTH CIRCUIT

Doe marks an important moment in the Tenth Circuit's development of the contours of Title IX liability. In *Doe*, the Tenth Circuit made two important clarifications to Title IX's scope that strengthen the statute's protections for plaintiffs in the Tenth Circuit. First, *Doe* makes clear that retaliatory harassment is actionable under Title IX.[264] Second, *Doe* commands schools to respond to known instances of sex-based harassment in a way that is calculated to end the harassment.[265]

The first major clarification the Tenth Circuit made in *Doe* establishes that retaliatory harassment is actionable under Title IX.[266] As the facts alleged by Ms. Doe demonstrate, students who report a sexual assault are vulnerable to harassment, especially when the perpetrator is a student at the same school as the victim.[267] Some harassment may have clear sexual overtones and include clear sexual language, however, other incidents of harassment may be less overtly sexual.[268] As *Doe* makes clear, even when the harassment is less overtly sexual, if it is directly related and in retaliation for a student's report of a sexual assault, that harassment is actionable under Title IX.[269]

By clarifying that retaliatory harassment is sex-based harassment and actionable under Title IX, the Tenth Circuit gave victims of sexual assault some reassurance that their school district cannot ignore harassment simply because the harassers did not use sexually explicit language. Ms. Doe's case is illustrative of the problems facing students who are victims

259. *Doe*, 970 F.3d at 1314.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 1314–15.
264. *Id.* at 1310.
265. *Id.* at 1313.
266. *Id.* at 1310.
267. *See* Amended Complaint, *supra* note 98, at 3–22 (describing harassment perpetrated by her assailant and her assailant's friends).
268. *See Doe*, 970 F.3d. at 1309 (describing allegations of harassment, including "sex-neutral but hostile conduct").
269. *Id.* at 1310–11.

of sexual assault. The perpetrator of Ms. Doe's sexual assault was a student in the same school, and STUDENT 1's friends were large contributors to the harassment she faced.[270] While Ms. Doe did allege some instances of harassment that included overtly sexual comments, such as being called a "dirty slut,"[271] some of the harassment Ms. Doe alleged did not contain explicit sexual language, such as students making drawings telling Ms. Doe to kill herself.[272] When the perpetrator and victim of a sexual assault are students in the same school, *Doe* provides assurances to the victim that harassment from the perpetrator's friends who are angry about the allegations will not slip past the protections of Title IX.

The second major impact of *Doe* comes from the Tenth Circuit's clarification that Title IX requires a school district to respond to known instances of harassment in a way calculated to actually end the harassment.[273] Throughout this case, the school district's briefing suggested that the school district believed its responsibility to Ms. Doe was to hear her complaints of harassment, provide access to school counselors, and tell Ms. Doe that they would speak with the harassers.[274] The school district throughout this case consistently pointed to each instance in which they met with Ms. Doe and her parents to discuss the harassment and to their provision of counseling and advice to Ms. Doe in dealing with the harassment.[275] The school district's briefing suggested that they viewed these responses to be sufficient and that they did not have a responsibility to change course when the harassment continued.[276] The *Doe* court made clear that the school district had a responsibility to respond in a way calculated to end the harassment.[277] While commendable, offering counseling and listening to the victim does not suffice.[278] Furthermore, when it is clear the school district's measures are not working to end the harassment, the school district needs to consider different measures.[279] For victims of harassment, *Doe* provides needed assurance that, even though the school district is not required to end all harassment, it must respond with an intention to end it.

CONCLUSION

Courts have been clarifying the scope of Title IX protections since its enactment. The Tenth Circuit has applied and developed the Supreme Court's framework. *Doe* continued that development, and the Tenth

270. Appellant's Opening Brief, *supra* note 198, at 4–7.
271. *Id.* at 4.
272. *Id.* at 7.
273. *Doe*, 970 F.3d at 1313–14.
274. *See, e.g.*, Appellee's Answer Brief, *supra* note 204, at 24–29(describing school officials' response).
275. *See, e.g.*, District Defendant's Motion to Dismiss, *supra* note 160, at 9–12.
276. *See, e.g.*, Appellee's Supplemental Brief, *supra* note 222, at 8 (defending the school district's response as "effective in curtailing the sexual harassment").
277. *Doe*, 970 F.3d at 1313–14.
278. *Id.* at 1313.
279. *Id.* at 1314.

Circuit made two clarifications that strengthen Title IX protections for students. By extending Title IX protections to retaliatory harassment against a student for reporting sexual assault and by confirming that a school district must respond to known instances of harassment with an intention to end the harassment and must reevaluate its ineffective measures, *Doe* provides greater Title IX protection to victims of sexual assault.