AN UNEXPECTED REACTION: ACTUAL NOTICE, THE CAT'S PAW, & THE PROBLEM OF UNFORESEEABLE RETALIATION UNDER TITLE IX

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ABSTRACT

The Supreme Court recently denied certiorari to Prianka Bose, the petitioner in *Bose v. Bea.* The Sixth Circuit below held that Rhodes College was not liable under Title IX when it expelled Bose after her professor fabricated false cheating allegations against her in retaliation for rejecting his romantic overtures. Following *Gebser v. Lago Vista*

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Independent School District, the Sixth Circuit held that Bose could not rely on a theory of "cat's paw" liability because it was indistinguishable from other theories like *respondeat superior* that are disfavored under Title IX.

Taking *Bose* as a starting point, this Note critiques the long-standing actual notice standard in Title IX law and argues that the Supreme Court should have carved out an exception to the standard in cases like *Bose. Bose* presents a case where vicarious liability makes sense because schools are in the best position to prevent discriminatory acts like expulsion that biased teachers seek to achieve when they accuse a student of cheating.

The actual notice standard is illogical in cases like *Bose* because a harasser's conduct may take the form of unwanted comments or touching, mild on its face and probably not warranting a report. Harassers can then escalate the situation and produce an adverse action from the school, such as expulsion, that is unforeseeable and significantly more harmful in comparison. Students should not bear the burden of reporting harassment where the initial harassing conduct is not cognizable under Title IX and the teacher's retaliation and school's adverse action are unforeseeable.

Regarding vicarious liability, the Court should have extended the theory of "cat's paw liability" to Title IX and held Rhodes College liable for the deprivation it caused Bose when its Honor Council, a neutral decision-maker, voted to expel her. Such a decision would have enabled students like Bose to trace a violation of Title IX back to a teacher either by looking to see if the teacher's discriminatory intent was a proximate cause of the ultimate adverse action or by turning to agency principles to hold schools vicariously liable for the discriminatory acts of teachers.

The Court's denial is a missed opportunity to further the purpose of Title IX, which is to provide relief to students who suffer educational deprivations because of their gender. The Supreme Court's refusal to hear Bose's case means that students will have to pursue constitutional claims under statutes such as § 1983. Keeping in mind that these avenues for relief will not be available to students who attend private schools, and those students who do attempt to make out such claims will face additional hurdles to relief. This ultimately defeats the purpose of Title IX.

INTRODUCTION

Every rule has its exception. Title IX is supposed to protect students from being harassed by their peers and teachers.[1] Some see Title IX as intended to protect students whose status as students makes them vulnerable, whether to professors who hold positions that make them immune from consequences or coaches who have influence over athletic programs and can similarly get away with sexual assault or harassment with impunity.[2] But when harassers can evade liability while inflicting significant damage on a student's life, the law's effectiveness must be reevaluated.

The Supreme Court recently had such an opportunity to reevaluate Title IX's effectiveness in the case of *Bose v. Bea.*[3] Petitioner Priyanka Bose sued Rhodes College under Title IX when the school's disciplinary committee expelled her.[4] The committee based its decision to expel Bose on accusations from her professor, Roberto de la Salud Bea, that Bose cheated on his exam.[5]

The problem is that Bea had made several romantic advances toward Bose and treated her in an unwelcome fashion, asking questions about her personal life and asking her out on a date.[6] One time, he approached her when she was alone in the parking lot and stood "a little too close."[7] He inquired how Bose spent her evenings, asking "do you hang out with your boyfriend?"[8] Bose had never mentioned a boyfriend and these questions made her uncomfortable.[9] As Bose left, Bea reached his hand toward her and asked her if she wanted to go to dinner with him and Bose declined.[10] Bea would often visit other classes just to talk to her.[11]

1. *See* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (holding that damages remedy is available for action brought to enforce Title IX).

2. *See infra* Part I.A.; *See also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 300 (1998) (Stevens, J., dissenting) (abuse made possible only by teacher's "affirmative misuse of his authority" as teacher).

3. *See generally* Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 (No. 20-216).

4. *See* Bose v. Bea, 947 F.3d 983, 987 (6th Cir. 2020).

5. *See id.* at 985.

6. *See id.* at 985–86.

7. Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 at 4.

8. *Id.*

9. *Id.*

10. *See id.*

11. *See id.*

Another time, Bea approached Bose from behind in the dining hall, leaned over her shoulder, and asked her if she was "texting her boyfriend."[12] Her friends who saw this interaction encouraged her to report it to the school.[13] But in an attempt to resolve the situation herself, Bose approached Bea outside the chemistry building with a friend and told him that his questions made her uncomfortable and that she just wanted to "keep our relationship strictly professional."[14]

Bose later took a test in Bea's office, but Bea acted differently than before.[15] She scored a 74 on the exam but Bea recorded it as a 47.[16] He was colder and aloof, stopped calling on her in class, and gave her the "silent treatment."[17] Presumably trying to alleviate the situation, Bose told Bea that she felt "like it's been really weird . . . there's been a lot of tension between us" and that "I'm not going to report you or anything."[18]

Bose later took a final quiz in Bea's office, as before.[19] But after she finished, Bea made a fake answer key that matched Bose's answers and claimed she cheated by looking at the key when he stepped out of his office and left it open on his computer.[20] The school's Honor Council expelled her soon after, concluding that there was sufficient evidence that she cheated.[21]

This case illustrates several problems with current Title IX law. First, students who face subtle, even benign, comments or attention from teachers that would not otherwise be cognizable under Title IX will have no recourse if they face significantly disproportionate adverse action from the school based on their efforts to stop the teacher's advances.

This is because students who receive that kind of attention may try to resolve the situation themselves, or they may feel that their place in a prestigious program will be jeopardized if they report the teacher's conduct.[22] If students in their judgment feel that it is unwarranted to

12. Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 at 5.
13. *See id.*
14. *Id.*
15. *See id.*
16. *See generally id.* at 6.
17. Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 at 6.
18. *Id.*
19. *See id.*
20. *See id.* at 6–7.
21. *Id.* at 9.
22. *See* Jennings v. Univ. of N.C., 482 F.3d 686, 696 (4th Cir. 2007). The defendant in *Jennings*, Anson Dorrance, is still known as a highly successful coach

report the teacher's behavior to an administrator, the school will not receive proper notice as required by Title IX, which will bar relief.[23]

Second, students in Bose's situation face an additional hurdle of proving causation.[24] When schools rely on a biased teacher's accusations and expel or discipline a student, courts like the Sixth Circuit may find that the causal link between the professor's discriminatory motive and the ultimate adverse action is severed because the school is not acting with any gender-based animus.[25] This further undermines the purpose behind the actual-notice standard because the teacher can accomplish the discriminatory goal (having the student expelled) without engaging in overt conduct that would rise to a Title IX violation.[26] Finally, the teacher's intent is left out of the analysis for determining Title IX liability.[27]

Bose advanced some of these arguments in her petition for writ of certiorari.[28] She emphasized that the school, in expelling her, gave effect to her professor's discriminatory motive.[29] She analogized to a similar notion under other anti-discrimination laws called "cat's paw liability," where defendants can be held liable for adverse actions taken by a neutral decision-maker when the decisions are influenced by allegations of co-workers or supervisors who harbor a discriminatory animus toward the plaintiff.[30] Rather than arguing that

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of the UNC soccer team. *Id.* at 696. As Jennings put it, "girls would cut off their right arm to be at UNC and play for Dorrance" and "didn't want to tick him off to a point where he would take it out on them by not playing them." *Id.* at 696–97.

23. *See infra* Part I.

24. *See* Bose v. Bea, 947 F.3d 983, 989 (6th Cir. 2020).

25. *See id.* at 991.

26. Bose advanced a similar argument, asserting that allowing disciplinary committees to act as rubber-stamps for a professor's biased accusations allows schools to evade Title IX liability. *See* Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 at 2.

27. Bose attempted to highlight this problem as well. *Id.* at 13–14.

28. *See id*. at 2, 13–14.

29. *See id.* at 21.

30. *Id.* at 14–15. For cases using similar reasoning *see* Theidon v. Harvard Univ., 948 F.3d 477, 507–08 (1st Cir. 2020) (mentioning the cat's paw but finding no causation where professor was denied tenure but allegedly discriminatory professor who gave negative feedback to tenure review committee did not vote on committee, other committee-members did not know of plaintiff's protected activity, and allegedly biased professor was not the only one who expressed reservations about plaintiff); *see also* Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 92–93 (2d Cir. 2011) (finding "substantial evidence of causation where student was expelled for cheating but evidence was "specious" and disciplinary

the school was liable for the professor's actions based on *respondeat superior*, a practice that is not accepted under Title IX law, Bose argued that the school should be held liable for its own action of expelling her.[31]

This Note builds on these arguments in three parts. Part I will review the background law on Title IX and show that the actual notice standard articulated in *Gebser* is ill-suited to retaliation claims where students do not necessarily experience harm in the form of harassment but in the form of unforeseeable retaliation, including expulsion, suspension or other significant disciplinary measures that are in no way comparable to the initial harassment. An exception to the actual notice standard should be carved out in these situations, relieving students from the burden of reporting earlier misconduct that is not actionable.

Part II will examine the background law on the "cat's paw" and show how the Court's denial of certiorari will further hinder students like Bose when it comes to proving causation. More specifically, it will show how the theory of cat's paw liability was a viable one that the Court should have adopted. Part III will show that the Supreme Court's denial of certiorari on this issue will foreclose remedies under Title IX and relegate students to more rigorous constitutional remedies.

I. AN EXCEPTION TO THE ACTUAL NOTICE STANDARD IS WARRANTED WHERE STUDENTS FACE UNACTIONABLE HARASSMENT FOLLOWED BY UNFORESEEABLE RETALIATION

Students like Bose, who face harassment primarily in the form of unwanted comments, may not provide proper notice to the school because the conduct does not interfere to a high enough degree to drive a student to make a report.[32] Students may also fear losing out on opportunities they see as vital to reaching their highest potential.[33] The result is that the student has no recourse when the harasser retaliates in an unforeseeable way such as by fabricating false evidence of cheating and bringing about the student's expulsion.

When a teacher sets in motion the school's disciplinary procedures against the student after the student refuses the teacher's

charges were initiated against student soon after he refused professor's sexually charged comments and advances); *see also infra* Part II.

31. *See* Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 at 18.

32. *See infra* Part I.B.

33. *See infra* Part I.B.

advances, the student will have no recourse unless they gave the school actual notice and the school's response was objectively unreasonable.[34] Under this rule, students are expected to respond to any and all conceivable harassment by escalating the situation and reporting the conduct to an administrator. This is unrealistic and out of touch with how students might respond to harassment.[35] A teacher's conduct could be borderline innocent and still make the student uncomfortable, but it follows that students will be even less likely to make a report, feeling that they should just shrug it off.

Students should not be forced to try to divine their professor's motives for the first time during the disciplinary proceedings against them. If students try to explain their side of the story when the disciplinary proceedings begin, as was the case in *Bose*, an unfair result is likely because the disciplinary charges against the student will inevitably color the student's re-telling of events. Students should always be able to tell their side of the story in a non-hostile setting to administrators with the ability to reflect and deliberate about the appropriate response.

The unactionable harassment that the student faced initially but did not report also provides necessary context for the professor's retaliatory actions, and students lose the benefit of having informed someone of all the incidents of harassment as they occurred, incidents that seemed too minor to report in the first place. The actual notice standard contemplates students making reports as they experience harassment so that administrators can make the most appropriate response.[36] But in cases such as *Bose*, the full context and sequence of events will be hard to appreciate when these details are unearthed for the first time at disciplinary proceedings against the student.

These factors negate the rationale of the actual notice standard and show the need for an exception that makes schools bear the cost when students face unforeseeable, significantly harmful retaliation such as expulsion and failed to provide notice to the school.

A. The Purpose of the Actual Notice and Deliberate Indifference

34. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998).

35. *See* Brian A. Pappas, *Sexual Misconduct on Campus*, AM. BAR ASS'N, (2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/sexual-misconduct-on-campus/.

36. *Compare Gebser*, 524 U.S. at 278 (no liability where no report was made) *with* Davis *ex. rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633–34 (1999) (petitioner stated claim under Title IX where the victim continuously made reports and the school did nothing).

Standard

Title IX reads, "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."[37] After becoming law, a private damages remedy was read into Title IX.[38] The scope of this relief was limited in *Gebser v. Lago Vista Independent School District* to include only harms for which the particular institution had actual knowledge and in response to which the school was deliberately indifferent.[39]

To bring a claim for private damages under Title IX, plaintiffs must show that "an official . . . with authority to take corrective action and end the discrimination" had actual notice of the misconduct and was deliberately indifferent to it.[40] Usually only such administrators as principals, assistant-principals, and higher-level administrators can be an "appropriate person."[41]

The actual notice standard is rooted in the fact that Title IX is a spending-power measure.[42] Title IX is modeled after Title VI of the Civil Rights Act of 1964 and combats gender-based discrimination by conditioning the receipt of federal funds on a promise by the recipient not to discriminate.[43] *Gebser* involved a teacher who engaged in a sexual relationship with an eighth-grade student.[44] The Court reasoned that a school should not have funding withdrawn for violations, even when perpetrated by its employees, where the school had no opportunity to correct the violation due to its lack of knowledge.[45]

Under the current actual notice regime, students bear the burden of ensuring a school has adequate notice.[46] They must make sure they

37. 20 U.S.C. § 1681(a) (2021).

38. Cannon v. Univ. of Chicago, 441 U.S. 677, 709 (1979).

39. 524 U.S. at 290. A school's response is deliberately indifferent if it is "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

40. *Gebser*, 524 U.S. at 277, 290.

41. Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147, 1161 (citing Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 848 (6th Cir. 2016); Santiago v. Puerto Rico, 655 F.3d 61, 73–74 (1st Cir. 2011)).

42. *Gebser*, 524 U.S. at 287.

43. *Id.* at 286.

44. *Id.* at 277–78.

45. *Id.* at 290.

46. Suski, *supra* note 41, at 1153 (drawing on behavioral psychology as well as child and adolescent brain science to argue that the actual notice standard is

notify particular people at the school at a particular time and allege specific incidents of harassment.[47] The policy behind the standard is partly to give school administrators flexibility in responding to reports of harassment, holding them liable only if their response is clearly unreasonable.[48]

As for retaliation, the Supreme Court has also read an implied cause of action for retaliation into Title IX.[49] The Court in *Jackson* noted that the actual-notice limitation on private damages was applicable to retaliation cases because retaliation involves an intentional violation of the statute.[50]

Procedurally, courts apply a burden-shifting framework: if the plaintiff makes a *prima facie* case establishing that the school took an adverse action based on the plaintiff's sex or protected activity, the burden shifts to the defendant to show a non-retaliatory reason for the action.[51] If the defendant satisfies this burden, then summary judgment is warranted unless the plaintiff can show that the defendant's articulated reason was pretextual.[52]

B. Students Cannot Be Counted on to Speak Out.

Students might not feel inclined to come forward and report misconduct that they face because the conduct is not objectively severe. In *Kocsis v. Florida State University Board of Trustees*, the defendant professor frequently made comments about the way female students looked and dressed, though never directly to the plaintiff.[53] The plaintiff did not provide actual notice to the school of the professor's unwanted comments when she reported them to another professor, who said he was in no position to supervise faculty and that

unproductive in light of how young people respond to sexual harassment and the trauma it can create and works against students by requiring them to respond to harassment in nuanced and legally specific ways).

47. *Id.* at 1151.

48. Davis *ex. rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

49. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005).

50. *Id.* at 182.

51. *See* Hiatt v. Colo. Seminary, 858 F.3d 1307, 1316 (10th Cir. 2017).

52. *Id.*

53. Kocsis v. Fla. State Univ. Bd. of Trs., No. 4:16-cv-529-RH/MJF, 2019 U.S. Dist. LEXIS 43865, at *2 (N.D. Fla. Feb. 27, 2019) (professor said, "you [a female student] can't expect to get by on your looks forever" and "whether she [a female student] is pretty or not, that could be an argument"). *Id.*

she should report the comments to the Dean, which she did not ultimately do.[54]

She also failed to make out a claim for retaliation.[55] To establish a *prima facie* case for retaliation, a plaintiff must show that: (1) he or she engaged in statutorily protected expression or activity; (2) the defendant took action that would be considered materially adverse to a reasonable person in the plaintiff's position; and (3) a causal link existed between the two events (i.e., a retaliatory motive played a substantial part in prompting the adverse action).[56]

There are two forms of activity that are protected from retaliation: (1) opposition to unlawful conduct under the relevant Act, and (2) participating in a hearing, investigation, or proceeding related to an unlawful practice.[57] In *Kocsis*, the plaintiff did not engage in a protected activity the first time the plaintiff spoke out about her professor's comments because she stated that she did not presently intend to file a formal complaint, that she thought she could "make it through," and that her "only hope" was that the professor might stop calling people names.[58]

In fact, it would have been objectively unreasonable for the plaintiff to believe the professor's comments were unlawful because gender-related jokes and occasional teasing do not amount to a sufficiently severe and pervasive environment that would deprive the plaintiff of an education.[59] The plaintiff's later filing of a formal complaint, where she participated in an investigation, interviews, and evidence gathering, however, was a protected activity.[60]

54. *Id.* at *13–14.

55. *Id.* at *37–38.

56. *Kocsis*, 2019 U.S. Dist. LEXIS 43865, at *23; *see also* Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 91 (2d Cir. 2011); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67 (1st Cir. 2002).

57. *Kocsis*, 2019 U.S. Dist. LEXIS 43865, at *23.

58. *Id.* at *24.

59. *Id.* at *25. The Court notes that the professor's comments would not have been prohibited under Title VII, citing Faragher v. City of Boca Raton, 524 U.S. 775 (1998). *Kocsis*, 2019 U.S. Dist. LEXIS 43865, at *11–12. While the showing of "severe and pervasive" harassment is not required for the hostile educational environment claim, the court uses that language in parsing the plaintiff's retaliation claim. *Id. See also* GP v. Lee Cnty. Sch. Bd., 737 F. App'x. 910, 914 (11th Cir. 2018); Jennings v. Univ. of N.C., 444 F.3d 255, 268 (4th Cir. 2006) *rev'd en banc*, 482 F.3d 686, 696 (4th Cir. 2007); Kollaritsch v. State Univ. Bd. of Trs., 944 F.3d 613, 618 (6th Cir. 2019).

60. *Id.* at *25–26.

As for the second element, plaintiffs must show that the school took action that a reasonable person would consider materially adverse.[61] The plaintiff failed here as well because, unlike Bose, she did not allege that she was expelled, just that she was forced to leave the university, that she also experienced lower grades, and that the school denied her an assistantship.[62]

The last element plaintiffs must show is a causal connection between the protected activity and the adverse action.[63] Under the Eleventh Circuit's approach, plaintiffs can rely on temporal proximity between the protected activity and the retaliatory action, but this proximity must be "very close." [64] Causation must be based on more than speculation or surmise.[65]

Kocsis failed to satisfy this component because she alleged that the supposed retaliatory actions, such as experiencing lower grades and being denied teaching assistantships, occurred before she made her formal complaint, meaning they could not have been caused by her engaging in a protected activity.[66] Assuming her initial complaints qualified as a protected activity, the alleged grade deflation still occurred eighteen months after she made those complaints, which was not a close enough time interval to show causation.[67] Even though the professor the plaintiff initially complained to was involved in the committee that denied her teaching assistantships, the plaintiff offered no evidence that that professor influenced or caused the committee to reject her based on her first complaints.[68]

As for the rest of the burden-shifting framework, the defendant in *Kocsis* offered legitimate reasons for her lower grades and denials for teaching assistantships, such as the fact that she was less qualified than other applicants and had lower scores on standardized tests like the GRE.[69] That the plaintiff was still admitted despite the Dean's assertion that her scores were below admissions standards, and that

61. *Id.* at *26.

62. *Kocsis*, 2019 U.S. Dist. LEXIS 43865, at *26.

63. *Id.* at *28.

64. *Id.* (citing Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007)).

65. *Id.* at *32 (citing Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 875 (10th Cir. 2004)).

66. *Id.* at *30–31.

67. *Kocsis*, 2019 U.S. Dist. LEXIS 43865, at *31.

68. *Id.* at *32.

69. *Id.* at *35–36.

she received a "negative" recommendation letter from the Dean did not establish that the school's actions were pretextual.[70]

Kocsis shows how the requirements of actual notice and causation are two independent hurdles for Title IX plaintiffs. Regardless of whether there is actual notice, causation presents a second hurdle that will not be met if the professor's actions are too remote from the protected activity. In *Bose*, the adverse action (expulsion) could not be connected to Bose's protected activity of refusing Bea's overtures because the school did not act based on a discriminatory motive.[71]

Several other cases illustrate how single occurrences where students are subjected to uncomfortable, distasteful, or inappropriate comments or material are insufficient to prevail on a Title IX claim because such instances are not sufficiently severe and pervasive.[72] In *Hendrichsen v. Ball State University*, a plaintiff brought a Title IX claim after her computer science professor sent her flowers and wrote her romantic notes.[73] Her claim failed because the alleged sexual harassment, such as "acting in an obsessive manner" and "singling her out for his attention," was not sufficiently egregious to support a hostile educational environment claim.[74]

The court noted how the professor's actions did not physically humiliate or threaten the plaintiff.[75] It also noted that the fact that the plaintiff received an A in the professor's class as well as almost all As the following two semesters weighed heavily in favor of finding that the harassment was not severe or pervasive.[76]

C. Students Will Have No Recourse When They Face Unforeseeable Retaliation.

When a student is retaliated against, the potential harm from speaking out could be wide-ranging, from abrasive treatment to

70. *Id.* at *36–37.

71. Bose v. Bea, 947 F.3d 983, 991 (6th Cir. 2020).

72. *See, e.g.*, Lam v. Curators of the Univ. of Mo., 122 F.3d 654, 656–57 (8th Cir. 1997) (finding single instances where a videotape containing sexual innuendo was not sufficiently severe or pervasive); Shalom v. Hunter Coll., 645 Fed. App'x *60, *62 (2d Cir. 2016) (finding no hostile educational environment where professor made comments about plaintiff's dress and appearance and received a failing grade in the class).

73. 107 F. App'x 680, 682–83 (7th Cir. 2004).

74. *Id.* at 684–85.

75. *Id.* at 685.

76. *Id.*

expulsion.[77] Where the complained-of harassment in the first place is relatively minor, students may be less likely to speak out. The actual notice standard in *Gebser* fails to further Title IX's goals in these situations because it is hard to predict whether students facing relatively minor treatment like unwanted comments or questions will come forward or try to resolve things themselves without escalating the situation.

Under the actual notice standard, students are punished for taking matters into their own hands and maturely asking a professor or teacher to please refrain from making the comments or asking the questions instead of reporting them to the school's administrators. Such students will have no recourse when their harasser initiates disciplinary proceedings that result in the student's expulsion, a result so dramatically disproportionate to the severity of the initial behavior that it is unforeseeable.

II. THE CAT'S PAW SHOULD HAVE BEEN EXTENDED TO TITLE IX TO HELP PLAINTIFFS SHOW CAUSATION.

A. The Inception of the Cat's Paw

The cat's paw is a notion that a defendant can be held liable when it acts through a neutral decisionmaker that is influenced by the discriminatory animus of another.[78] This section will discuss two ways that the cat's paw has been used to hold employers liable for making decisions adverse to the plaintiff based on conduct by a supervisor biased against the plaintiff. First, agency principles can be used to create liability by holding that a biased supervisor is an agent of the employer.[79] Second, courts might find that the supervisor's discriminatory intent was the proximate cause of the adverse action taken against the plaintiff.[80]

The first approach meets pitfalls when applied to Title IX because of the textual differences between Title IX and other anti-

77. *See, e.g.*, Kesterson v. Kent State Univ., 967 F.3d 519, 525 (6th Cir. 2020) (abrasive treatment, comments, and exclusion from playing in games); Bose v. Bea, 947 F.3d 983, 985 (6th Cir. 2020) (expulsion); Kocsis v. Fla. State Univ. Bd. of Trs., No. 4:16-cv-529-RH/MJF, 2019 U.S. Dist. LEXIS 43865, at *21–22, *31 (N.D. Fla. Feb. 27, 2019) (plaintiff alleged she received lower grades and denial of assistantship in retaliation).

78. Staub v. Proctor Hosp., 562 U.S. 411, 415 (2011).

79. *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

80. *Staub*, 562 U.S. at 422.

discrimination statutes.[81] While Title VII and other anti-discrimination statutes expressly use the term "agent," Title IX does not.[82] The rationale in such cases is that an employer should only be liable for torts committed while in the scope of employment, and since sexual harassment may often fall outside of that category, it would be imprudent to hold employers strictly liable in those cases.[83] This rationale is less persuasive in cases like *Bose* because schools have power over how they conduct academic hearings, a function that schools perform in their unique capacities as academic institutions and to which courts typically defer.[84] Therefore, imposing vicarious liability makes sense in cases like *Bose.*

As for the second approach, the Supreme Court has found liability in a similar employment context without resorting to agency principles by asking simply whether the biased supervisor's intent to injure the plaintiff was the proximate cause of the harm.[85]

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

82. *Id.; see also Shager*, 913 F.2d at 404 (noting ADEA defines "employers" to include "agents").

83. *See Shager*, 913 F.2d at 404; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

84. *See, e.g.*, Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (declining to "ignore the historic judgment of educators" in requiring a hearing before dismissing a student); Brown v. Li, 308 F.3d 939, 949–50 (9th Cir. 2002) (finding deferential review should be applied to university's review and denial of graduate student's thesis because regulation of curricular speech is "an integral part of the classroom-teaching function of an educational institution"); Pugel v. Bd. of Trs. of the Univ. of Ill., 378 F.3d 659, 668 (7th Cir. 2004) (finding school's dismissal of graduate student for academic misconduct, namely fabricating research results, was justified by the "significant ramifications on the discipline and rigor of the University's intellectual enterprise," and that, in the free speech context, the university's interest in protecting academic integrity clearly outweighed allowing the plaintiff to present fraudulent data). The usual deference to schools might change depending on whether the proceedings are flawed. *See* Jones v. Bd. of Governors of Univ. of N.C., 704 F.2d 713, 716 (4th Cir. 1983) (affirming preliminary injunction staying school's disciplinary proceedings where school's interest in academic integrity was outweighed by potential injustice to student if wrongfully expelled where student was dismissed for cheating on a final exam; proceedings run by student tribunal were "so flawed" that the university set the results aside).

85. *Staub*, 562 U.S. at 422.

B. Using Agency Principles to Incorporate the Cat's Paw

The cat's paw originated in *Shager v. Upjohn Co.*[86] There, a plaintiff brought a claim under the Age Discrimination in Employment Act, arguing that his termination was based on the discriminatory animus of one of his supervisors, who praised a younger co-worker and whose negative performance reviews of him led to the plaintiff's termination at the hands of the employer's "Career Path Committee."[87] The court found no evidence that any employee on the Career Path Committee harbored any hostility toward older employees and the defendant-employer argued that it was therefore shielded from liability because it was the *committee* that terminated the plaintiff and not the supposedly biased supervisor.[88]

Despite this argument, the plaintiff survived summary judgment, showing that in addition to making comments that it was "refreshing to work with a young man," the supervisor exaggerated the plaintiff's performance deficiencies compared with the plaintiff's overall performance in making sales, and transferred the plaintiff to a region where it was harder to make sales while keeping a younger sales employee in a more prosperous region.[89]

The court imputed the supervisor's bias to the Career Path Committee.[90] It based its reasoning on agency principles, a decision rooted partly in the text of the statute but also in the practical realities of employment situations, where it is unreasonable to expect an employer to completely prevent all harassment.[91]

In particular, it noted the principle that the common law rule of *respondeat superior* is usually imported to statutory torts.[92] The ADEA and Title VII are similar in that they both impose liability on "employers," which they define to include "agent."[93] The court found that it was appropriate to use agency principles to draw the connection

86. 913 F.2d at 405.

87. *Id.* at 399–401.

88. *Id.* at 404.

89. *Id.* at 399–401.

90. *Id.* at 404, 406.

91. *Shager*, 913 F.2d at 404. The Supreme Court has held that it is inappropriate to apply agency principles to Title IX because of the lack of such direct language that exists in Title VII and the ADEA. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998).

92. *Shager*, 913 F.2d at 404.

93. *Id.*; 42 U.S.C. § 2000e(b) (2021).

between the supervisor's bias and the committee's action because of ADEA's silence on the issue.[94]

Citing *Meritor Savings Bank v. Vinson,* the court noted the "unrealism" of expecting an employer to purge every risk of sexual harassment from the workplace.[95] In the words of Judge Posner, "strict liability would add nothing to liability based on fault."[96] But that concern is not as strong when the challenged action is not harassment but discharge.[97]

Applying this analysis to *Bose* leads to a similar conclusion. The reasoning in *Gebser* is sound insofar as schools cannot address violations they have no knowledge of, but imposing strict liability would absolutely work to limit Title IX violations that result from allegations of academic dishonesty because resolving such claims are an inherent part of the school's business. When there is any question that a professor may be acting out of gender-related animus in accusing a student, imposing strict liability ensures that school administrators will be proactive and involved in ensuring that the student has an opportunity to be heard rather than assigning such an important fact-finding duty to student committees and honor councils.[98]

C. Using Proximate Cause to Incorporate the Cat's Paw

The Supreme Court adopted the cat's paw in *Staub v. Proctor Hospital.*[99] There, the plaintiff's two co-workers encouraged the plaintiff's supervisor to implement corrective actions against the plaintiff and then accused him of violating those actions, resulting in his termination.[100] The plaintiff argued that those accusations were false and were motivated by the co-workers' animus toward his military obligations.[101]

The Court held that a supervisor performs an action "motivated by" discriminatory animus, and is liable under the Uniformed Services

94. *Shager*, 913 F.2d at 404.

95. *Id.* (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 59 (1986). *Meritor* is a Title VII case. *Id.*

96. *Id.*

97. *Id.*

98. The Honor Council in *Bose* was composed of students. Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 at 7.

99. *See* 562 U.S. 411, 415–16, 422 (2011).

100. *Id.* at 414–15.

101. *Id.* at 415. The law was the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Employment and Reemployment Rights Act (USERRA), if the action is intended by the supervisor to produce an adverse employment action, and if that action is a proximate cause of the ultimate employment action.[102] As a result, the causal link between the supervisor's intent and the adverse action remains intact.[103] The ultimate employment action can have multiple proximate causes, as long as one of them is the supervisor's bias.[104]

The Court started from the same premise as the Seventh Circuit in *Shager* that Congress adopts the background of general tort law when it creates a federal tort.[105] One of these principles is that actors generally intend the consequences of their actions and not just the actions themselves.[106]

The point is that, in cases like *Bose*, a harasser intends to have the student expelled. This may be out of a fear that the student will make a report that will cost the harasser his or her job.[107] When the professor's allegations result in a disciplinary hearing where the student is expelled, the same causal chain in *Staub* is present, and the professor's intent is the proximate cause of the adverse action against the student.

D. Students Will Not Be Able to Show Causation When a Harasser Influences a Neutral Decision-maker.

Even if students can show the school had actual notice, they will not be able to contend with the requirement of causation because the fact that a neutral decisionmaker took action against them will sever the causal connection.[108]

Had the Court granted certiorari to Bose and extended the holding in *Staub*, the professor's intent to have a student expelled would govern the question of causation, holding the school liable. The denial means that students will not have recourse under Title IX when their

102. *Staub*, 562 U.S. at 422. The Court noted a split in views on whether under agency principles a malicious state of mind can be combined with the adverse action of another to hold the principal liable for the tort that requires both, but found that it was unnecessary to refer to agency principles to resolve the issue. *Id.*

103. *Id.* at 421.

104. *Id.* at 420.

105. *Id.* at 417.

106. *Staub*, 562 U.S. at 417.

107. Petition for Writ of Certiorari, Bose v. Bea, 141 S. Ct. 1051 at 8 (stating that at the disciplinary hearing, Bea stated, in regard to Bose, "do you think I'm going to put in jeopardy my tenure because of you?").

108. Bose v. Bea, 947 F.3d 983, 991 (6th Cir. 2020).

professor takes any retaliatory action toward them through a neutral decisionmaker.

III. AFTERMATH: THE SUPREME COURT'S DENIAL OF CERTIORARI RELEGATES PLAINTIFFS TO CONSTITUTIONAL CLAIMS

This section will examine the challenges students face when seeking relief under the Constitution rather than Title IX. Because the Supreme Court has declined the chance to extend the cat's paw to Title IX retaliation cases, students are left to pursue relief via § 1983. Title IX is not the exclusive vehicle for relief for combatting discrimination, and students can turn to § 1983 to obtain relief.[109] But constitutional claims present additional hurdles because students must show state action, they cannot sue for retrospective injunctive relief such as readmission, and there is a higher causation standard. Students might also face evidentiary challenges of showing "comparators" when bringing claims under the equal protection clause.

A. State Action

The threshold hurdle for any claim under § 1983 is state action.[110] This requirement probably disqualifies students like Bose, who attend private schools like Rhodes College, without any further inquiry.[111] Students have had limited success showing that a private institution could be a state actor.[112]

In *Weise v. Syracuse University*, one plaintiff claimed she was denied a position due to her sex and another plaintiff claimed she was

109. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256 (2009).

110. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982).

111. Many courts hold that private educational institutions are not state actors even where they receive state funding and are subject to state regulation. *See* Berrios v. Inter Am. Univ., 409 F. Supp. 769, 771 (D.P.R. 1975), *aff'd*, 535 F.2d 1330 (1st Cir. 1976) (listing cases). State involvement sufficient to transform a private institution into a state one requires more than chartering the university, providing public funding or tax exemptions. *See* Blackburn v. Fisk Univ., 443 F.2d 121, 123 (6th Cir. 1971); Cohen v. Ill. Inst. of Tech., 524 F.2d 818, 826, n.24 (7th Cir. 1975).

112. *See* Weise v. Syracuse Univ., 522 F.2d 397, 408 (2d Cir. 1975); *see also* Coleman v. Wagner Coll., 429 F.2d 1120, 1123 (2d Cir. 1970) (finding plaintiffs were entitled to a hearing on state action, leaving open possibility of state action where state statute requiring schools to have certain disciplinary measures, such as expulsion, created a question of whether the state officials tasked with reviewing the school's policies intended the schools to use those disciplinary measures against students for participating in a campus demonstration).

terminated due to her sex.[113] Despite the plaintiff's argument that the school received so much funding as to be almost dependent on the state, the court acknowledged that state funding and regulation, without more, was insufficient for state action.[114]

But the court also considered the nature of the right violated, in this case the right to be free from sex discrimination.[115] It remanded the issue, finding that the potential violation of this right justified a "less stringent standard" in analyzing state action because the state cannot participate in such "invidious" or "offensive" violations of rights.[116]

Weise presents a sort of blueprint for advocates to argue (and courts to find) that an apparently private university is a state actor. Depending on the kind of funding a school like Rhodes College receives, the combination of funding, regulation, and the particularly important right at issue could tip the balance in favor of students like Bose. But *Weise* appears to be somewhat of an outlier, and no state action was found on remand.[117]

B. Injunctive Relief

Students can only sue state officials in their official capacity for prospective equitable relief under § 1983.[118] In *Lipian v. University of Michigan*, the plaintiff sought to have the school expunge a report it made to investigate his claims because it was slanderous to the plaintiff.[119] But the plaintiff was not entitled to such relief because it was asking the school to undo something it did before, and retroactive injunctive relief is not allowed under § 1983.[120] For Bose or any other student wrongly expelled, asking to be readmitted would similarly be retrospective relief and not allowed.

113. *Weise*, 522 F.2d at 400.

114. *Id.* at 405.

115. *Id.*

116. *Id.* at 406. The court was more willing to intervene where the plaintiff's interests were permanently dropped from the school rather than suspended. *Id.* There is less need to "meddle" in the school's business, such as by regrading a disputed exam or second-guessing a school's rules for academic research, to vindicate the right. *Weise*, 522 F.2d at 406.

117. Weise v. Syracuse Univ., 553 F. Supp. 675, 682 (N.D.N.Y. 1982).

118. Lipian v. Univ. of Mich., 453 F. Supp. 3d 937, 954 (E.D. Mich. 2020).

119. *Id.* at 965.

120. *Id.* at 955.

C. Causation

Causation can appear under § 1983 in two ways. First, where a plaintiff alleges retaliation, there must be a causal link between the plaintiff's protected activity and the adverse action.[121] Second, *respondeat superior* is not available under § 1983, and acts of supervisors will not give rise to liability unless there is a 'direct causal link' between the supervisor and the subordinate's acts that create liability.[122] The first causation requirement appears under Title IX, where courts require a "causal connection" between the protected activity and the adverse action.[123] But pursuing claims under § 1983 means students face the second type of causation if they want to hold supervisors liable, not just individual teachers or coaches.[124]

Students may initially succeed under the first hurdle when pursuing a retaliation claim under the First Amendment against defendants in their individual capacity.[125] In *Kesterson v. Kent State University*, the plaintiff brought a First Amendment claim.[126] To show a First Amendment violation, the Sixth Circuit requires plaintiffs to show (1) that the First Amendment protected their speech, (2) that they

121. *See id.* at 966 (citing Gordon v. Traverse City Area Pub. Schs., 686 F. App'x 315, 320 (6th Cir. 2017)).

122. *Id.* at 955 (citing Hays v. Jefferson Cnty., 668 F.2d 869, 872 (6th Cir. 1982)).

123. *Lipian*, 453 F. Supp. 3d at 966 (citing *Gordon*, 686 F. App'x at 320). Different standards of causation are required by different anti-discrimination statutes. For example, status-based discrimination claims under Title VII require plaintiffs to show that discrimination was a motivating factor in the defendant's conduct. *See* 42 U.S.C. § 2000e-2(m); The same standard applies under the USERRA. 38 U.S.C. § 4311(c); There is no express causation standard for Title IX. *See* Kocsis v. Fla. State Univ. Bd. of Trs., No. 4:16-cv-529-RH/MJF, 2019 U.S. Dist. LEXIS 43865, at *22 (N.D. Fla. Feb. 27, 2019); Taylor-Travis v. Jackson State Univ., 984 F.3d 1107, 1119 (5th Cir. 2021) (requiring a "causal connection" between the discriminatory motive and the defendant's conduct); For Title VII retaliation claims the standard is but-for. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (interpreting 42 U.S.C. § 2000e-3(a) (2021). But-for is also applied under the ADEA. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009) (interpreting 29 U.S.C. § 623 (2021)).

124. Plaintiffs would also have to overcome an individual's qualified immunity by showing that the law violated was clearly established. *See* Kesterson v. Kent State Univ., 967 F.3d 519, 524 (6th Cir. 2020). This Note does not address that issue.

125. *See Kesterson*, 967 F.3d at 524–26 (plaintiff's claims could proceed to trial where plaintiff did not have to show her protected speech *alone* was the reason for the retaliation).

126. *Id.* at 524.

suffered an injury that would deter a person of 'ordinary firmness' from continuing to speak out, and (3) that the defendant's actions were motivated at least in part by their speech.[127]

Kesterson met the first element because sexual assault allegations are protected under the First Amendment.[128] There was a genuine issue of material fact as to the other two elements.[129] As for whether a person of "ordinary firmness" would be deterred from continuing to speak out, this was a question, based on the conflicting testimony of the parties, that could only be resolved at trial by examining the credibility of each party.[130]

That Kesterson told other officials about the alleged assault did not mean that she did not fear retaliation.[131] Perhaps a student might tell others to simply receive moral support.[132] All that matters is that a coach's decisions were motivated in substantial part by a desire to punish the student.[133] Since retaliating against a student for speaking out about sexual assault was prohibited by a clearly established law, the case could proceed to trial.[134]

With the Supreme Court's denial of certiorari, students like Bose can probably succeed as Kesterson did in showing that the teacher's actions were motivated at least in part by their protected activity. The third element of the First Amendment claim is that the defendant's actions must be motivated at least in part by the plaintiff's speech.[135] If Bose brought this claim against Bea, she could probably show that Bea was motivated in part by a desire to punish her.

But Bose would not be able to get any supervisory liability. There would be no direct causal link because the school's dismissal, even if based on false charges of cheating, cannot be said to be motivated by Bose's speech. This was the Sixth Circuit's reasoning in *Bose*.[136]

Therefore, plaintiffs who pursue First Amendment retaliation cases will not have trouble showing that their speech, complaining of sexual assault or harassment or speaking out in opposition to sexual

127. *Id.* at 525 (citing Jenkins v. Rock Hill Loc. Sch. Dist., 513 F.3d 580, 585–86 (6th Cir. 2008).

128. *Id.*

129. *Id.*

130. *Kesterson*, 967 F.3d at 525.

131. *Id.* at 526.

132. *Id.*

133. *Id.*

134. *Id.* at 525.

135. *Kesterson*, 967 F.3d at 525.

136. Bose v. Bea, 947 F.3d 983, 989–91 (6th Cir. 2020).

comments, is protected.[137] But if school supervisors rely on the teacher's accusations, there will not be a direct causal link between their actions because the expulsion will not be motivated by the student's speech. This conclusion is consistent with the Sixth Circuit's holding that the expulsion was not motivated by any gender animus.[138]

D. Equal Protection

Students can also bring claims under the Fourteenth Amendment but showing that they were treated unequally might prove difficult. In *Lipian v. University of Michigan*, the plaintiff was sexually assaulted by a professor in a music school, David Daniels, and brought a claim under § 1983 alleging that school supervisors violated his right to equal protection under the Fourteenth Amendment when they treated him, a male, differently than other students without a justifiable reason.[139]

Daniels was a renowned vocalist and music teacher, regarded as the "Luciano Pavarotti of countertenors."[140] According to the plaintiff, Daniels invited him over to discuss his musical career, but then gave him Ambien (which he said was Tylenol) and sexually assaulted him.[141] After that incident, Daniels would request pictures of plaintiff's genitalia and videos of him masturbating.[142] Plaintiff replied with texts saying "I love you" and "thanks for spending time with me," but testified that he was trying to prevent Daniels from retaliating against him.[143]

As part of this equal protection claim, plaintiffs must show that a similarly-situated person outside the plaintiff's category was treated differently.[144] Plaintiff's claim in *Lipian* failed because he did not provide evidence of such "comparators," specifically of female students who were victims of sexual assault but treated better by the

137. *See id.* at 989 n.3 (citing EEOC v. New Breed Logistics, 783 F.3d 1057, 1067 (6th Cir. 2015).

138. *Id.* at 991.

139. Lipian v. Univ. of Mich., 453 F. Supp. 3d 937, 963–64 (E.D. Mich. 2020). The plaintiff in *Lipian* also used § 1983 to bring an equal protection "class-of-one" claim as well as a First Amendment retaliation claim, both of which failed due to the fact that the alleged actions did not violate the clearly established law, entitling defendants to qualified immunity. *Id.* at 968–69.

140. *Id.* at 948.

141. *Id.* at 949–50.

142. *Id.* at 950.

143. *Id.*

144. *Lipian*, 453 F. Supp. 3d at 964.

school.[145] More than offering hypothetical scenarios, students have to show that such a student was treated differently "on the same set of operative facts."[146]

The plaintiff in *Lipian* argued that during the course of Daniels' advances against him, he felt that he had to "play along" with Daniels' sexually charged comments and jokes and feared being retaliated against or "blackballed" from the prestigious music program at Michigan if he angered Daniels.[147] This reaffirms how relying on students to come forward or take decisive action can lead to unpredictable results where students end up compromising their claims because they acted in a way that might suggest they consented to the teacher's conduct.[148]

Regarding comparators, students like Bose may have a hard time coming up with such evidence. Even though logic suggests the outcome in *Bose* would have been different had the plaintiff been male, plaintiffs will still have to present specific instances that closely reflect the facts in the plaintiff's case. This will be hard to do.

CONCLUSION

Title IX cannot serve its purpose if it undermines the ability of students to fight unjust and unforeseeable action taken by their school. When a school relies on a teacher's accusations and expels a student, the student suffers a harm that was, in cases like *Bose*, unexpected. Students who are subjected to unwanted conduct that is not cognizable under Title IX will be left with nothing when they try to resolve the situation themselves rather than reporting it, or do not report it out of fear of losing out on valuable academic or athletic opportunities.

Even when students do meet the requirement of actual notice, they will still have to contend with proving causation. Without a decision from the Supreme Court, courts will continue to follow the 6th Circuit decision holding that the causal link between the protected activity and the adverse action is severed when teachers succeed in

145. *Id.* at 964.

146. *Id.* at 964 (*quoting* Doe v. Ohio State Univ., 239 F. Supp. 3d 1048, 1082–83 (S.D. Ohio 2017)).

147. *Id.* at 948–50.

148. *Lipian*, 453 F. Supp. 3d at 967 (the Court in *Lipian* noted that the text messages between plaintiff and Daniels gave the appearance that the "sexualized banter" was mutual and ran the risk of "fool[ing]" school investigators into thinking the conduct was welcome).

expelling a student by bringing false claims to a disciplinary committee.

Students in Bose's position will now have to look to other constitutional claims if they make the mistake of trying to address a teacher's conduct themselves rather than reporting it. These statutes are not as efficient vehicles for redress, and in many cases will leave students with no relief.