No. 16-1982

IN THE

Supreme Court of the United States

CHILTON STATE UNIVERSITY,

Petitioner,

v.

JANE DOE,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

LAWYER 1
LAWYER 2
CHILTON STATE UNIVERSITY
123 Fourth Street, N.W.
Chilton City, CN 12345
(123) 456-7890

*Counsel of Record

LAWYER 3
TEAM NUMBER **889**
BROOKLYN, N.Y.
PETITIONER'S BRIEF
123 Fourth Street, N.W.
Chilton City, CN 12345

Counsel for Petitioner

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The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 over plaintiff's claims under Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-88 ("Title IX"). The opinion of the District Court for the Western Division of the District of Chilton is reproduced in the record beginning on page 2. The opinion of the Court of Appeals for the Thirteenth Circuit is reproduced in the record beginning at page 20. The petition for a writ of certiorari was granted on November 2, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

III. STATEMENT OF THE ISSUES

This Court's order granting certiorari directed the parties to address the following questions:

I. Whether Department of Education Office of Civil Rights guidance documents that impose a duty to investigate off-campus events outside of university operations are reasonable interpretations of federal regulations, thereby meriting *Auer* deference

II. Whether, despite taking numerous other actions, Chilton State University's decision not to investigate Plaintiff's report of an off-campus sexual assault that occurred outside the educational context was so clearly unreasonable as to constitute deliberate indifference in violation of Title IX

IV. STATEMENT OF THE FACTS

1. Chilton State's Student Groups and Beta Kappa Delta

Chilton State is a public university in Chilton City, Chilton. (R. at 2.) Besides its curricular offerings, Chilton State offers various extracurricular programs and grants official recognition to certain student groups and organizations. (R. at 3.) Chilton State requires all student organizations to submit approval requests for their formal events. More specifically, when recognized student groups would like to host an event that bears the official mark of the organization, they must jump through various procedural hurdles, including submitting the event to the Office of Student Activities ("OSA") at least 72 hours before the event is to be held. (R. at 3.)

One of the recognized groups of Chilton State is Beta Kappa Delta ("BKD"). (R. at 2.) BKD is a co-ed fraternity, which does not have any on-campus housing or facilities. (R. at 3, 4.) BKD hosts various types of events. It hosts weekly meetings, regular community service events, and formal social events. (R. at 2, 3.) BKD's members also host informal social gatherings. (R. at 4.) BKD chooses to seek OSA approval for many of its more formal events, such as community service events and weekly meetings. (R. at 3.) BKD also submits many of its formal social events for approval by OSA. (R. at 3.) But BKD does not apply for approval of informal social gatherings of its members. (R. at 3, 4.)

2. The 4th of July Event

During the summer of 2014, Jane Doe ("Doe") was a rising sophomore at Chilton State and a member of BKD. (R. at 2, 4.) Doe decided to live and work in Chilton City for the summer of 2014 rather than returning home. (R. at 4.) Doe did not, however, enroll in any summer classes. (R. at 4.) One of Doe's friends within BKD, Logan Forester ("Forester"), a rising junior, also chose to live and work in Chilton City for the summer. (R. at 4.)

Doe lived with several female members of BKD in an off-campus home that is privately owned and frequently rented by students. (R. at 4.) The house where Doe lived was often rented from the owner by members of BKD. (R. at 4.) Forester lived on the same street as Doe in another house rented by BKD members. (R. at 4.)

During the summer, Forester and his roommates hosted an informal social gathering to celebrate the 4th of July. (R. at 4.) Approximately twenty people attended the event, including Doe. (R. at 4.) Doe consumed several alcoholic drinks over the course of the afternoon and became intoxicated by early evening. (R. at 4.)

At some point during the evening, Forester approached Doe and asked her to help him prepare some food inside of the house. (R. at 5.) Doe accompanied him, and, once inside, Forester kissed Doe.[1] (R. at 5.) Doe reports that she both pulled away from his kiss and stumbled backwards. (R. at 5.) After either moving away from his kiss or stumbling, Doe alleges that Forester pulled Doe into the living room and onto the couch. (R. at 5.) Then, Doe reports, Forester began assaulting her. (R. at 5.) No details of the exact form of assault were provided, and no report from Forester was supplied. Soon after Forester pulled Doe onto the couch, one of Forester's roommates entered the room. (R. at 5.) Doe reported that Forester sat up, made a joke,

[1] Forester had previously expressed romantic interest in Doe, which Doe had neither reciprocated nor rejected. (R. at 3.)

and then walked outside with his roommate. (R. at 5.) Soon thereafter, Doe told her roommate she was not feeling well and returned home. (R. at 5.) No report was gathered from either Forester or his roommate.

After the 4th of July event, Doe decided to return home for the summer rather than stay in Chilton City. (R. at 5.) She did not mention the 4th of July incident to anyone. (R. at 5.) Doe later reported feeling emotional distress during the remainder of the summer. (R. at 5.) Despite reportedly feeling emotional distress, there is no report that Doe sought counseling services. Doe also chose to hide the 4th of July event from her parents and roommates. (R. at 5.) But in mid-August, when the school year was approaching, Doe told both her parents and one of her roommates about the event. (R. at 5.) Doe's parents urged her to report the 4th of July event to Chilton State's Title IX officer. (R. at 6.) Doe's roommate responded by telling one of Forester's roommates. (R. at 6.)

Before Doe returned to school, anonymous posts about Doe began appearing on the social media website YakTalk. (R. at 6.) Because posts on YakTalk are anonymous, it is unclear who wrote them. (R. at 6.) YakTalk is not formally affiliated with Chilton State, and Chilton State has not endorsed YakTalk. (R. at 6.) But YakTalk has a voluntary "Chilton State" group that members can join, and once they are part of the group, members can post anonymous messages that are viewable by other members. (R. at 6.)

3. Chilton State's Response to Doe

When Doe returned for the school year, she reported the 4th of July event and the YakTalk posts to Emily Johnson ("Johnson"), Chilton State's Title IX officer. (R. at 6.) While Johnson informed Doe that she could not investigate the 4th of July incident or the YakTalk posts because both were outside Chilton State's jurisdiction, Johnson did offer to help Doe in

several other ways. (R. at 6.) First, Johnson offered to fully and actively cooperate in an investigation by law enforcement if Doe decided to inform the authorities. (R. at 7.) Second, she promised an immediate response to any on-campus harassment. (R. at 7.) Third, she gave Doe information about on-campus counseling services. (R. at 7.) Fourth, Johnson offered to help Doe rearrange her class schedule. (R. at 7.) And fifth, she offered to help Doe find a new living situation. (R. at 7.) Johnson also informed Doe that she could not remove Forester from BKD without substantiated allegations of an assault on-campus or results from a law enforcement investigation. (R. at 7.) There is no evidence that Doe accepted any of Johnson's offers.

After this meeting, Doe began missing classes, her grades began falling, and she dropped out of BKD and all other extracurricular activities. (R. at 7.) Doe did not report any more contact with Forester. She did report seeing a few more messages on YakTalk about her. She reports suffering from anxiety and depression, which she attributes to Chilton State. (R. at 7.) There is no evidence that she sought treatment for any anxiety or depression.

Doe subsequently filed this lawsuit, alleging that Chilton's response to her report was inadequate because there was no investigation. (R. at 7.) After "extensive discovery," Chilton State filed the current Motion for Summary Judgment. (R. at 8.)

V. STATEMENT OF THE CASE

The District Court for the Western Division of the District of Chilton granted the summary judgment motion of Chilton State. The District Court ruled that the Office of Civil Rights guidance document were not entitled to *Auer* deference. The District Court also ruled that Chilton State lacked substantial control over the premises of where the alleged assault occurred and did not act with deliberate indifference.

The Court of Appeals for the Thirteenth Circuit reversed. The Court of Appeals held that *Auer* deference should be given to the guidance documents. It further held that the record contained sufficient evidence for a jury to possibly find that Chilton State committed actionable discrimination.

VI. SUMMARY OF THE ARGUMENT

Title IX imposes liability on universities for their own wrongdoing, not the misconduct of others. Doe seeks to change this basic premise of Title IX liability, expanding the duties of Chilton State, and universities everywhere, to conduct that occurred beyond the boundaries of campus and the operations of its educational programs and activities. In order to do so, she seeks to (1) divorce *Auer* deference from its practical underpinnings and (2) expand the notions of substantial control and deliberate indifference beyond their doctrinal formulations. Neither one of these transformation should be given credence.

Auer deference is not a hard-and-fast rule—it is a general principle that applies in a limited number of cases. Doe asks this Court to apply *Auer* deference to a 2014 Q&A and 2011 Letter from the Office of Civil Rights, despite none of the predicates for *Auer* deference being present. By placing duties on universities for conduct that occurs off-campus and outside of university operations, the Letter and Q&A extend beyond the language of Title IX, as interpreted by this Court, violating the will of Congress. The Letter and Q&A also violate federal regulations passed pursuant to Title IX. These regulations explicitly target misconduct that occurs within the university's operations. But if the Letter and Q&A are given deference, these regulations will receive an "interpretation" their text cannot hold.

Besides going beyond what Title IX permits, and beyond its own regulations, the Letter and Q&A do not represent the agency's fair, reasoned judgment. Three reasons dictate this

conclusion. First, the OCR used none of its expertise when it promulgated the regulations supposedly being interpreted by the Letter and Q&A. These regulations simply mime the words Congress, undercutting Doe's argument that the agency used its expertise when crafting its regulations—clicking "copy" and "paste" does not require expertise. Second, the Letter and Q&A break with prior agency practice with no explanation whatsoever. This sudden change in agency practice raises acute worries about unfair surprise. Third, the inconsistent break with practice was accompanied by no explanation. A rapid break from clear past practice without reasoned justification cannot be considered the reasoned judgment of the agency.

Doe does not simply seek to expand principles of administrative law in an unjustified fashion—she would also have this Court expand the "operations" of universities across the nation to include off-campus parties outside of any education program or school-sanctioned activity. Under Doe's reading of this Court's precedent, universities should be considered to have "substantial control" over any event attended by students of the university. In order to comply with this reading, universities will be forced to monitor every student cookout, pool party, and movie night. Instead of using limited fiscal resources on education, universities will be required to hire staff to police the social lives of their students. And if they do not, universities will be vicariously liable for the misconduct of their students. Title IX cannot and should not bear the reading urged by Doe.

Doe would also change the notion of deliberate indifference into a single, formulaic duty for universities: investigation and punishment. Regardless of whether a well-intentioned university seeks to help an alleged victim by securing counseling or new housing, assisting law enforcement, or punishing wrongdoing within its control, the university will be liable unless it treks off-campus and investigates all wrongdoing done to its students. This cookie-cutter

approach gives no deference to university administrators, no flexibility to the myriad scenarios that can arise in the university setting, and no tailoring based on the circumstances. Even worse, this approach will place the university outside the realm of education and require certain costs for uncertain benefits. It is time for this Court to once again reaffirm its precedent by refusing to allow courts and plaintiff students to second-guess the reasonable decisions of university administrators.

VII. ARGUMENT

A. The 2011 Letter and 2014 Q&A Do Not Deserve *Auer* Deference

As a general rule, courts will "defer to an agency's interpretation of its own regulation . . . unless that interpretation is plainly erroneous or inconsistent with the regulation." *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (citing *Auer v. Robbins,* 519 U.S. 452 (1997)). This general rule, however, "does not apply in all cases." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). In order to receive *Auer* deference, an agency's interpretation must first satisfy several preconditions. Respondent meets none of them.

Respondent argues that the 2011 Dear Colleague Letter and 2014 Q&A issued by the Office of Civil Rights ("OCR") at the Department of Education ("DOE") merit total deference as a result of this Court's decision in *Auer*, 519 U.S. 452. But *Auer* deference is only granted when certain preconditions have been satisfied. First, the agency's interpretation must be a valid interpretation of the enabling statute enacted by Congress. *See id*. at 457 ("Because Congress has not directly spoken to the precise question at issue, we must sustain the Secretary's approach so long as it is based on a permissible construction of the statute." (internal quotation marks omitted)). If Congress has already spoken to the issue at hand, then deference must be withheld. Second, the regulation that the agency is interpreting must be ambiguous and capable of multiple

interpretations. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted *only* when the language of the regulation is ambiguous.") (emphasis added). If the regulation's text and context clearly answer the question at hand, then the agency's interpretation will not receive deference. Third, the agency's interpretation must be a reasonable interpretation of the ambiguous regulation and cannot be inconsistent with the regulation's text. *Accord Chevron U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984) (requiring that agency interpretations of statutory provisions be reasonable).

Even if these preconditions are satisfied, *Auer* deference is subject to important caveats. First, interpretations of Congress's words are not given *Auer* deference. If an agency merely mimics or paraphrase's Congress's words in its regulation, then it does not deserve deference when interpreting those words. *See Gonzales v. Oregon,* 546 U.S. 243, 257 (2006) (declining to give an agency deference because the regulation in question did "little more than restate the terms of the statute" pursuant to which the regulation was promulgated.). Second, deference is not granted for interpretive documents that break with long-standing administrative practice. *See Christopher*, 132 S. Ct. at 2168 ("[W]here . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute."); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (declining to extend *Auer* deference to the Department of Labor because its interpretation was a break from longstanding practice). And finally, inconsistent agency interpretations are not deserving of *Auer* deference because they likely do not represent an agency's reasoned judgment. *See Christopher*, 132 S. Ct. at 2166 (holding that deference should be withheld if an "agency's interpretation conflicts with a prior interpretation.").

Proceeding with these preconditions and caveats in mind, the 2011 Letter and 2014 Q&A, upon which Doe's entire claim relies, must be accorded no deference. Two broad reasons dictate this conclusion. First, the statute and regulations supposedly undergirding the Letter and Q&A foreclose the interpretation advanced by the OCR. Second, the Letter and Q&A do not represent the agency's reasoned judgment—they merely restate Congress's words but then attempt to attribute novel meaning to those words; they break with long-standing administrative practice without offering a reasoned explanation; and, by their own terms, they do not apply to civil suits. As a result, the Letter and Q&A deserve no deference.

1. Deference is not warranted because the OCR Letter and Q&A are foreclosed by the statutory language of Title IX and the language of regulations issued by the DOE

a) <u>The Letter and Q&A are inconsistent with the text of Title IX</u>

Before an agency's interpretation can be extended *Auer* deference, a reviewing court must ensure that "Congress has not spoken to the precise question at issue." *Auer*, 519 U.S. at 457. While an initial agency regulation might resolve ambiguity in the governing statute, a subsequent interpretation of that regulation could expand that regulation's scope beyond its statutory basis, especially if the initial interpretation is close to the bounds of acceptability. In these cases, the agency interpretation should be granted no deference due to its conflict with a clear Congressional purpose. *See, e.g.*, *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 80 (2d Cir. 2009) (considering whether agency interpretation of its own regulation was consistent with Congressional purpose when determining level of deference).

The 2011 Letter and the 2014 Q&A are ultimately interpretations of Title IX. And the clear language of Title IX limits the scope of a university's duties to its own educational programs and activities. Title IX prohibits discrimination on the basis of sex "under *any education program or activity* receiving Federal financial assistance." 20 U.S.C. § 1681(a)

(emphasis added). Section 1687 defines "program or activity" as "all the operations of . . . a college, university . . . or public system of higher education." 20 U.S.C. § 1687(2)(A).

This language was interpreted definitively this Court in *Davis v. Monroe County Bd. of Educ*., 526 U.S. 629 (1999). In *Davis*, this Court held that the "under the operations of" language of Title IX does not extend beyond "context[s] subject to the school district's control." *Id.* at 645. The "plain language" of Title IX "confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs." *Id.* at 644. Thus, according to the plain language of Title IX as promulgated by Congress and interpreted by this Court, universities are not subject to Title IX for conduct that occurs in a context where the university lacks control over both the harasser and the environment in which the harassment occurs.

The Letter and Q&A suggest, and Respondent argues, that a university can be liable for failing to investigate incidents that occur during an off-campus, non-school-sanctioned event. *See* U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence ("2014 Q&A") at 29, *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred . . ."); Dear Colleague Letter from Russlyn Ali, Assistant Sec'y for Civil Rights ("2011 Letter"), U.S. Dep't of Educ. 4 (Apr. 4, 2011) ("If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures."). Differently put, they impose liability for incidents that do not occur within any operation of the university. Those documents directly conflict with the language of both Title IX and this Court's binding interpretation. In order to respect this clear Congressional purpose, *Auer* deference must be withheld.

b) The Letter and Q&A are not entitled to deference because they conflict with the unambiguous applicable regulations

Agency interpretations of their own regulations are not automatically afforded *Auer* deference if the enabling statute is ambiguous. Before deference can be granted, the regulation being interpreted must be ambiguous as well. *Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous.").

Here, the plain text of the regulations being interpreted, as well as the regulatory context, make clear that off-campus actions that take place outside of an "education program or activity," 20 U.S.C. § 1681(a), do not give rise to a university duty or liability. To suggest otherwise, as Respondent argues, would impose new legal obligations on regulated entities, in turn necessitating a formal rulemaking by OCR. The regulations may be ambiguous elsewhere, but they are not ambiguous with respect to off-campus conduct that occurs outside of any education program or activity. As a result, no deference should be given to the 2011 Letter or 2014 Q&A.

(1) The clear language of all regulations up until 2011 imposed a duty to investigate only if an alleged assault occurred on campus or in a university program

The Letter and Q&A conflict with the clear language of the regulations implementing Title IX. The regulations promulgated pursuant to Title IX are contained in Section 106, which is designed to eliminate "discrimination on the basis of sex in *any education program or activity* receiving Federal financial assistance." 34 C.F.R. § 106.1 (emphasis added). Section 106.2 defines "any education program or activity" as "all of the operations of . . . [a] college, university, or other postsecondary institution, or a public system of higher education." 34 C.F.R. § 106.2. The scope of the regulations is defined in exact same way as Title IX itself.

Given that the language used in the regulations matches verbatim the language of Title IX, the only inference that can be drawn is that the regulations do not extend beyond the scope of

Title IX. In addition to the clear textual consistencies, two other reasons show that the language should be construed the same as Title IX. First, this Court definitively interpreted the scope of Title IX, and this interpretation was based on the plain language of the statute. Given that the language of Title IX dictated a specific scope of applicability, the DOE does not have the power to expand beyond what the statute allows; doing so requires Congressional authorization. Second, when the same words are used in the same statute, they are intended to have the same meaning. *See Envtl. Def. v. Duke Energy Corp.,* 549 U.S. 561, 574 (2007) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."). Thus, when the term "education program" was interpreted by this Court to exclude unsanctioned, off-campus events, the meaning of that term could not be radically transformed simply by transporting the words "education program" from a statute to a regulation.

Despite the clear language in the existing federal regulations, the 2011 Letter and 2014 Q&A have expanded the scope of Title IX and imposed duties on universities for actions that occur off-campus, outside the "operations" of the university. Due to their conflict with the clear language of the regulations they are supposedly interpreting, the 2011 Letter and 2014 Q&A should be given no deference.

(2) The regulatory context up until the 2011 guidance applied solely to on-campus activities or university programs

The broader OCR regulatory context shows that no part of OCR regulations extends to off-campus conduct. All of the actions prohibited by OCR regulations involve on-campus activities and programs affiliated with the school. For example, the regulations prohibit sex discrimination in "any academic, extracurricular, research, occupational training, or other education program or activity operated by [a federally funded University]." 34 C.F.R. § 106.31. They also require universities to provide comparable facilities for men and women in educational

institutions, such as classrooms, toilets, and locker rooms. *See* 34 C.F.R. § 106.33. The regulations further prohibit discrimination in the context of providing equal access to extracurricular activities, and equal quality of materials, technology and staff support for such activities. *See* 34 C.F.R. § 106.34. All parts of Section 106 deal squarely, and only, with activities affiliated with the school. They do not contemplate anything that would occur off-campus, outside a school sanctioned or school funded event, or outside the substantial control of the school. And it is within this context that the grievance procedures established in 106.8(b) sit.

The repeated references to educational programs in Section 106 regulations render illogical any interpretation of 106.8(b) that covers non-educational events and activities that are neither sanctioned nor supported by the school. Yet this is what Respondent argues. Reasonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). Granting *Auer* deference to the 2011 Letter and 2014 Q&A will dangerously signal to agencies that they may extraordinarily broaden the meaning of regulation terms through interpretive documents, thwarting the reasoning of this Court in *Christensen.*

The factual predicate of Respondent's claim unequivocally occurred in physical locations and through online platforms that cannot be described as "education"-related. Nor do such programs receive federal financial assistance. These are facts that Respondent does not dispute. The 2011 Letter and 2014 Q&A, if granted deference, would effectively eliminate the words "education" and "federal financial assistance" from both Title IX and Section 106 of OCR regulations. Respondent's argument would imagine ambiguity where none exists, conflict with the entire framework of Section 106, and create an anomaly in an otherwise clear regulatory structure. An agency interpretation that is "inconsisten[t] with the design and structure of the

statute as a whole," does not merit deference. *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 133 S. Ct. 2517, 2529 (2013).

(3) Regulatory silence does not amount to regulatory ambiguity

Respondent also cannot argue that silence about off-campus conduct in the regulations grants an agency the power to regulate beyond the language of its own regulation. On the contrary, courts consistently hold that silence must be read as a denial of power, and for good reason. *See Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 452 (D.C. Cir. 2012) (declining to grant deference to a guidance letter than expanded actionable misrepresentation beyond the categories listed in the regulation, even though the regulation was silent about other forms of misrepresentation). If silence were read as an implicit grant of power, agencies would have the ability to expand the scope of their regulatory power and requirements without going through the notice-and-comment process. *See Appalachian Power Co. v. EPA,* 249 F.3d 1032, 1048 (D.C. Cir. 2001) (per curiam) ("[W]e should not defer to an agency's interpretation imputing a limiting provision to a rule that is silent on the subject, lest we 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" (internal citation omitted)).

Here, no part of Section 106 makes it evident that off-campus activities or non-sanctioned events could subject a university to liability. In fact, Section 106 is completely silent with respect to off-campus conduct that is unconnected to an "educational program or activity." As a result, the Letter and Q&A should not be allowed to extend the duties of universities into territory about which the agency is silent. If DOE wishes to break this silence, it must do so via notice-and-comment procedures under the APA. *Christensen*, 529 U.S. at 588 ("To defer to the agency's

position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

2. Deference is not warranted because the Letter and Q&A break new ground and mark a fundamental change from previous agency practice

In order to receive *Auer* deference, an agency's interpretation of its own regulation must not only satisfy the numerous preconditions explained in Section 1, *supra*, the interpretation must also avoid several caveats to the general rule of *Auer* deference articulated by this Court. The Letter and Q&A run afoul of several of these caveats. First, the regulations implementing Title IX merely interpret the words of Congress—they are not the agency's words. Second, the Letter and Q&A are a surprising break with long-standing agency practice, raising acute fairness and reliance concerns. Third, to the extent that the Letter and Q&A do break with prior agency practice, they do so without offering an explanation for this about-face.

a) The Letter and Q&A interpret the words of Congress, not an agency regulation

In *Gonzales v. Oregon*, this Court clarified that agencies do not deserve deference when their regulation simply mimes the words of Congress. 546 U.S. at 243. In *Gonzales*, the regulation at issue required all prescriptions to be issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." *Id.* at 256. These words, however, matched two phrases in the statute. Both "legitimate medical purpose" and "the course of professional practice" appeared in the enabling statute passed by Congress. *Id.* at 257 ("The regulation uses the terms 'legitimate medical purpose' and 'the course of professional practice,' . . . but this just repeats two statutory phrases and attempts to summarize the others.").

According to this Court, the agency did not deserve deference when it interpreted a regulation that merely restated Congress's words. *See id*. (declining to give an agency deference because the regulation in question did "little more than restate the terms of the statute" pursuant

to which the regulation was promulgated). When an agency simply mimics or paraphrases words of Congress, it does not deserve deference because it has not used its experience or expertise to create the regulation. *Id.* ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). *Auer* deference is predicated on (a) agency expertise and (b) agency familiarity with regulations that it formulated. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("[D]eference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program." (internal quotation marks omitted)); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) ("[S]ome cases say that the agency, as the drafter of the rule, will have some special insight into its intent when enacting it."). But when the agency simply repeats the words of Congress, the agency cannot be expected to have any more expertise or insight into the meaning of regulation terms than a court. Thus, when Congress's words are at issue, courts, not agencies, are the appropriate arbiters of interpretation. *See Chase Bank*, 562 U.S. at 210.

The regulations supposedly interpreted by the Letter and Q&A merely "paraphrase the statutory language" found in Title IX, *Gonzales*, 546 U.S. at 257, rather than utilizing agency expertise or regulatory familiarity. *See Shalala*, 512 U.S. at 512. As noted above, Title IX prohibits discrimination on the basis of sex "under *any education program or activity* receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). Section 1687 defines "program or activity" as "all the operations of . . . a college, university . . . or public system of higher education." 20 U.S.C. § 1687(2)(A). The regulations promulgated pursuant to Title IX also prohibit "discrimination on the basis of sex in *any education program or activity* receiving

Federal financial assistance." 34 C.F.R. § 106.1 (emphasis added). Section 106.2 defines "any education program or activity" as "all of the operations of . . . [a] college, university, or other postsecondary institution, or a public system of higher education." 34 C.F.R. § 106.2. The scope of the regulations is defined, verbatim, as it is defined in Title IX itself.

In other words, OCR's regulations in Section 106 are a textbook example of what this Court stated would not merit deference in *Gonzales*. In fact, the Letter and Q&A did not even attempt to paraphrase the governing statute. Instead, they "just repeat[ed] two statutory phrases," *Gonzales*, 546 U.S. at 257. Respondent cannot argue that the agency "used its expertise" when fashioning the regulations underlying the Letter and Q&A. Nor can she argue that the agency has "special insight", *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part), into the meaning of the words in the regulation—words the agency did not write. On the contrary, the agency seemingly gave no thought to this element of the regulation. Clicking "copy" and "paste" does not require thought or expertise. Based on this Court's holdings in *Shalala*, *Gonzales*, and *Decker* alone, the Letter and Q&A deserve no deference.

b) The Letter and Q&A do not deserve deference because they break with long-standing administrative precedent

The 2011 Letter and 2014 Q&A also do not deserve *Auer* deference because they break with long-standing administrative practice. This Court has consistently rejected arguments that guidance documents deserve *Auer* deference when they represent a significant departure from long-standing administrative practice. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2125 (holding that when an agency takes a position at odds with long-standing practice, it has announced a new rule); *Christopher*, 132 S. Ct. at 2168 ("[W]here . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute."). For example, in *Encino Motorcars*, a Department of Labor

regulation interpreting overtime pay eligibility provisions in the Fair Labor Standards Act was at issue. In 2011, after decades of stating that service advisors were not eligible for overtime pay, the Department reversed its position with minimal explanation. This Court held that the change in policy represented a new rule should not be accorded any deference. 136 S. Ct. at 2125. The 2011 Letter and 2014 Q&A should receive the same treatment.

(1) Prior guidance documents and investigation letters explicitly stated that universities had no duty to investigate off-campus conduct that occurred outside of a university program.

The 2011 Letter and 2014 Q&A do not simply contradict agency regulations—they completely reverse their meaning. Under previous OCR investigation letters and guidance documents, universities were only liable for acts that occurred on-campus or pursuant to a university activity or function. And prior agency actions were not simply silent about off-campus conduct—they explicitly *denied* that schools could be liable for it. For example, after four Oklahoma State University football players raped a student in an off-campus house, the OCR specifically stated that the "University does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient." Oklahoma State University, OCR Complaint No. 06- 03-2054 (June 10, 2004). In another instance, the OCR stated that the University of Wisconsin-Madison did not have a duty to respond to a sexual assault that occurred in a house that was rented out by members of the university crew team and owned by a university employee. *See* University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2009) ("OCR determined that the alleged assault did not occur in the context of an educational program or activity operated by the University."). The Letter and Q&A take OCR from affirmative denials that universities are liable

for off-campus incidents in a non-university context to affirmative requirements that universities assume such liability.

Guidance documents promulgated by OCR also made the location of an alleged assault a critical factor in determining how universities should appropriately respond. *See* Office for Civ. Rights, U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (hereinafter "2001 Revised Guidance") (Jan. 2001), *available at* http:// www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. The examples used in the 2001 document are explicitly limited to on-campus activities or programs under the direct control of the university. For example, "harassing conduct in a personal or secluded area, such as a dormitory or residence hall" was considered a factor in determining control. *Id.* at 7. The example farthest from campus was a school bus, which, even though potentially off campus, is still under the university's direct control. *Id.* ("Harassing conduct occurring on a school bus may be more intimidating than similar conduct on a school playground because the restricted area makes it impossible for students to avoid their harassers."). All of these examples made the location of an alleged assault critical in determining the appropriate remedy. But each example was limited to on-campus activities, or programs operated directly by the school.

Even the term "or elsewhere," which appears in the 2001 Revised Guidance, cannot be read to extend beyond university programs or activities—a faulty interpretive leap the Thirteenth Circuit seemed to make. (R. at 22.); *see also* 2001 Revised Guidance, at 3 ("Title IX protects students . . . in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."). The *ejusdem generis* canon of statutory construction controls where a general term follows specific ones, and is a canon repeatedly used by this Court to elucidate the appropriate meaning of terms like "elsewhere." In

these situations, *ejusdem generis* "limits [the] general terms . . . to matters similar to those specified." *Gooch v. United States*, 297 U.S. 124, 128 (1936). The *ejusdem generis* canon is particularly important to ensure that a "general word" at the end of a list does not essentially "render specific words [before it] meaningless." *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 114–115 (2001).

The term "or elsewhere" must be read in light of the terms that precede it. When read in light of the preceding terms, "or elsewhere" can only be read to reference places similar to university "facilities," which are on campus, school buses, which are part of university programs, or training programs sponsored by the university, which are educational activities. If "or elsewhere" was not read in light of the previous terms, it would render the specific terms meaningless. Title IX would apply anywhere students might venture. But Title IX clearly does not extend this far, and the 2001 document was not meant to wrap in any conduct that occurs anywhere. Respondent's argument asks this Court to erase the entire operative sentence of the 2001 Revised Guidance and substitute it for the word "anywhere".

(2) The Letter and Q&A conflict with prior agency investigation letters and guidance documents

The 2011 Letter and 2014 Q&A upend a longstanding regulatory framework. The Letter now states "[i]f a student files a complaint with the school, *regardless of where the conduct occurred*, the school must process the complaint in accordance with its established procedures." 2011 Letter, at 4 (emphasis added); *see also* 2014 Q&A, at 29 ("a school *must* process all complaints of sexual violence, regardless of where the conduct occurred." (emphasis added)). The 2011 Letter further states that "[t]he school also should take steps to protect a student who was assaulted *off campus* from further sexual harassment or retaliation from the perpetrator and his or her associates." 2011 Letter, at 4 (emphasis added). This Letter differs in two fundamental

ways from previous agency actions and guidance. First, the Letter explicitly contradicts previous agency statements that universities are not liable for an alleged assault that occurs off-campus. *See* Oklahoma State University, OCR Complaint No. 06- 03-2054 (June 10, 2004); University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2009). Second, the Letter removes location as a critical factor in determining the appropriate university response. Location was previously an important factor in determining both (a) whether a university had a duty to respond and (b) how it should respond. Now, any assault of a university student, regardless of location, can make a university liable. The location of the alleged assault also does not matter for determining the university's response. An assault must be treated the same, regardless of whether is occurred in a university dormitory or off-campus in a private house with no university attachment.

Contrary to the Court of Appeals' holding, these changes represent a fundamental break with both previous agency actions and regulations. While it is certainly possible that the OCR always had the power to interpret Title IX to impose a duty to investigate off-campus conduct outside of a university program or activity, a more plausible hypothesis is that the OCR previously did not believe universities had any duty to investigate off-campus conduct. *See Christopher,* 132 S. Ct. at 2168 ("[W]hile it may be 'possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing,' the 'more plausible hypothesis' is that the Department did not think the industry's practice was unlawful."). The previous agency actions do not suggest that there was any ambiguity with respect to a university's duties for off-campus, non-sanctioned events. On the contrary, previous agency actions suggest that the OCR itself did not believe it had the power to require universities to take actions for off-campus allegations. As a result, *Auer* deference is not warranted.

c) The interpretation does not represent the reasoned judgment of the agency

Besides amounting to a large change from previous administrative practice, which gives rise to unfair surprise, this change gives reason for this Court to doubt whether the interpretation represents the reasoned judgment of the agency. When an "agency's interpretation conflicts with a prior interpretation," *Christopher*, 132 S. Ct. at 2166, there are reasons to doubt that the interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. While inconsistent interpretations are not automatically undeserving of deference, they raise doubts and must be accompanied by a convincing explanation.

The Letter and Q&A fail to justify their deviation from prior practice. The Letter and Q&A break with prior administrative practice and guidance documents without offering an explanation for, or even acknowledging, the deviation from prior practice. Nowhere in the document does the agency attempt to justify their attempt to require universities to place duties on universities for conduct that occurs off-campus and outside of a university program or activity. Both the Letter and Q&A merely state that universities have these duties as if the statement was clearly aligned with prior practice. This change with prior practice is particular surprising given that the 2001 Guidance, with which the Letter and Q&A conflict, passed through the notice and comment process and was published in the Federal Register. *See* 2001 Revised Guidance. The Letter and Q&A attempt to change this interpretation without going through the same comment-gathering process, which deprived the agency of information about the concerns of the affected entities.

d) The regulations cannot amount to a reasoned judgment of the agency because they explicitly do not apply to civil suits

Even if the court determines that these are valid regulations for purposes of administrative suits, they are not applicable, by their own terms, to civil suits by students against

the university. Indeed, it is puzzling why the Court of Appeals flatly ignored the plain language in the regulations and guidance documents that explicitly denied that they were applicable to civil suits. *See* 2014 Q&A, at 15 n.23 ("[A] school will only be liable for money damages in a private lawsuit where there is actual notice to a school official with the authority to address the alleged discrimination and take corrective action."); 2011 Letter, at 4 n.12 ("The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference."). In crafting the guidance documents at issue, the OCR expressly stated that they should not be used to alter the requirements plaintiffs must meet when bringing civil suits under Title IX. These plain statements are enough to reject the argument that the guidance documents deserve any deference in civil suits. If the OCR itself did not intend or think it wise to alter the requirements for civil liability, federal courts should not use them for that purpose either. To do so would be to ignore the expertise of the OCR.

B. Chilton State Cannot Be Liable for Failing to Take All Possible Remedial Steps in Response to Alleged Harassment that Occurred out of Its Control

Universities that receive federal funds cannot be held vicariously liable under Title IX for acts of sexual harassment or violence committed by students. Instead, universities are liable under Title IX only for their own misconduct. *Davis*, 526 U.S. at 640. In determining what should count as actionable misconduct by a university, the Supreme Court has explicitly rejected a negligence liability standard, instead requiring a more stringent level of legal culpability. Under this standard, a recipient of federal education funds can only be liable if it "intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of [peer-on-peer] harassment of which it had actual knowledge." *Id.* at 642. Differently put, recipients must "at a minimum, cause [students] to undergo harassment or make them liable or vulnerable to it." *Id.* at 645 (internal citations and quotation marks omitted).

In order to satisfy this standard of deliberate indifference, the *Davis* court required claimants to make several showings, two of which are particularly relevant to this case. First, the plaintiff must prove that the recipient had "substantial control over both the harasser and the context in which the known harassment" occurred. *Id.*; *see also Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir. 2012) ("The deliberate indifference standard requires that the harassment 'take place in a context subject to the school district's control' in circumstances 'wherein the [school district] exercises substantial control over both the harasser and the context in which the known harassment occurs.' "). Without establishing substantial control, the plaintiff cannot show that the university's intentional wrongdoing caused his or her harm.

Second, the plaintiff must show that the university's response to alleged sexual harassment was clearly unreasonable in light of known circumstances. *Davis*, 526 U.S. at 648 ("School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."). In addressing Title IX claims, courts should refrain from second-guessing the disciplinary decisions made by school administrators. *Id*. It is also important to note that the "clearly unreasonable" standard does not amount to a mere reasonableness test. *Id*. On the contrary, a mere reasonableness test would transform Title IX liability into a negligence standard that the Court specifically rejected in *Davis*. *See Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006) (requiring a showing that the recipient was more than merely "negligent, lazy, or careless."). Thus, a plaintiff's claim will not survive simply by showing that the university acted negligently—only acts that are clearly unreasonable can lead to liability. *See Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011)

("[Deliberate indifference] is a high bar, and neither negligence nor mere unreasonableness is enough."). Under this standard, "there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law." *Davis*, 526 U.S. at 649.

As explained below, the Thirteenth Circuit incorrectly applied these Title IX principles when it reversed the District Court's ruling. Two reasons dictate this conclusion. First, Chilton lacked substantial control over both the alleged harassment by Forester and the subsequent posts on YakTalk. And second, Chilton's response to Doe's allegations was not "clearly unreasonable," which precludes a finding of deliberate indifference.

1. Chilton lacked substantial control over the initial alleged harassment and the subsequent posts on YakTalk

Doe's claim fails because Chilton lacked substantial control over "the context in which the harassment" occurred—a required element of a deliberate indifference claim. *Davis*, 526 U.S. at 646. More specifically, Doe's claim fails due to Chilton's lack of control over both (a) the alleged sexual harasser and (b) the situation in which the harassment occurred. Interpreting "substantial control" to extend to non-sanctioned events that occur off-campus on private premises would place excessive burdens on universities, subjecting them to potentially sweeping liability and diverting significant resources away from core university functions.

a) Chilton lacked control over the alleged sexual assault

(1) Chilton lacked control over Forester at the time of the alleged assault

In order for Doe's claim to survive, she must have alleged facts to show that Chilton had control over Forester at the time of the alleged assault. *Davis*, 526 U.S. at 645. But Doe cannot make this showing for two reasons. First, Forester was not an actively enrolled student at the time of the assault. (R. at 4.) Nor does the record indicate that he was working for Chilton State.

Without active student or employee status, Chilton could not claim to have disciplinary control over Forester any more than they could claim to have disciplinary control over an alumnus.

(2) Chilton lacked control over the situation in which the alleged assault occurred

Doe's claim also fails because Chilton lacked control over the context in which the assault occurred. In order for a university to have control over an event involving university students, it must be either (a) on-campus or (b) pursuant to a university program or activity. Doe cannot establish either of these elements. *See Davis*, 526 U.S. at 645 ("[B]ecause the harassment must occur 'under' 'the operations of' a funding recipient . . . the harassment must take place in a context subject to the school district's control . . ."); Oklahoma State University, OCR Complaint No. 06-03-2054 (June 10, 2004) ("A University does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient."); *see also Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654 (8th Cir. 1997) (holding that a professor's off-campus sexual harassment of a student in his private practice was not actionable under Title IX). The event was in no way sanctioned by or affiliated with Chilton State, and it occurred off-campus in a private student home. Because the alleged assault did not occur during a sanctioned event or on-campus, Chilton cannot have had substantial control over the event where the alleged assault occurred.

(a) The event occurred off-campus in a private student home

Doe cannot show substantial control because the alleged assault occurred off of the Chilton campus. Numerous cases support the proposition that universities cannot have control over activities that occur off-campus, unless other factors are present. *See, e.g.*, *Ostrander v. Duggan*, 341 F.3d 745, 750-51 (8th Cir. 2003) (granting summary judgment because "the record [was] clear [that the university] did not own, possess, or control the fraternity house where the

alleged sexual assault occurred."). Without the presence of other factors, case law forecloses the argument that universities have substantial control of off-campus premises.

Accepting Doe's argument also comes with significant practical difficulties. It is unclear how a university could be deemed to be in substantial control over private premises. The mere presence of university students at a social event cannot give the university substantial control. Such a reading of substantial control knows virtually no limits. For example, it could turn summer vacation trips by members of a university organization into events over which the university has substantial control. *See Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014) (holding that the university did not have substantial control over a rape committed by a fraternity pledge at an off-campus Halloween party). The houses also did not become subject to university jurisdiction merely because they are consistently utilized by members of BKD. Under this reading, every apartment, house, and condominium that was rented by students of the same group would be treated like a dormitory. For large universities, the spaces over which universities would have substantial control would extend far beyond the boundaries of campus. Rather than expand the scope of substantial control, the bright-line on-campus limitation should be adopted as the baseline rule.

(b) The event was not sanctioned by the university

Chilton also lacked substantial control over the context in which the alleged assault occurred because it did not happen during a sanctioned university event. The event was not linked to an "official organization of activity," and several attendees of the event were not actively enrolled in the school. (R. at 4). While the event did involve numerous members of BKD, universities are not deemed to have substantial control simply because members of the same group attend a party. *See, e.g.*, *Clifford v. Regents of Univ. of Calif.*, No. 11-cv-02935,

2012 WL 1565702 (E.D. Cal. Apr. 30, 2012) (finding the university did not have substantial control over events that occurred off-campus on a fraternity retreat at a home that was privately owned by a fraternity alumnus). Unless special circumstances exist, unofficial events involving students never give rise to substantial control unless they occur on campus.

(3) Expanding university control over off-campus, non-sanctioned events on private premises would place an excessive burden on universities

Doe's reading of "substantial control" is not only foreclosed by existing case law—policy implications cut strongly against her claims. Expanding the concept of substantial control to encompass a broad swath of events, regardless of whether they are sanctioned by Chilton or not, would create two significant problems, one for courts and another for universities and students.

First, Doe's reading is flawed because of the difficult line-drawing problems it would create for courts. For example, Doe's reading of "substantial control" presumes that it easy to determine when an event should be considered an official, university-sanctioned gathering. But groups are made up of individuals who may congregate without (a) wanting the university to be involved or (b) intending the organization's label to attach to the event. An event put on by a member of the university band does not become a "band event" simply because the event organizer is part of that group. Nor is it easy to determine a threshold attendance composition an event must meet before attributing that event to a particular organization.

It is also unclear how many students must attend an event before it is of sufficient importance to warrant university attention. The event in question here was attended by only "approximately twenty members." (R. at 4.) For the many universities that have thousands of students, gatherings of 20 or fewer students cannot possibly be on the radar of university officials. But these questions will be raised in the future if Doe's reading of substantial control is accepted.

Even more concerning is the fact that the significant ambiguity that accompanies Doe's interpretation of substantial control has large consequences for universities and students. Differently put, getting the answer to the substantial control question wrong comes with significant costs. If Doe's reading of substantial control is accepted, it would potentially subject every facet of a student's social life to university scrutiny. In order for members of university organizations to gather for social events, they would need to alert the university and receive approval. Every weekend barbecue, pool gathering, or movie outing attended by members of the any student organization would potentially be subject to university approval. In the end, these requirements would not sweep more social functions into the university's purview. On the contrary, they would result in fewer students joining official organizations and the university having less control and fewer monitoring abilities.

Such a reading of control would also impose liability on the university for the actions of any of its students, even when it had no way of knowing about the event. Limited university staff are incapable of scrutinizing and approving every event attended by members of the same organization. Instead of using limited fiscal resources on education, universities would be required to hire staff to police the social lives of their students. And adding to the duties of universities is not free. These costs will be passed on to students, further increasing the price of college tuition.

While the Thirteenth Circuit was correct to see that the distinction between "sanctioned and unsanctioned" events is difficult to delineate, (R. at 25.), the distinction is neither "flimsy" nor meaningless—it is loaded with practical significance for universities, and courts are ill-equipped to draw these lines in the course of one-shot lawsuits. Rather than having courts police the boundaries of what should be considered a sanctioned or unsanctioned event based on who

attends it, who advertised it, or who created it, these decisions should be left to university administrators who have familiarity with the specific groups within their schools and their individual resource constraints. Contrary to the Thirteenth Circuit, what "makes little sense" is sweeping every facet of a university student's social life under the gaze of university officials. (R. at 25.) And it makes even less sense to impose such large burdens on universities that lack resources to monitor the weekend activities of thousands of students.

b) Chilton lacked control over all communication on YakTalk

Doe's claim also fails because Chilton lacked control over the posts on YakTalk. Indeed, it is unclear what legal basis Doe has for this claim, given that not a single case has found that a university had substantial control over students' posts on any website, much less an anonymous one. YakTalk is not run by Chilton, Doe has produced no evidence that Chilton played any role in creating or approving the Chilton page on YakTalk, and there is no evidence that Chilton is even capable of exerting any control over YakTalk or determining who has posted on it. Given the reactions of similar sites, such as Yik Yak, it is unlikely that Chilton could take any successful investigative measures. *See* Jonathan Mahler, *Who Spewed that Abuse? Anonymous Yik Yak App Isn't Telling*, N.Y. TIMES, March 8, 2015 ("[Yik Yak's] privacy policy prevents schools from identifying users without a subpoena, court order or search warrant, or an emergency request from a law-enforcement official with a compelling claim of imminent harm."), *available at* http://www.nytimes.com/2015/03/09/technology/popular-yik-yak-app-confers-anonymity-and-delivers-abuse.html?. Without some evidence about whether Chilton could exert even a little bit of control over YakTalk, it makes little sense to require them to perform a full investigation of the posts.

While the YakTalk comments are certainly upsetting for Doe, courts must bear in mind that "unlike the adult workplace . . . [students] may regularly interact in a manner that would be unacceptable" in other settings. *Davis*, 526 U.S. at 651. Unfortunately, it is not uncommon for students to "engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* at 651-52. But "damages are not available for simple acts of teasing and name-calling among [students] . . . even where these comments target differences in gender." *Id.*; *see also Hawkins v. Sarasota Cty. Sch. Bd.*, 322 F.3d 1279, 1288 (11th Cir. 2003) (granting summary judgment on a deliberate indifference claim where the victims were subjected to ongoing verbal taunting and occasional physical touching). It is also important to note that *Davis* specifically addressed peer-on-peer harassment that occurred within a grade school, where school administrators have a significant amount of control over their students. A university, however, should not be "expected to exercise the same degree of control over its students that a grade school would enjoy." *Davis*, 526 U.S. at 649.

Interpreting Title IX to require universities to monitor websites used by their students for language that could potentially be offensive is also far beyond the scope of liability that Congress sought to impose on universities. Doe's reading of substantial control would potentially subject Chilton to liability for posts on Facebook by individuals who simply have Chilton on their profile. Policing the content of anonymous websites and attempting to investigate if students are responsible is even farther beyond the practical capabilities of universities than monitoring every physical congregation of students.

2. Doe cannot identify any actionable discrimination by Chilton State because Chilton took reasonable steps in light of the circumstances

Doe's claim must also fail because she has not shown that Chilton's response was clearly unreasonable in light of the known circumstances. Her allegations fail for two reasons. First,

Chilton took several remedial steps designed to both prevent future harassment and address the previous allegations of harassment. Second, the OCR guidance documents merely dictate possible responses to allegations of harassment; they do not dictate particular responses to particular harms. Chilton also followed several of the steps outlined by the regulations. In the end, Doe's demands merely amount to a claim for a particular remedial action. *Davis*, 526 U.S. at 648 (rejecting the idea that "victims of peer harassment now have a Title IX right to make particular remedial demands.").

a) Chilton's response was reasonable in light of the circumstances and does not amount to deliberate indifference

Chilton's response to Doe's allegation of sexual harassment rises above the low bar set by the Supreme Court in *Davis* and cannot be characterized as "clearly unreasonable" for several reasons. First, Chilton took numerous steps to help Doe recover from her alleged assault and take advantage of the educational benefits available at Chilton. Second, these actions also kept Doe from further harassment by Forester. Third, Chilton reasonably determined that an investigation was not justified under the circumstances.

(1) Chilton provided numerous forms of material assistance to Doe

Contrary to the characterization painted by the Thirteenth Circuit, Chilton took several steps to address both the alleged harassment by Forester and any future harassment. Chilton promised to "fully and actively cooperate in any law enforcement investigation." (R. at 7.); *see also Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 (10th Cir. 2008) (granting a motion for summary judgment where the school fully cooperated with a law enforcement investigation). Chilton also promised to immediately respond to any on-campus harassment. (R. at 7.) In order to prevent contact between Forester and Doe, Chilton offered to help Doe "rearrange her class schedule and find an alternate living situation." (R. at 7); *see also Watkins v.*

La Marque Indep. Sch. Dist., 308 Fed. App'x 781, 784 (5th Cir. 2009) (finding no deliberate indifference where school district separated students and gave victim an escort to the bathroom); *Manfredi v. Mt. Vernon Bd. Of Educ.*, 94 F. Supp. 2d 447 (S.D.N.Y. 2000) (Title IX not violated where victim of sexual assault was moved to another class as soon as as school officials heard about the incident). Finally, to help Doe cope with her experiences, Chilton offered Doe "information about on-campus counseling services" so that she could continue to take advantage of the educational opportunities available. (R. at 7.); *see also Doe v. Ohio State Univ. Bd. of Regents,* 2006 WL 2813190, at *14 (E.D. Ohio Sept. 28, 2008) (finding no deliberate indifference when the university "made [counseling] resources available to Plaintiff that she chose not to take advantage of..."). Far from showing that Chilton deliberately subjected Doe to further harassment, or failed to help her recover from experiences, these facts show that Chilton was dedicated to making sure Doe would benefit from the opportunities available to her.

Chilton is also not liable for actions that are attributable to Doe. Chilton did not remove Doe from all other extracurricular activities—Doe removed herself. (R. at 7). Chilton did not prohibit Doe from attending her classes—Doe missed these classes on her own. (R. at 7). Chilton also did not keep Doe from the counseling available to her. (R. at 7). Nor did Chilton cause Doe's grade to drop. Failing grades are not even, on their own, proof that Chilton's actions were unreasonable. *See Davis*, 526 U.S. at 652 ("Nor do we contemplate, much less hold, that a mere 'decline in grades is enough to survive' a motion to dismiss."). Title IX is not a unilateral relationship with all duties falling on the university. Victims must also cooperate when universities attempt to help them take advantage of educational opportunities. *See Ohio State Univ. Bd. of Regents*, 2006 WL 2813190, at *14 (finding it unclear what more the university

could be expected to do when plaintiff "chose not to take advantage of the resources readily available to help her.").

Chilton should not be held liable for failing to investigate the posts on YakTalk either. The District Court made an explicit factual finding that the YakTalk posts could not "rise to the level of a harassing message directed at Doe." (R. at 7.) The Supreme Court has also held that "simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender" cannot rise to the level of actionable behavior. *Davis*, 526 U.S. at 652; *see also Hawkins*, 322 F.3d at 1288 (granting summary judgment on a deliberate indifference claim where the victims were subjected to ongoing verbal taunting and occasional physical touching). Given that anonymous, online verbal behavior is not, and never has been, considered harassment for purposes of Title IX, failure to investigate the YakTalk posts should not lead to Chilton being held vicariously liable.

(2) Chilton's response did not subject Doe to further harassment or the threat of harassment

Doe's claim and the Thirteenth Circuit's analysis also fail to properly take into account the University's offer to help Doe find new housing and modify her class schedule. (R. at 7.) When faced with a claim for harassment, Chilton took steps to move Doe from her current housing and class schedule in order to eliminate further threats of harassment. Taking such efforts to prevent recurrence of an alleged assault undercuts any claim of deliberate indifference. *See Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1297 (11th Cir. 2007) (reversing dismissal of a Title IX claim where school failed to "take any precautions that would prevent future attacks"). Chilton was not indifferent to Doe's needs. Instead, Chilton attempted to accommodate her by preventing contact between Doe and Forester and preventing any reasonable threat of future harassment.

(3) Chilton's choice not to investigate was reasonable in light of the circumstances

Chilton's decision not to investigate was also reasonable in light of the existing circumstances. Numerous factors show that Chilton's decision not to investigate was justified. The alleged offense occurred months before being reported, which could have impeded investigatory efforts. Chilton is also not a law enforcement agency. The University's limited resources and unsophisticated investigative abilities could have led them to reasonably believe that their investigation would not be the most effective use of resources. This conclusion is even more justified when compared with other remedial actions the University did take, such as separating Doe and Forester and helping Doe get counseling. For investigatory work, Chilton instead relied on law enforcement—the institution with the experience and special resources necessary to carry out a proper investigation. *See Rost*, 511 F.3d 1114 (granting the school's motion for summary judgment where a school district declined to interview the alleged offender and victim to determine whether the harassment had occurred, and instead relied on law enforcement's investigations of the incident); *see also* Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005) (implying that cases of sexual assault and rape should be left to the civil and criminal justice systems). Chilton also allowed Doe to take the lead on choosing whether to involve law enforcement, rather than unilaterally compromising Doe's privacy. (R. at 7.)

Chilton's decision not to investigate was also in accord with the purposes of Title IX investigations. Title IX investigations are designed to prevent recurrence of future harassment. Even the OCR guidance states that investigation is designed to "end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again." 2001 Revised Guidance, at 15. What Doe would have Title IX require is an investigation into a non-

recurring situation where the university has already taken steps to prevent recurrence. Given that the goal of Title IX is to end harassment and prevent its recurrence, universities should not be required to use a formulaic approach to each individual situation. On the contrary, they should be given flexibility to tailor a response to each situation with the ultimate aim of ending and preventing further harassment. 2001 Revised Guidance, at 12 ("As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations."). After all, "Title IX does not require . . . perfect solutions." *Sanches,* 647 F.3d at 169–70.

(4) Doe does not have the right to demand a particular remedial action

Given the various steps taken by Chilton, Doe's claim essentially amounts to a request for a particular remedial action: investigating Forester. Unsatisfied with the numerous actions taken by Chilton, Doe brought this action to force the University to respond how she desires. This claim, however, is exactly what the Supreme Court sought to foreclose in *Davis*. The Court explicitly rejected the idea that "victims of peer harassment now have a Title IX right to make particular remedial demands." *Davis*, 526 U.S. at 648. Subsequent courts have taken this command seriously, failing to grant requests for particular remedial actions. *See, e.g.*, *Oden*, 440 F.3d at 1089 ("An aggrieved party is not entitled to the precise remedy that he or she would prefer.").

To the extent Doe would like Chilton to remove Forester from campus, her request is also foreclosed by Title IX case law. Courts consistently reject the idea that Title IX claimants can request an alleged perpetrator to be removed from campus. *See Frazer v. Temple Univ.*, 25 F. Supp. 3d 598, 614 (E.D. Pa. 2014) (dismissing Title IX claim where plaintiff's only allegations

of subsequent harassment were that her harasser "followed her, sat outside her dormitory, . . . 'and stood directly beside her [in the cafeteria] and stared at her while she was having a conversation with a fellow student'"); *O'Hara v. Colonial Sch. Dist.,* 2002 U.S. Dist. LEXIS 12153, at *18-19 (E.D. Pa. Mar. 25, 2002) (dismissing Title IX claim, holding that plaintiffs' allegations that her harasser "could occasionally be found in the same vicinity as [plaintiff] and that he would stare at her" were "not claims of actionable harassment under Title IX").

b) OCR documents do not set the university's duties in civil suits

Chilton's duties are set by Title IX, as explained by *Davis*, and not any OCR guidance documents. An institution's "alleged failure to comply with the regulations . . . does not establish the requisite actual notice and deliberate indifference" required for a university to be liable for peer-on-peer sexual assault. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92 (1998). Four main reasons dictate this conclusion. First, the Supreme Court specifically foreclosed Doe's position in *Gebser*, holding that an institution's failure to adopt and publish grievance procedures required by DOE regulations did not establish the actual notice or deliberate indifference required for Title IX liability in civil suits. *See Gebser*, 524 U.S. at 291-92.

Second, Title IX case law follows the Supreme Court's decision, uniformly rejecting the position that an institution's duties are set by OCR guidance documents. *See, e.g.*, *Roe*, 746 F.3d at 883-84 (rejecting the argument that failure to hire a Title IX coordinator, as required by Title IX regulations, established deliberate indifference or actual notice); *Sanches,* 647 F.3d at 169-70 (finding that an administrator's decision not to follow official school policy on sexual harassment complaints did not make her actions clearly unreasonable); *Moore v. Regents of the Univ. of California*, No. 15-CV-05779-RS, 2016 WL 2961984, at *5 (N.D. Cal. May 23, 2016) ("There is no private right of action to recover damages under Title IX for violations of DOE's

administrative requirements, much less the provisions of the DCL and Q&As, which are agency guidance documents." (citing *Gebser*, 524 U.S. at 291-92). Case law on its own forecloses Doe's arguments.

Third, OCR documents specifically note that their requirements are only applicable to "investigations and administrative enforcement of Title IX." 2001 Revised Guidance, at i. The document itself also clarifies that these requirements are distinct from the "standards applicable to private litigation for money damages." *Id.* Given that the OCR did not craft its administrative requirements with an eye towards civil litigation, courts should not apply them in civil suits. Doing otherwise would substitute the judgment of courts in favor of the expert judgment of the OCR. Nor should courts use the OCR documents as evidence of a violation. If the OCR documents can be used as evidence to establish a factual conflict and overcome a motion for summary judgment, universities will have lost virtually all of the protection of the "clearly unreasonable" standard. Using administrative documents in a civil suit is simply a way to sneak in a standard other than the one mandated by the Supreme Court in *Davis*.

c) Even if the OCR documents are given weight, Chilton's response satisfies their requirements

If the OCR documents are given weight, Chilton took numerous steps required or suggested by the OCR documents. For example, OCR regulations state that "[a]ppropriate steps should be taken to end the harassment." 2001 Revised Guidance, at 16. Chilton's actions eliminated further harassment and threats of future harassment. OCR regulations also state that "[i]n some cases, it may be appropriate to further separate the harassed student and the harasser." *Id.* The regulations further require "the school [to] assist the student in making program or schedule changes and ensure that none of the changes adversely affect the student's academic record." *Id.* Chilton again followed this regulation by offering to help Doe change her class

schedule and find new housing. The regulations also state that "a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student" such as "professional counseling." *Id.* Yet again, Chilton followed the requirements of the regulations by offering to help Doe find counseling. Finally, the regulations require "the school [to] take steps to prevent retaliation" and "take strong responsive actions if retaliation occurs." *Id.* Doe made no further claims of harassment, but Chilton promised to take strong responses to any further on-campus harassment. All of the actions taken by Chilton were required or suggested by documents promulgated by OCR. Unless the OCR regulations are unreasonable themselves, Chilton cannot be deemed to have violated any duty created by OCR.

Failing to take some steps required or suggested by the regulations is also insufficient to subject a university to liability. The OCR documents give universities significant discretion in determining how to respond to allegations of assault. Both guidance documents and the original regulations consistently clarify that a university response should be tailored to the circumstances—a uniform approach to every instance of alleged assault is firmly rejected. *See, e.g.*, *id.* ("[The recipient] should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation."); 2011 Letter, at 16 ("Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to . . . ."). Far from prescribing a cookie-cutter approach to any alleged instance of assault, these statements give universities significant discretion to tailor their responses to specific situations.

The previous analysis has not even mentioned the fact that OCR regulations apply only to allegations of assault that occur on-campus or under the substantial control of recipients. For off-

campus allegations of assault, however, the 2011 Letter does not require a university to respond at all, much less respond in a particular way. *See* 2011 Letter, at 4 ("Schools *may* have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds." (emphasis added)). OCR guidance merely says that a university "should *consider* the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus." 2011 Letter, at 4 (emphasis added). The 2011 Letter does not require a specific remedial response to claims of off-campus assault. Nor does it require a university to give specific weight to the effects of off-campus conduct. The lack of both a prescribed response and weight to be given to effects of off-campus conduct signals that universities should be given broad latitude to determine what counts as an appropriate response to off-campus assault. *Accord Weyerhauser v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978) (giving the EPA discretion to weigh competing statutory factors where no prescribed weight was given to any particular factor). While universities should consider off-campus assault effects, their consideration does not have to yield a particular decision. Holding otherwise would remove the flexibility given to university administrators, transferring power over university functions to courts and plaintiff students.

The 2014 Q&A is even more equivocal when it comes to a duty to investigate off-campus conduct. While the Q&A initially seems to require a response to an off-campus sexual assault, the Q&A then immediately clarifies that this investigation is only "determine whether the alleged off-campus sexual violence occurred in the context of an education program or activity of the school." 2014 Q&A, at 29. If the alleged misconduct occurred off-campus, then the university's duties are at an end, unless the off-campus assault took place within a university program or activity. *Id.* ("[I]f a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off

campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus."). The only time that a university has a duty to respond to off-campus conduct outside of a university program or activity is when the effects of off-campus misconduct have on-campus effects. And in this situation, the 2014 Q&A matches the 2011 Letter by only requiring the school to "consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus." *Id.*

Here, Chilton followed these requirements. Chilton considered the effects of the alleged off-campus assault on Doe, offering to help keep her separate from Forester and get her counseling to overcome any continuing psychological hardship she faced. If Chilton had not considered the off-campus incident at all, then it would not have taken even these actions. But because Chilton responded to Doe's allegations, the only conclusion that can be drawn is that it followed the OCR guidance document by considering the effects of the alleged off-campus assault. Chilton also responded to the off-campus conduct despite not having a clear duty to do so. As made clear by the 2011 Letter, universities do not have a duty to respond to off-campus misconduct outside of a university program—the university "may have an obligation to respond." 2011 Letter, at 4. Chilton took steps, in good faith, that are required by these regulations. Thus, Chilton should not be held liable.

d) Requirements for injunctive relief should be the same as for monetary relief in order to prevent students from dictating university policy

While the Thirteenth Circuit was correct to note that *Davis* did not necessarily decide the applicable standard for injunctive relief, (R. at 26.), it is also important to note that no case, statute, or agency rule offers an alternate standard. Indeed, post-*Gebser* and *Davis* "it is . . . not clear what liability standard would apply to a Title IX harassment claim against an institution

seeking only injunctive or declaratory relief." William A. Kaplin, *Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615, 637 (Spring 2000). Both the 2001 Revised Guidance issued in the aftermath of *Davis* and the 2011 DCL argue that the *Davis* requirements of actual knowledge and deliberate indifference apply only to monetary relief. The 2011 DCL states that injunctive relief is justified if the university "knows or reasonably should know about student-on-student harassment that creates a hostile environment" yet fails "to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects." 2011 Letter, at 4. This position, however, sets a new standard for Title IX enforcement and is procedurally invalid in guidance form. Even if it were validly promulgated, this low standard for injunctive relief raises severely negative policy implications.

The exact same rationale the *Davis* Court invoked in setting out its framework is relevant to claims for injunctive relief as well. The *Davis* Court was concerned about the impacts of monetary damages on educational institutions, but injunctive relief comes at an alarmingly high cost, financially and otherwise. First, injunctive relief requires the expenditure of resources, particularly when it results in a university having to "revise its policy" (R. at 26.) Second, broadly construing the standard for injunctive relief means that students could upset the judgments of university administrators with a mere showing of negligence in one instance. The standard laid out by the DCL sets an incredibly high burden on school administrators. In any instance where a school "reasonably should know" about student-on-student harassment, the DCL requires schools to immediately act to completely stop the harassment. 2011 Letter, at 4. This mandates a direct and serious intervention into the lives of students, and the immediacy requirement necessitates hasty action without the benefit of thorough analysis. Expanding the parameters for granting injunctive relief would allow students to effectively force universities to

take particular remedial actions—an outcome specifically foreclosed in *Davis*. *See Davis*, 526 U.S. at 648.

Third, allowing a claim for injunctive relief would upset the step-by-step formula prescribed by Title IX and the applicable federal regulations. When OCR receives a complaint, it first inspects whether the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures, whether the school investigated or otherwise responded to allegations of sexual harassment, and whether the school has taken immediate and effective corrective action responsive to the harassment. *See* 2001 Revised Guidance, at 14 (citing 34 C.F.R. §§ 106.8(b), 106.31(b), 106.9). Even after OCR makes these various inspections, however, it cannot simply find the school has violated Title IX—OCR is required to give the school a chance to secure voluntary compliance. 2001 Revised Guidance, at 15 (citing 20 U.S.C. § 1682). If after this time OCR determines voluntary compliance cannot be secured, then "OCR may take steps that may result in termination of Federal funding through administrative enforcement, or, alternatively, OCR may refer the case to the Department of Justice for judicial enforcement." *Id.* at n.85. Individual student plaintiffs, however, would have to jump through none of these hoops. If experts at the DOE are not allowed to seek direct changes in a university's policies without conducting serious inspections and producing detailed findings, then students should not be able to do so either. *See generally Moore*, 2016 U.S. Dist. LEXIS 67548, at *10 (N.D. Cal. May 23, 2016) (outlining the steps that the OCR must take before it is able engage in administrative enforcement).

VIII. CONCLUSION

For the foregoing reasons, Chilton State respectfully requests that the judgment of the Thirteenth Circuit Court of Appeals be reversed and Chilton State's motion for summary judgment be granted.

Respectfully submitted,

/s/ NAAC Team 889

Counsel for Petitioner