# 23-1080

**In the United States Court of Appeals**
**for the Second Circuit**

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KEITH SCHIEBEL,
*Plaintiff-Appellant,*

v.

SCHOHARIE CENTRAL SCHOOL DISTRICT,
KRISTEN DUGUAY, AND DAVID BLANCHARD,
*Defendants-Appellees.*

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On Appeal from the United States District Court
for the Northern District of New York
1:22-CV-1109
Hon. Lawrence E. Kahn

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**BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF DEFENDANT-APPELLEES AND AFFIRMANCE**

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## CORPORATE DISCLOSURE STATEMENT

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**



**Other Authorities**

## STATEMENT OF *AMICUS CURIAE*

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice has, for decades, litigated and advocated on behalf of individuals who have experienced discrimination, including sexual harassment. From its significant experience, Public Justice recognizes that judicial enforcement of federal sex discrimination laws that is consistent with the statutes' full breadth and promise is crucial to ensuring individuals who have endured discrimination receive the redress they deserve.[1]

Public Justice has particular expertise on the issues in this case. Currently, Public Justice is counsel in two cases in which courts have held that Title IX protects individuals who are not students or employees of the defendant institution, including independent contractors. *See Snyder-Hill v. Ohio State Univ.,* 48 F.4th 686, 707-09 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 2659 (2023); *Conviser v. DePaul Univ.,* 649 F. Supp. 3d

[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus*' counsel authored this brief, no party's counsel authored this brief in whole or in part, and no party beyond *amicus* contributed any money toward the brief. The District has consented to *amicus* filing this brief. Mr. Schiebel has not.

686, 699-04 (N.D. Ill. 2023). In addition, Public Justice attorneys have previously authored law review articles and an *amicus* brief on the appropriate standard for establishing anti-male bias in suits brought by men punished for sexual harassment.

## INTRODUCTION

Every year, many thousands of students and school employees are sexually harassed. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, protects these individuals, requiring schools to stop the abuse and remediate its effects. And if a school disciplines a student or staff member for sexual harassment, or any other violation of school rules, Title IX requires that the discipline must not be "on the basis of sex." *Id.*

The district court properly held that Keith Schiebel, an independent contractor accused of sexual harassment by a student, is among those whom Title IX protects. Title IX's text is clear that schools may not discriminate against any "person," 20 U.S.C. § 1681, and independent contractors, like students and employees, are people.

But the court was also correct that Mr. Schiebel's allegations fail to raise an inference that Schoharie Central School District discriminated against him based on his sex: Even if a court or a jury believes the investigation Mr. Schiebel describes in his complaint was unfair, that does not mean that that process was unfair *because of his sex.* Without that, Mr.

Schiebel is unable to state a Title IX claim. This Court, then, should affirm the dismissal of Mr. Schiebel's Title IX claim.

## ARGUMENT

### I. Independent Contractors May Bring Title IX Claims.

The district court was correct that Title IX's private right of action is available to independent contractors, including Mr. Schiebel. It is not limited to students, employees, and other "beneficiaries," as Schoharie Central School District ("the District") asserts. On this, the decision below is required by the statute's plain text and Supreme Court precedent. Perhaps for that reason, the District no longer presses the issue at all. *See generally* Response Br.

One preliminary note on terminology: The parties and the district court have characterized this issue as one of "standing," presumably a reference to so-called "statutory standing," not Article III standing. Opening Br. 9-10; Dist. Ct. ECF No. 15 at 2-3; App. 117-20. The Supreme Court has disapproved of that term. As Justice Scalia wrote, the Court has "on occasion referred to this inquiry as 'statutory standing' and treated it as effectively jurisdictional . . . But it . . . is misleading, since the absence of a valid (as opposed to arguable) cause of action does not implicate subject-

matter jurisdiction." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (cleaned up). For that reason, this Court "avoid[s]" "the 'statutory standing' appellation," a "misnomer." *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016) (citing *Lexmark*, 572 U.S. at 127). The question posed is "simply . . . whether the particular plaintiff 'has a cause of action under the statute.'" *Id.* (quoting *Lexmark*, 572 U.S. at 128).

1. The starting point of any inquiry into a statute's application is its text. *See e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 418 (2d Cir. 2022); *see also Lexmark*, 572 U.S. at 128 (noting courts "apply traditional principles of statutory interpretation" in determining who may bring suit under a statute). That principle is no less true for Title IX: The Supreme Court has specifically instructed courts to "accord it a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("[B]y using such a broad term, Congress gave the statute a broad reach.").

So, to the text. Title IX provides that "[n]o *person* in the United States shall, on the basis of sex, be excluded from participation in, be

denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). The Dictionary Act defines a "person" to encompass all "individuals." 1 U.S.C. § 1. Unsurprisingly, it does not define "person" to mean only "a student or employee," or "beneficiaries," as the District suggests. *See id.* Neither did dictionaries in 1972, the year Congress passed Title IX. *See, e.g.*, *Person*, Webster's Seventh New Collegiate Dictionary (1972) (defining "person" as "a human being"); *see also Person*, Cassell's English Dictionary (1968) (same).

Accordingly, the statute's text does not "limit its coverage" to persons with a particular relationship to the institution, instead "outlawing discrimination against any 'person.'" *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) (quoting 20 U.S.C. § 1681(a)); *see Jackson*, 544 U.S. at 179 n.3 ("Title IX's beneficiaries plainly include *all* those who are subjected to 'discrimination' 'on the basis of sex.'" (emphasis added)). The Supreme Court recognized as much in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). Holding that Title IX applies to school employees, the Court determined that the statute's text "neither expressly nor impliedly excludes

employees from its reach." *Id.* at 521. "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of" the statute, the Court reasoned, but it had not done so. *Id.* Thus, "the statutory language . . . favor[ed] inclusion of employees." *Id.* at 522. The same reasoning applies here: If Congress had intended to restrict Title IX's protection to certain classes of "person[s]," 20 U.S.C. § 1681(a), and exclude independent contractors, Congress could have said so. But it did not.

2. The Civil Rights Restoration Act of 1987 (CRRA) confirms Title IX's broad reach. *See* 20 U.S.C. § 1687. The CRRA "amended Title IX to require the *entire* entity receiving federal funds to abide by the statute's substantive rules." *United States v. Grossi*, 143 F.3d 348, 350 (7th Cir. 1998) (emphasis added); *see also Doe v. Claiborne Cnty.*, 103 F.3d 495, 513 (6th Cir. 1996) (noting the CRRA requires "broad, institution-wide application" of Title IX (quoting 20 U.S.C. § 1687(2)(A))). To accomplish this goal, Congress defined "program or activity," as used in Title IX, to "mean all of the operations of . . . a local educational agency . . . or other school system." 20 U.S.C. § 1687.

A public school district, then, is a single "program or activity." 20 U.S.C. § 1687. And because a school district is an educational institution, the whole school is an "education program or activity" subject to Title IX. 20 U.S.C. § 1681(a); *see also Conviser*, 649 F. Supp. 3d at 702 (explaining why "'all the operations of' . . . a college . . . constitute an 'education program or activity' under Title IX," and the function of the word "education"). As the Senate report accompanying the CRRA explained, that means Title IX extends to parts of a school beyond their "traditional educational operations," including, for example, "campus restaurants" and "the bookstore." S. Rep. No. 100-64, at 17 (1998); *see also Conviser*, 649 F. Supp. 3d at 702-04 (discussing Title IX's reach to non-academic programs); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1124 (D. Kan. 2017) (same); *Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018) (same).[2]

[2] Where the recipient of federal funds is a school, Title IX's use of the word "education" might seem superfluous. But the CRRA defines "program or activity" to encompass many different entities, including, for example, private corporations. 20 U.S.C. § 1687(3). In that case, the adjective "education" narrows the number of "programs or activities" subject to Title IX because most corporations are not "education corporations." *See*, *e.g.*, *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 553-56 (3d Cir. 2017) (explaining how "education" limits Title IX's application to non-school recipients). "[E]ducation" serves a limiting function, just not one at issue here. 20 U.S.C. § 1681(a). Plus, "because the CRRA modified not only Title IX, but several other civil rights statutes as well, it makes sense that certain terms are repeated." *Conviser*, 649 F. Supp. 3d at 703.

3. For these reasons, courts across the country have acknowledged that plaintiffs other than students and employees may bring Title IX claims. *See, e.g.*, *Brown Univ.*, 896 F.3d at 132 n.6 (noting the broad range of plaintiffs who may bring Title IX claims, including "[m]embers of the public"); *Doe v. Avon Old Farms Sch., Inc.*, No. 21-CV-748, 2023 WL 2742330, at *13 (D. Conn. Mar. 31, 2023) ("Title IX is not so limited that it would exclude either of the . . . plaintiffs from its scope simply because neither was a student."); *Douglass v. Garden City Comm. Coll.*, 543 F. Supp. 3d 1043, 1054 (D. Kan. 2021) ("In the context of Title IX retaliation, [a] plaintiff is not required to plead that she is a . . . student or faculty member"). And at least two courts have specifically noted that Title IX's private right of action is available to independent contractors working for schools. *See Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 708 (6th Cir. 2022*), cert. denied*, 143 S. Ct. 2659 (2023); *Conviser*, 649 F. Supp. 3d at 699-01.

* * *

In sum, the district court's recognition that "person[s]" other than students and employees may bring claims under Title IX is a straightforward application of Title IX's plain text.

## II. Particularized Allegations of Anti-Male Bias are Necessary to State an Erroneous Outcome Claim.

To state a Title IX claim based on the erroneous outcome of a disciplinary proceeding, a plaintiff must allege (1) "facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding," as well as (2) "particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). "[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Id.* And "lack of a particularized allegation" showing "a causal connection between the flawed outcome and gender bias" is "fatal." *Id.* Put another way, a plaintiff "cannot merely rest on superficial assertions of discrimination, but must establish that 'particular circumstances suggest[ ] that gender bias was a motivating factor" in the erroneous decision. *Doe v. Trs. of Boston Coll.*, 892 F.3d 67, 91 (1st Cir. 2018) (citing *Yusuf*, 35 F.3d at 715)).

The district court was correct that Mr. Schiebel's complaint does not raise an inference of anti-male bias. Mr. Schiebel points to a hodgepodge of allegations that he asserts suggest he was punished because of

his sex. But they do not, either together or apart. He argues that the District treated the female student complainant more favorably than it treated him, but she is not a similarly situated comparator, and pro-complainant bias is not sex-based bias. He contends that a comment by the District Title IX Coordinator demonstrates gender bias, but it at most expresses a fear of people accused of sexual harassment. Mr. Schiebel also points to case law about external pressures causing anti-male bias at schools, but he never identifies any relevant pressures at play here. And Mr. Schiebel's allegations of procedural irregularities cannot, on their own, give rise to inference of anti-male gender bias. Accordingly, Mr. Schiebel has not successfully pleaded a Title IX claim.

### A. Mr. Schiebel's complaint fails to raise an inference of anti-male bias.

#### 1. The District's treatment of the complainant does not demonstrate anti-male bias against Mr. Schiebel.

Mr. Schiebel argues that disparities between the District's treatment of him and its treatment of the female student who accused him of sexual harassment create an inference of anti-male bias. Opening Br. at 15. But an appropriate comparator is someone who is "similarly situated" to the plaintiff "in all material respects." *Littlejohn v. City of New York,* 795 F.3d 297, 312 (2d Cir. 2015) (quoting *Mandell v. Cnty. of Suffolk,* 316

F.3d 368, 379 (2d Cir. 2003)). Here, that would be a female instructor accused of inappropriately touching a student. By contrast, Mr. Schiebel and the complainant are differently situated in at least two material ways.

First, as multiple appellate courts have noted, a complainant is not an appropriate comparator for a person accused of sexual harassment. *Rowles v. Curators of Univ. of Mo.*, 983 F.3d 345, 360 (8th Cir. 2020); *Plummer v. Univ. of Houston*, 860 F.3d 767, 778 (5th Cir. 2017); *Oirya v. Brigham Young Univ.*, 854 F. App'x 968, 970 (10th Cir. 2021); *Verdu v. Trs. of Princeton Univ.*, No. 20-1724, 2022 WL 4482457, at *5 (3d Cir. 2022). The accused—often referred to in the case law as a "respondent"—is inherently differently situated than a complainant because one is alleged to have engaged in wrongdoing and the other is asserting that they have been victimized. *See Brigham Young Univ.,* 854 F. App'x at 970; *Rowles,* 983 F.3d at 360. An appropriate comparator for a man accused of sexual harassment is not their alleged victim, then, but instead is "a female accused of sexual harassment." *Rowles,* 983 F.3d at 360; *see also Brigham Young Univ.,* 854 F. App'x at 970 (same).

Plus, a student like the complainant is not similarly situated to an instructor like Mr. Schiebel. Students and their instructors "hold unquestionably different roles and levels of authority." *Trs. of Princeton Univ.*, 2022 WL 4482457, at *5. These distinct roles necessitate that schools treat these two groups differently. *Cf. Wamer v. Univ. of Toledo,* 27 F.4th 461, 470-71 (6th Cit. 2022), *cert. denied*, 143 S. Ct. 444 (2022) (noting that schools' responsibilities regarding students are different from those regarding instructors). And because schools must treat students and instructors differently, members of the two groups are not "sufficiently alike to be considered valid comparators." *Trs. of Princeton Univ.,* 2022 WL 4482457, at *5; *see also Johnson v. Schmid,* 750 F. App'x 12, 17 (2d Cir. 2018) (holding that instructors could not be similarly situated to their student as a matter of law).

It's possible that Mr. Schiebel relies on these allegations about the female complainant not as a comparator, but instead to demonstrate that the District treated a complainant better than it treated him as a respondent. But even if his allegations raised an inference of pro-victim or anti-respondent bias by the District, that would not support an inference of *sex-based* bias cognizable under Title IX, a sex discrimination statute.

That's because anti-respondent bias is not the same as anti-*male* bias. An individual's status as a person accused of sexual misconduct is distinct from their sex. After all, both women and men can be accused of sexual harassment and be victims of it. *Doe v. Univ. of Denver*, 952 F.3d 1182, 1196 (10th Cir. 2020); *Doe v. Samford Univ.*, 29 F.4th 675, 690 (11th Cir. 2022); *see also infra* p. 24 (collecting statistics about rates of sexual harassment of male students). Discrimination based on an individual's status as a respondent, then, is not sex-based. *See Doe v. Univ. of Iowa*, 80 F.4th 891, 898 (8th Cir. 2023) (explaining that bias against alleged perpetrators of sexual assault "is not the equivalent of demonstrating bias against male[s]."); *Doe v. Rollins Coll.*, 77 F.4th 1340, 1358 (11th Cir. 2023) (same); *Univ. of Denver*, 952 F.3d at 1196 (same and collecting cases).

This is true in the same way that classifications based on pregnancy are not necessarily sex-based. In *Geduldig v. Aiello*, the Supreme Court rejected an Equal Protection challenge to the exclusion of pregnancy-related conditions from California's disability insurance plans of pregnancy. 417 U.S. 484, 494-98 (1974). The Court reasoned that "[w]hile it is true that only women can become pregnant . . . [t]he [challenged]

program divides potential [benefits'] recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496 n.20. Accordingly, there was a "lack of identity between the excluded [pregnancy-related] disability and gender," meaning discrimination against pregnant people did not equate to discrimination against women. *See id.* By like token, even though a majority of individuals accused of sexual harassment are men, the status of being accused of sexual harassment is distinct from gender, so bias against respondents does not equate to bias against men.[3]

For these reasons, Mr. Schiebel's allegations about the District's putative bias against him as a respondent do not raise an inference of anti-male bias necessary to state a Title IX claim.

[3] Similarly, victims of sexual harassment are not members of a sex-based category, since victims are not limited to women and girls. *See supra* p. 14. Schools violate Title IX when they are deliberately indifferent to sexual harassment because sexual harassment is sex-based, *see, e.g.*, *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999), not because anti-victim bias is inherently sex-based bias.

2. The Title IX Coordinator's comment does not evince anti-male bias.

Mr. Schiebel also tries, unsuccessfully, to establish an inference of anti-male bias based on a comment made by a District official. Mr. Schiebel alleges that, when he visited the school for his interview as a part of the school's investigatory process, the District's Title IX Coordinator stated that, "because of her concerns about [Mr.] Schiebel," she had located the exits and positioned herself with her back to the wall. Compl. ¶ 108; Opening Br. at 16. But the allegation does not suggest that the Title IX Coordinator's "concerns about Schiebel" related to his gender. Compl. ¶¶ 108-09; Opening Br. at 16.

To the contrary, the obvious explanation for the Title IX Coordinator's comment is that Mr. Schiebel had recently been accused of sexually assaulting a student, and the Title IX Coordinator feared that he would assault her as well. *See Samford Univ.*, 29 F.4th at 689 (rejecting plaintiff's conclusory assertions of anti-male bias given evident gender-neutral explanations for decisionmaker's conduct in erroneous outcome case); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that a plaintiff must allege more than a "sheer possibility that a defendant has acted unlawfully."). Nothing in the complaint suggests that the Title IX

Coordinator only feared Mr. Schiebel would assault her as well because he was a man. To be sure, the comment was inappropriate, and may have demonstrated anti-respondent bias. But, as explained, that is insufficient to establish sex discrimination. *See supra* pp. 13-15.

3. Mr. Schiebel fails to identify relevant external pressures that could cause anti-male bias.

Mr. Schiebel points to case law holding that a plaintiff can state an erroneous outcome claim by alleging that some external pressure based on a school's past handling of sexual misconduct reports infected the underlying disciplinary proceeding with anti-male bias. Opening Br. at 13-14 (citing *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019); *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)). But, in his brief, Mr. Schiebel fails to identify any external pressures, including any history of criticism, let alone one with a "causal connection" to the "flawed outcome" he challenges in this suit. *Yusuf*, 35 F.3d at 715. So, though Mr. Schiebel gestures at an argument based on external pressures, he has failed to make it.[4] An argument that "lack[s] specificity" in this way is unpreserved. *Barbour v. City of White Plains,* 700 F.3d 631, 634 (2d Cir. 2012).

[4] In his opening brief, when discussing his allegations, Mr. Schiebel asserts generally that "there has been a history of criticism of the treatment of females when a school

Mr. Schiebel may have abandoned this argument because, as the district court recognized, his complaint does not allege any "facts to support" the suggestion that external cultural forces created an "anti-male environment" that "manifested in [the District's] investigation." App. 123. In his complaint, Mr. Schiebel alleged that "heavily publicized" sexual harassment accusations against Andrew Cuomo, Compl. ¶ 49, and the "#Metoo movement" pressured educational institutions "to protect female complainants of sexual misconduct and harassment," *id.* ¶ 48. Those allegations go unmentioned in his appellate brief, and rightly so: Discussions of sexual harassment and efforts to prevent and address similar harms are not inherently biased—either against respondents, or against men. *See, e.g., Univ. of Iowa,* 80 F.4th at 898 (explaining that "institutional efforts to prevent sexual misconduct on campus" do not "support[] an inference of bias."); *Rollins Coll.*, 77 F.4th at 1358 (noting that a "victim-centered approach" does not demonstrate "discriminatory bias motivated by gender").

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has been faced with claims of sexual misconduct." Opening Br. at 14 (emphasis added). What that means is less than clear. But regardless, it has nothing to do this with this case: Mr. Schiebel never alleges that the District has been the subject of criticism for its handling of sexual harassment reports.

Plus, Mr. Schiebel failed to allege how these general efforts affected the investigation into his conduct. *See generally* Compl.; *see also* App. 123. So even if he had plausibly alleged anti-male bias out in the world, he would have run afoul of a basic principle of anti-discrimination law: A plaintiff must demonstrate a connection between the challenged adverse action and allegations of bias. *See Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115 (2d Cir. 2007); *Yusuf*, 35 F.3d at 715. Men like Mr. Schiebel cannot state claims for sex discrimination based on allegations of diffuse anti-male bias any more than Black people can state race discrimination claims based on allegations of general widespread anti-Black racism or women can state sex discrimination claims based on allegations of misogyny writ large.

Mr. Schiebel would have faced similar problems had he relied on his allegations that the U.S. Department of Education's 2011 Dear Colleague Letter—a guidance letter aimed at "'eliminat[ing] harassment, prevent[ing] its reoccurrence, and address[ing] its effects'"—caused a "nationwide trend favoring female student complaints over male student respondents." Compl. ¶¶ 41-45 (quoting the Dear Colleague Letter). But Mr. Schiebel again failed to connect these broader allegations about the

Dear Colleague Letter to the District's investigation into his conduct. *See id.* ¶¶ 41-49. Perhaps that is because the Dear Colleague Letter was rescinded years before the events underlying this appeal took place. *Samford Univ.*, 29 F.4th at 691-92; *see also* Compl. ¶ 44 (acknowledging the Dear Colleague Letter was rescinded).[5]

4. Procedural irregularities alone do not raise an inference of gender bias.

Unable to otherwise establish an inference of gender bias, Mr. Schiebel focuses on allegations of procedural irregularities. Opening Br. at 14-23; Compl. ¶¶ 77-169. Procedural irregularities, however, only raise an inference of anti-male bias where the complaint includes non-conclusory allegations that the *reason* for the irregularities was anti-male bias. *Vengalattore v. Cornell Univ.*, 36 F.4th 87, 107 (2d Cir. 2022). Put differently, to rest an erroneous outcome claim on procedural irregularities, a plaintiff's allegations must raise an inference that "the defendant deviated from the proper procedures" as a way to "discriminate against the

[5] Besides, even if Mr. Schiebel could connect his allegations about the Dear Colleague Letter to the District, he would still be unable to raise an inference of anti-male bias, given that the Dear Colleague Letter is gender neutral. *See Univ. of Denver*, 952 F.3d at 1196 (explaining that the Dear Colleague Letter is gender-neutral and does not, on its own, raise an inference of anti-male bias); *Rossley v. Drake Univ.*, 979 F.3d 1184, 1196 (8th Cir. 2020) (similar); *Trs. of Boston Coll.*, 892 F.3d at 92 (similar).

plaintiff on the basis of his sex." *Doe v. Univ. of S. Ind.*, 43 F.4th 784, 793 (7th Cir. 2022).

After all, there are many "plausible reasons for procedural irregularities" that are not sex-based at all. *Doe v. Stonehill Coll., Inc.*, 55 F.4th 302, 334 (1st Cir. 2022). These can range from "ineptitude" to "inexperience or sex-neutral pro-complainant bias"—none of which are sex-based motives, and so cannot give rise to a sex discrimination claim under Title IX. *Stonehill Coll., Inc.,* 55 F.4th at 334 (quoting *Samford Univ.,* 29 F.4th at 692); *see also. Univ. of S. Ind.*, 43 F.4th at 797-99 (explaining that the most likely reason for procedural irregularities was mistake, which does not demonstrate anti-male bias); Opening Br. at 18 (explaining that the District's Title IX Coordinator was not properly trained, which might explain any procedural irregularities in this case).

### B. Mr. Schiebel's vision of the law would create perverse incentives for schools to sweep harassment under the rug.

If Mr. Schiebel were right that his allegations were enough to establish a claim for anti-male bias under Title IX, that law would create perverse incentives for schools to excuse, rather than address, sexual harassment. Under the ordinary principles that apply to anti-discrimination suits, Mr. Schiebel cannot identify a comparator, point to a

discriminatory statement by a decisionmaker, or otherwise raise an inference of sex-based bias. *See supra* pp. 11-20. A victory for Mr. Schiebel, then, would establish an unusually lenient pleading standard for Title IX suits brought by men accused of sexual harassment.

That standard would stand in stark contrast to the unusually high standards that victims' suits face under Title IX. *See Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 848 (6th Cir. 2016) (noting victims of sexual harassment face a "high bar" to establishing school liability under Supreme Court Title IX precedent); *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014) (similar); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 269 (4th Cir. 2021), *cert. denied,* 143 S. Ct. 442 (2022) (similar); *Doe v. Dardanelle Sch. Dist.*, 928 F.3d 722, 725 (8th Cir. 2019) (similar). Student victims must plead, among other elements, deliberate indifference to known sexual harassment. *Davis*, 526 U.S. at 643. This makes it "tremendously difficult" for survivors of sexual harassment to bring successful Title IX claims—far more so than adult employee victims who file suit under Title VII. Shiwali Patel et al., *A Sweep As Broad As Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 La. L. Rev. 939, 972 (2023); *see also id.* at 973-82 (describing the "stringent

requirements" victims must meet to state a Title IX claim); Fatima Goss Graves, *Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the* Gebser *and* Davis *Standards*, 2 Advance 135, 136 (2008) (explaining that the Supreme Court has imposed "crippling burdens on students" who seek to bring Title IX claims in the wake of harassment).

Such a sharp contrast between the applicable standards for survivors of harassment, on the one hand, and respondents, on the other, would incentivize litigation-averse schools to sweep harassment allegations under the rug. If it were unusually easy for a person found responsible for sexual harassment to make out a claim, but still unusually hard for a victim of sexual harassment to do the same, a school would be more likely to face onerous discovery, and ultimately liability, if it substantiates an allegation, even if such a finding is supported by the weight of the evidence. That would be a perversion of Title IX.

Importantly, though Mr. Schiebel presents himself as a victim of broad cultural anti-male bias, his vision of the law would hurt boys and men. Each school year, two in five male students in seventh through twelfth grades report being sexually harassed. Catherine Hill & Holly

Kearl, *Crossing the Line: Sexual Harassment at School* 11 (2011), https://perma.cc/X2ZY-7ALA. In higher education, about three in ten male students report experiencing forms of sexual harassment other than sexual assault, and one in twenty report that they were sexually assaulted. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* A7-55, A7-59 (2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf.

These high rates of male victimization dwarf the rates at which schools suspend or expel students for sexual harassment. *See* Kenny Jacoby, *Despite Men's Rights Claims, Colleges Expel Few Sexual Misconduct Offenders While Survivors Suffer,* USA TODAY (Nov. 16, 2022), https://www.usatoday.com/in-depth/news/investigations/2022/11/16/title-ix-campus-rape-colleges-sexual-misconduct-expel-suspend/7938853001/ (finding that colleges and universities suspend one in every 12,400 students and expel one in every 22,900 students based on reports of sexual misconduct); *cf.* Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault Than to Be Falsely Accused of It,* HuffPost (Oct. 16, 2015),

https://www.huffpost.com/entry/false-rape-accusations_n_6290380 (explaining men are much more likely to be sexually assaulted than they are to be falsely accused). Equitable Title IX liability standards, then, benefit men and boys in addition to women and girls.

## CONCLUSION

This Court should affirm the district court's dismissal of Mr. Schiebel's Title IX erroneous outcome claim.

November 20, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 4,994 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: November 20, 2023

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## CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 20, 2023

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