INNOCENT KISS OR POTENTIAL LEGAL NIGHTMARE: PEER SEXUAL HARASSMENT AND THE STANDARD FOR SCHOOL LIABILITY UNDER TITLE IX

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"A... student should feel safe and comfortable walking down the halls of his or her school. School is a place for learning and growing. Sexual harassment stops that process." 1

INTRODUCTION

Commentators have called it the "kiss that shook the nation" 2—a Lexington, North Carolina school suspended six-year-old first-grader Johnathan Prevette for a day when he kissed a schoolmate on the cheek. 3 Johnathan told his mother that the little girl asked him to kiss her, 4 but the school’s principal decided the display of affection violated a "school policy on ‘student-to-student sexual harassment,’ [which] includ[es] pressure for sex, flirting, patting, and pinching." 5

1 OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., SEXUAL HARASSMENT: IT’S NOT ACADEMIC 1 (1997) (omission in original) (quoting N. STEIN & LISA SJOSTRAM, FLIRTING OR HURTING? A TEACHER’S GUIDE ON STUDENT TO STUDENT SEXUAL HARASSMENT IN SCHOOLS 66 (1994)).
2 Debra Carlton Harrell, Kiss May Be a Kiss, But Teen Sex Harassment No Joke, SAN DIEGO UNION—TRIB., Oct. 12, 1996, at E5.
5 Phillips, supra note 3, at 49. But see Ellen Goodman, The Truth Behind “the Kiss,” BOSTON GLOBE, Oct. 13, 1996, at D7 (stating that the school did not suspend Johnathan, but sent him to another room for misbehavior, and that the school did not characterize his act as sexual harassment, but as “unwanted touching that violated the student behavior code”); Paul Nowell, Boy’s Kiss Brings Him International Fame, GREENSBORO NEWS & REC., Sept. 26, 1996, at B1 (“The student was disciplined for violation of the general school rule which prohibits unwarranted and unwelcome touching of one student by another ... Unfortunately, references have been made to sexual harassment, which in its usual context, is not involved in this case.” (quoting the school administration)). Despite his outraged parents’ complaints and the mayor’s admission that the policy was “flawed,” Phillips, supra note 3, at 49, the school stood by its decision, calling the disciplinary action “justi-
A month later, seven-year-old second-grader De'Andre Dearinge of Queens, New York found himself in a similar predicament, when school officials suspended him for five days for violating the school board’s policy against sexual harassment because he kissed a classmate and tore a button off her skirt. De'Andre admitted that he kissed the girl because he liked her, and explained he removed the button because it reminded him of Corduroy, the teddy bear in his favorite book who is missing a button from his overalls.

Stories like Johnathan’s and De’Andre’s are enough to make anyone wonder, have school officials lost their minds? The extensive media coverage sparked “a blizzard of charges that the boys were victims of political correctness run amok,” and that America was “going overboard” with sexual harassment in general. Many articles pointed out that the children were too young to grasp the concept of sex, let alone

fied.” Nowell, supra. The case made headlines across the country, turning Johnathan into an instant celebrity with appearances on CNN, the “Today Show,” and NBC News. See id. Johnathan’s mother plans to take legal action against Lexington school officials for their punishment of her son. See Conservative Group to Defend 6-Year-Old, News & Observer, Oct. 9, 1996, at A3. The North Carolina Fund for Individual Rights, a conservative civil rights group, is providing free legal representation to the Prevette family. See id.

6 See Seven-Year-Old Suspended 5 Days for Kissing Classmate, Buffalo News, Oct. 2, 1996, at A16 (hereinafter Seven-Year-Old Suspended) (“School officials said their guidelines define sexual harassment as sexually suggestive comments, innuendoes or propositions; or inappropriate physical contact such as touching, patting or pinching. . . . No minimum age is set.”).

7 See id. Following criticism of the extreme nature of the punishment from many, including De'Andre's mother, New York City Mayor Rudolph Giuliani, and sexual harassment experts, and after attracting national media attention, school administrators allowed De'Andre to return to school after he served only three days of his suspension. See Beth J. Harpaz, School Officials Abandon Punishment for Stolen Kiss, Critics Called Penalty Political Correctness Run Amok, Buffalo News, Oct. 3, 1996, at A5 (“It appears as if this was kind of a normal, childish thing that happened and was misinterpreted. . . . It seems somebody made a mistake.”) (quoting Mayor Giuliani); Norimitsu Onishi, Harassment in 2d Grade? Queens Kisser Is Pardoned, N.Y. Times, Oct. 3, 1996, at A1 (“Clearly, Title IX doesn’t reach a little boy kissing a girl.”) (quoting Verna Williams, Attorney, National Women's Law Center); New York Boy, 7, Cleared of Sexual Harassment Charges for Kissing Classmate, Jer, Oct. 21, 1996, at 53 (noting that De'Andre's incident followed on the heels of Johnathan's in North Carolina and that it again captivated widespread media attention, prompting school officials to consider amending harassment policies to “reflect age considerations”).

8 Phillips, supra note 3, at 49; see also Harrell, supra note 2, at E5 (stating that the schools' reaction to Johnathan and De'Andre's cases were "widely perceived as overreactions by school districts trying to be politically and legally correct").

9 Sally Lehrman, Schools Learn the Hard Way: Harassment Not Child's Play, S.F. Examiner, Oct. 3, 1996, at A1 (quoting a professor as saying that "high-profile" suspensions like Johnathan's and De'Andre's "helped fuel a sense that schools were going overboard in their effort to respond to sexual harassment").
sexual harassment. One critic told the nation's educators to "worry about teaching, not trivialities." 

Unfortunately, "high-profile" stories like these distract attention from the very real problem of sexual harassment that faces older students in America's public schools. Routine, nonheadline-making stories reveal serious incidents of intimidation and unwelcomed sexual contact that many girls experience every day in the classroom, the hallway, on the school bus, and the playground. At school, "young girls are repeatedly exposed to attitudes and behaviors that frighten, intimidate, and degrade them." In fact, sexual harassment is so common that many girls assume it is just part of the ordinary school day—a lot of people do it, it's no big deal.

The reality of the situation leads many critics to complain that "the biggest problem with sexual harassment [in America's schools] is not overreaction, but a failure to react where warranted." Perhaps

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10 See, e.g., Fred Bruning, An American View: Going Overboard on Sexual Harassment, MacLean's, Oct. 21, 1996, at 15 (criticizing the punishment of children "so young they have notions neither of sex nor harassment"); Onishi, supra note 7, at B8 ("I have a problem with holding little ones to the same standard you would hold adults to in the workplace.") (quoting Carol A. Gressner, Queens representative to the school board); Seven-Year-Old Suspended, supra note 6 ("De'Andre couldn't say what sex means.") (citing The Daily News).
11 Bruning, supra note 10, at 15.
12 See Lehrman, supra note 9, at A1.
14 Kirsten M. Eriksson, Note, What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment, 83 Geo. L.J. 1799, 1800 (1995); see also Carol Jones, Sexual Tyranny: Male Violence in a Mixed Secondary School, in Just A Bunch of Girls: Feminist Approaches to Schooling 26, 35 (Gaby Weiner ed., 1985) (concluding that because of sexual harassment, "mixed-sex schools are dangerous places for girls and women and... they exist to further benefit boys as they establish their sexual domination over girls").
15 See Nancy S. Layman, Sexual Harassment in American Secondary Schools: A Legal Guide for Administrators, Teachers and Students 34 (1994); Stein, supra note 13, at 2; Jones, supra note 14, at 28. June Larkin, in her interviews of young Canadian students, uncovered three factors that contribute to female students' systematic acceptance of their male counterparts' sexually harassing behavior: "(1) the frequency of the behavior; (2) the way it was interpreted by others, particularly the male harassers; and (3) the fact that the topic of sexual harassment was seldom, if ever, discussed at school.
16 American Ass'n of Univ. Women Educ. Found., Hostile Hallways: The AAUW Survey On Sexual Harassment in America's Schools 12 (1993) (noting that 37% of student perpetrators of sexual harassment gave the "no big deal" explanation for their behavior) [hereinafter AAUW Survey].
17 Harrell, supra note 2, at E5 (citing local and national school officials, students, teachers, child psychologists, attorneys and other experts); see also AAUW Survey, supra note 16, at 21 (indicating that parents, teachers, and school officials have failed to recognize the extent of sexual harassment in schools); JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Law & Ineq. J. 163, 165 (1992) (noting that "[s]exual harassment is
educators "ignore, downplay or [are] unaware of sexual harassment" because they do not from the outset identify certain student conduct as sexual and harassing in nature. However, the recent flurry of lawsuits that students and parents have brought against school districts, alleging peer sexual harassment, has done much to focus attention on the growing problem of sexual harassment in our schools.

Consider, for example, the story of Tianna Ugarte, a young girl living in California who, as an eleven-year-old sixth-grader, suffered sexual harassment by a classmate for an entire year. For ten months, the boy verbally assaulted Tianna with regular, explicit vulgarities, repeatedly calling her "bitch," "slut," "whore," and other degrading sexual slurs and epithets in front of other classmates. The student also grabbed his own groin, questioned Tianna why her breasts were not bigger, and even threatened her after she complained. Tianna's father, seeing that his daughter was living in fear, complained repeatedly to the boy's family, Tianna's teacher, and the school's principal and superintendent. The principal promised to investigate the matter, but the superintendent later told Tianna's parents that he was powerless to act, absent proof of the allegations. Tianna's case attracted national headlines when a jury awarded her $500,000 in damages and attorney's fees, finding unanimously that prevalent in high school in the guise of 'teasing' and all too often the reaction to such harassment is 'boys will be boys').

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18 JOHN F. LEWIS & SUSAN C. HASTINGS, SEXUAL HARASSMENT IN EDUCATION 20 (2d ed. 1994).
19 See, e.g., infra Part II.
20 See Harrell, supra note 2, at E5.
22 See Phillips, supra note 3, at 49.
23 See Delgado, supra note 21, at A1.
24 See Bill Hewitt et al., Bitter Lessons: School Days Aren't Golden Rule Days Anymore, and Some Parents Are Suing to Keep Their Kids From Being Abused, PEOPLE, Oct. 28, 1996, at 52, 53. During the four-week trial of Tianna's case, the school district argued, among other things, "that Tianna was too sensitive." Delgado, supra note 21, at A14.
25 See Phillips, supra note 3, at 49.
26 Delgado, supra note 21, at A1.
27 See Tamar Lewin, Kissing Cases Highlight Schools' Fears of Liability for Sexual Harassment, N.Y. TIMES, Oct. 6, 1996, at 22. According to Tianna's father, she had become "very sullen and isolated . . . [S]he would come home and lock the door to her room. She stopped her dance. Her self-esteem withered away. I just wanted to protect my daughter." Id. (quoting Tianna's father).
28 See id.
29 See Hewitt et al., supra note 24, at 53. Superintendent Alan J. Newell stated, "We did investigate, and our investigations concluded there was some name-calling, but never verified any of the other allegations . . . . We're not bashful about discipline. But we didn't have the evidence to corroborate the complaint." Lewin, supra note 27, at 22 (quoting Superintendent Newell).
the Antioch Unified School District negligently handled Tianna’s numerous sexual harassment complaints.  

Similarly, Eve Bruneau, an eleven-year-old from upstate New York, informed her father and mother that her sixth-grade class “had become a nightmare.” Boys, she told them, would regularly snap girls’ bras, fondle their breasts, and taunt them with names like “lesbian,” “prostitute,” and “whore.” One boy called Eve an “ugly, dog-faced bitch.” Adding insult to injury, Eve’s teacher took no action to stop the boys’ behavior. After Eve’s parents complained, the teacher attempted to make a boy who had insulted her apologize. When the boy refused, the teacher told Eve, “guys are going to call you names all your life, and you’re going to have to deal with it.” After the teacher and other school officials ignored their complaints, her parents enrolled Eve in a boarding school in Massachusetts. In the first such case in New York, Eve sued the South Kortright Central School District in federal court for monetary damages under Title IX, alleging that school officials knowingly failed to protect her from the sexual harassment. Unfortunately for Eve, the jury returned a verdict in favor of the school district, concluding that “the school’s sex discrimination and harassment laws apply only to adults, like teachers and staff, not to students.”

Who is responsible for monitoring and preventing sexual harassment between students? While sexual harassment in the workplace

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30 See Delgado, supra note 21, at A1. The jurors based their decision on the school’s failure to implement a 1993 California law “banning sexual harassment in schools.” Lehrman, supra note 9, at A1. The law, passed on January 1, 1993, required every California school district to adopt a sexual harassment policy, and the Antioch School District did not adopt this policy until the middle of May 1993, “put[ting] the district in violation of state law for five and a half months.” Doe v. Antioch Unified Sch. Dist., 1996 WL 763135 (T.D. Cal. Jury) at *1-*2; see also CAL. EDUC. CODE § 212.6 (West 1998) (providing that “[e]ach educational institution in the state of California shall have a written policy on sexual harassment [included] in its regular policy statement”).

31 Hewitt, et al., supra note 24, at 54.

32 Id. at 55.

33 Id.

34 See id.

35 See id.

36 See id.


38 Girl Presses State’s First Case Alleging Sexual Harassment in Grade School, N.Y. TIMES, Nov. 4, 1996, at B3.


40 Lost Battle, BUFFALO NEWS, Dec. 17, 1996, at 12. “Afterward, most jurors said they sympathized with Bruneau’s case, but said they thought district officials had done all they could to correct the situation once they became aware of it.” Girl Loses Suit Claiming Sex Harassment at School, TIMES UNION, Nov. 22, 1996, at A1.

41 See, e.g., Elaine D. Ingulli, Sexual Harassment in Education, 18 RUTGERS L.J. 281, 282-83 (1987) (arguing that “faculty, through their institutions, unions and professional as-
has attracted widespread judicial attention in the last three decades, and employers are now held legally responsible for sexual harassment among their employees, neither courts nor school officials have adequately addressed the serious problem of student-to-student sexual harassment. Due to current judicial disagreement regarding the standard for liability of school districts under Title IX of the Education Amendments of 1972 ("Title IX") for peer sexual harassment, school officials remain uncertain about their legal duty when one student makes unwelcomed sexual advances toward another student. Nevertheless, understanding the potential for liability is the first step educators must take in resolving this pressing problem.

Part I of this Note begins by examining the statutory language of Title IX and its legislative history. Part I also examines the development of the law's recognition of sexual harassment as sex discrimination under Title IX, and looks at the prevalence of peer sexual harassment in America's primary and secondary schools and its impact on victims and perpetrators. Part II outlines the current judicial disagreement over whether, and under what circumstances, schools should be held liable for peer sexual harassment, and analyzes the conflicting theories of liability that the federal courts currently advance. Part III argues that schools should be held liable for student-to-student sexual harassment under Title IX by implementing a standard similar to that governing employer liability for sexual harassment under Title VII. Part IV offers some suggestions to schools seeking to avoid potential financial liability in the current climate of judicial uncertainty.

associations should be in the forefront of developing ethical standards that enhance the academic and intellectual environment for all students by seriously attacking the problem of sexual harassment on campus"); Strauss, supra note 17, at 181-82 (posing the imposition of an affirmative duty on school districts to deal with sexual harassment).

See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); see also Strauss, supra note 17, at 165 (noting that "[s]exual harassment is well-documented and analyzed in the workplace").

See Verna L. Williams & Deborah L. Brake, When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment, 30 Creighton L. Rev. 423, 424 (1997) ("The difficulty schools are having addressing student-to-student harassment reflects the disarray in the courts in this emerging area of the law.").


See Williams & Brake, supra note 43, at 424.
I

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

A. The Statutory Language and Legislative History of Title IX

The enactment of Title IX was "the culmination of efforts over several years to ban gender discrimination in the field of education." By enacting Title IX, Congress intended to eradicate sex discrimination in federally funded educational programs and activities by preventing "the use of federal resources to support discriminatory practices." It also sought to protect individual citizens from those discriminatory practices.

Title IX filled the gender gap in civil rights legislation that Title VI and Title VII of the Civil Rights Act of 1964 ("Title VI" and "Title VII," respectively) left, and closed "loopholes in existing legislation relating to general education programs and employment resulting from those programs." Title VI prohibits discrimination on the basis of race and national origin in any federally funded program, but does not address sex discrimination. Title VII makes it an unlawful employment practice for an employer to discriminate on the basis of sex, but does not include educational institutions within its scope.

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47 Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979); see also Bell, 687 F.2d at 691-93 (emphasizing Congress's intent to prevent use of all federal monies for discriminatory purposes); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993) (explaining that Title IX "was intended to prevent the use of federal resources to support gender discrimination."); aff'd, 7 F.3d 332 (3d Cir. 1993); 118 CONG. REc. 5803 (1972) (stating that "the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds") (statement of Senator Bayh).
48 See Cannon, 441 U.S. at 704.
50 118 CONG. REc. 5803 (1972) (statement of Senator Bayh).
51 Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).
52 Title VII states: "It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). Congress added the prohibition against sex discrimination in the employment context at the last minute as a floor amendment in the House of Representatives, without any hearing or debate. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986) (citing 110 CONG. REc. 2577-84 (1964)); see also Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (quoting Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977)). One conservative Congressman proposed the amendment in an effort to entirely thwart the adoption of the Civil Rights Act of 1964. See Ulane, 742 F.2d at 1085. However, this ruse failed and the bill passed quickly as amended. See id.
terms similar to those of Title VI, Title IX specifically 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."\(^5\)

Senator Bayh first introduced the provisions that became Title IX as an amendment\(^5\) to the Education Amendments of 1971.\(^5\) Advocating his proposed amendment, Senator Bayh stated that

> [t]he bill deals with equal access to education. Such access should not be denied because of poverty or sex. If we are going to give all students an equal education, women must finally be guaranteed equal access to education. . . . It does not do any good to pass out hundreds of millions of dollars if we do not see that the money is applied equitably to over half our citizens.\(^5\)

Specifically, Senator Bayh's amendment focused on gender discrimination in school admissions and employment opportunities for female teachers,\(^5\) and aimed at correcting a disturbing statistical imbalance: only nine percent of college professors, six percent of law students, and eight percent of medical school students were women.\(^5\)

When the bill passed through the legislative process and returned to the Senate floor without an antidiscrimination provision,\(^5\) Senator

\(^{53}\) 20 U.S.C. § 1681 (emphasis added). Legislative history demonstrates that Congress believed it was "only adding the 3-letter word 'sex' to existing law," and was "not doing anything to the private school that [was] not [already] in the law under Title VI of the 1964 Civil Rights Act, relating to discrimination in other areas." 117 Cong. Rec. 30,408 (1971) (statement of Senator Bayh).

\(^{54}\) Senator Bayh's first amendment provided that

> [n]o person . . . shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity.


\(^{55}\) See Grove City College v. Bell, 687 F.2d 684, 692 (3d Cir. 1982), aff'd, 465 U.S. 555 (1984). The Education Amendments of 1971 established the Basic Educational Opportunity Grant program, see id., whose primary concern was: the availability of educational facilities to low-income students, . . . the quality of education provided by the nation's educational institutions and their need for funding to bolster programs and facilities, . . . the establishment of continuing education programs for the nation's teachers, and most predominately, . . . the sensitive issue of busing.


\(^{56}\) See id. at 30,155-56 (statement of Senator Bayh).

\(^{57}\) See id. at 30,411 (statement of Senator McGovern).

\(^{58}\) The Senate rejected Senator Bayh's first amendment to the educational bill as non-germane, see 117 Cong. Rec. 30,415 (1971), and passed the bill without the antidiscrimination provision. The House, after considering the Senate's version, replaced it with its own educational bill, including an antidiscrimination provision, and passed its own version of
Bayh again introduced an antidiscrimination amendment, adding the language that is now Title IX. Senate Bayh stressed the link between discrimination in education and employment:

The field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.

Senator Bayh thought his provision would "cover such crucial aspects as admissions procedures, scholarships, and faculty employment."

B. Recognizing Sexual Harassment as Sex Discrimination Under Title IX: Step One in Achieving Gender Equality in Schools

Although Title IX prohibits sex discrimination in education, it does not explicitly proscribe sexual harassment. As one commentator has observed, "historically, the majority of Title IX lawsuits have been filed by plaintiffs attempting to gain equal funding or opportunities for women." The first cases brought under Title IX "primarily challenged discriminatory practices in athletic programs and admissions policies," alleging that these practices "did not provide equal access to the bill. See 117 Cong. Rec. 30,882 (1971). The Senate referred the House version back to the Committee on Labor and Public Welfare, which amended it to conform to the original Senate version. See S. Rep. No. 92-504 (1972), reprinted in 1972 U.S.C.C.A.N. 2595, 2595-96. On February 7, 1972, the Senate Committee sent its own version of the education bill back to the floor of the Senate, again without an anti-discrimination clause. See 118 Cong. Rec. 2806 (1972). For this same general discussion, see Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1396-97 (11th Cir.) (en banc), petition for cert. filed, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

60 See 118 Cong. Rec. 5803 (1972).
61 U.S. Comm'n on Civil Rights, Enforcing Title IX, at 1 (1980).
63 Id. at 5803. For a thorough discussion of the legislative history of Title IX, see Paul C. Sweeney, Abuse, Misuse and Abrogation of the Use of Legislative History: Title IX and Peer Sexual Harassment, 66 UMKC L. Rev. 41, 46-67 (1997).

65 Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1190 (11th Cir.), vacated, 91 F.3d 1418 (11th Cir.), rev'd en banc, 120 F.3d 1390 (11th Cir.), petition for cert. filed, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843). For a discussion of the success of Title IX challenges to college athletic programs, see Wendy Olson, Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's, 3 Yale J.L. & Feminism 105 (1991); Glenn M.
to males and females.”66 Judicial interpretations in these early lawsuits transformed Title IX “from a statute which prohibits discrimination on the basis of sex . . . into a statute which provides ‘equal opportunit[ies] for members of both sexes.’”67

In Franklin v. Gwinnett County Public Schools,68 until recently the first and only Title IX sexual harassment case that the Supreme Court had considered,69 the Justices offered some hope to victims of sexual harassment in the educational setting by unanimously holding that schools can be held liable for monetary damages for violations of Title IX. The plaintiff in Franklin, a female high school student, alleged that a high school coach and teacher subjected her to continual sexual harassment and abuse, including rape.70 Furthermore, she alleged that school officials investigated and knew of the teacher’s conduct, yet failed to take action to protect her, and even discouraged her from pressing charges against the teacher.71 The United States District Court for the Northern District of Georgia dismissed the complaint, concluding that “Title IX does not authorize an award of damages,”72 and the Eleventh Circuit subsequently affirmed.73

69 The Supreme Court recently granted certiorari to another Title IX case involving a teacher’s sexual harassment of a student to determine “what standard should be used for imposing liability on a school district for the intentional acts of one of its teachers.” Cert. Granted, NAT’L L.J., Dec. 22, 1997, at B18; see also Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997), cert. granted, 118 S. Ct. 595 (1997) (embracing a high standard of institutional liability for a teacher’s sexual harassment of a student). In Lago Vista, the Fifth Circuit held that the school district cannot be held liable under Title IX for such conduct “unless an employee who has been vested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.” Lago Vista, 106 F.3d at 1225-26 (citing Rose H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997), and rejecting Title IX liability based on theories of strict liability, constructive notice, and common law agency). The Court will hear oral arguments both on the Gebser case and the Faragher case (involving the standard for employer liability for Title VII sexual harassment) on March 25, 1998. See Linda Greenhouse, Court to Examine Sex Harassment, Amplifying Earlier Decision, N.Y. TIMES, Mar. 8, 1998, § 1, at 22 (reporting on the Supreme Court’s acceptance of four cases this term involving sexual harassment).
70 See Franklin, 503 U.S. at 63. Plaintiff alleged that, among other conduct, the teacher “engaged her in sexually oriented conversations, . . . forcibly kissed her on the mouth, . . . [and] subjected her to coercive intercourse.” Id. (citations omitted).
71 See id. at 64. After the complaint was filed, the teacher resigned on the condition that the school drop all matters pending against him, at which point the school ended its investigation. See id.
72 Id.
In reversing the Eleventh Circuit's decision, the Supreme Court stated that Title IX prohibits sexual harassment in public schools, and held that a damage remedy is available for those bringing an action to enforce Title IX. Acknowledging that Title IX is enforceable through an implied right of action, the Court relied on the longstanding rule that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Therefore, unless Congress has specifically indicated otherwise, the federal courts have the power to award any appropriate relief in a cause of action brought under a federal statute.

Franklin is significant not only because the Court awarded damages in an implied rights of action, but also because it protects students from sexual harassment within the scope of prohibiting sex discrimination in educational programs that receive federal funding. Issuing a strong statement against sexual harassment, the Court wrote:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.

As the first reported federal case in which a student won a sexual harassment claim under Title IX, the opinion is remarkable for its brevity and its almost casual tone. Although sexual harassment in education is an issue of first impres-

74 See Franklin, 503 U.S. at 75.
75 Id. at 75-76. Until the Court's Franklin decision in 1992, the denial of federal financial assistance to the offending educational institution "was the only remedy available to a Title IX plaintiff." Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1190 (11th Cir.), vacated, 91 F.3d 1418 (11th Cir. 1996), rev'd en banc, 120 F.3d 1390 (11th Cir.), petition for cert. filed, 66 U.S.L.W. 3387 (U.S. No. 19, 1997) (No. 97-843).
76 See Franklin, 503 U.S. at 65 (stating that the implied private right of action under Title IX recognized in Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) applies in cases of intentional sexual harassment).
77 See id. at 68-69. In examining whether Congress specifically "intended to limit application of this general principle in the enforcement of Title IX," id. at 71, the court found Title IX's text and legislative history "silent on the issue of available remedies," id., and concluded that Congress, legislating in light of the Cannon decision, did not intend to limit the appropriate remedies and relief available to the courts for redressing violations of the statute. Id. at 71-72.
79 Franklin, 503 U.S. at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).
sion for the Court, the Court limits its treatment of the issue to two sentences, which are embedded in the discussion of whether institutions have sufficient notice to justify imposing damage remedies on them for Title IX violations. However, the "Court's decision to provide both legal and equitable relief under Title IX" makes it a strong and effective weapon for combating both sexual harassment and sex discrimination in schools. The Franklin decision was also consistent with the Court's evolving jurisprudence in the area of sex discrimination and sexual harassment in the workplace. Furthermore, by recognizing sexual harassment as sex discrimination for purposes of Title IX, the Court took an important and necessary step toward the achievement of gender equality in education.

C. Student-to-Student Sexual Harassment in America's Schools

As a result of the extensive media coverage of the Anita Hill-Clarence Thomas hearings, the Senator Packwood scandal, the Navy's Tailhook party in Las Vegas, and Paula Jones's lawsuit against President Clinton, the public has become increasingly aware of the perva-

81 Matson, supra note 79, at 293.
82 Elizabeth J. Gant, Comment, Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972—An Avenue of Relief for Victims of Student-to-Student Sexual Harassment in the Schools, 98 Dick. L. Rev. 489, 498 (1994).
83 See id.
84 See, e.g., Meritor Sav. Bank., 477 U.S. at 66-67 (agreeing with the lower courts that sexual harassment is an arbitrary barrier to gender equality in the workplace, and holding that sexual harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" is discrimination based on sex and, therefore, is actionable under Title VII (alterations in original) (quoting Henson v. Dundee, 682 F.2d 897, 902 (1982)).
86 See, e.g., Excerpts from Senator Packwood's Diaries and Depositions by Accusers, N.Y. Times, Sept. 8, 1995, at D16 (excerpting selections from Senator Packwood's diaries); Katharine Q. Seely, Packwood Says He Is Quitting as Ethics Panel Gives Evidence, N.Y. Times, Sept. 8, 1995, at A1 (detailing Packwood's resignation from the Senate as a result of the Senate Ethics Committee investigation of numerous sexual harassment and misconduct charges).
87 See, e.g., Gregory Vistica, Navy Ends Support of Tailhook in Wake of Sex-Abuse Charges, San Diego Union-Trib., Oct. 30, 1991, at A1 (reporting on Navy Secretary Garrett's decision to terminate funding to the Tailhook Association after reports of sexual harassment and assault at an annual convention in Las Vegas).
88 See, e.g., Michael Isikoff et al., Clinton Hires Lawyer as Sexual Harassment Suit Is Threatened, Wash. Post, May 4, 1994, at A1 (reporting on Paula Jones's appearance at a news conference where she accused then Arkansas governor Bill Clinton of "making an unwanted and improper sexual advance during a brief encounter" in a hotel room in 1991); Howard Kurtz, Paula Jones Speaks to National Media about Clinton Suit, Wash. Post,
siveness of adult sexual harassment in the workplace. "Until recently, though, very little was known about the extent or the severity of sexual harassment in American public schools." Recent developments do not paint a pretty picture: "sexual harassment is a major problem for many students," and "[n]ot unlike like their adult counterparts in the workplace, children in school are experiencing unwanted advances."

How widespread is sexual harassment in schools and how does it affect our children? In June 1993, the American Association of University Women’s Educational Foundation published *Hostile Hallways: The AAUW Survey of Sexual Harassment in America’s Schools* (the "AAUW Survey"), the first major U.S. study to compile empirical data on school-based sexual harassment. The study’s goal was to assess the problem of sexual harassment in schools and its "educational, emotional, and behavioral impact" on students. Public school students in grades eight through eleven, from seventy-nine schools across the country, completed 1,632 field surveys in February and March 1993. The survey defined sexual harassment for students as "unwanted and unwelcome sexual behavior which interferes with your life." The survey listed fourteen types of harassment, involving both physical and nonphysical contact, and asked: "During your whole school life, how often, if at all, has anyone (this includes students, teachers, other school employees, or anyone else) done the following things to you when you did not want them to?" Students could answer "often, occasionally, rarely, never, and not sure."

The results were alarming: 81%, or more than "4 out of 5 students [had] experienced some form of sexual harassment in June 17, 1994, at A11 (discussing Paula Jones’s sudden high media profile four months after unveiling her sexual harassment accusations).

89 See Layman, supra note 15, at 12-14 (noting the public’s increased awareness of sexual harassment in the workplace as a result of the media’s extensive coverage of high-profile cases and related issues like child abuse and violence against women); Anne Bryant, Sexual Harassment in School Takes Its Toll, USA Today Mag., Mar. 1995, at 40.
89 Bryant, supra note 89, at 40.
91 AAUW Survey, supra note 16, at 3.
92 See Bryant, supra note 89, at 40.
94 See id. at 5.
95 Id. at 6. This definition explicitly excluded conduct that students might like or want. See id.
96 Id. at 5. The surveys specifically instructed the students “to answer only about their school-related experiences during school-related times.” Id. at 6.
97 Id. at 6.
Within this 81%, "the gender gap [was] surprisingly narrow": 85% of girls and 76% of boys surveyed said they had been the targets of unwanted and unwelcome sexual conduct at school. The most prevalent form of sexual harassment was "sexual comments, jokes, gestures, or looks" (65%), the second most common was "touching, grabbing and/or pinching in a sexual way" (53%). A significant number of students reported someone "intentionally brush[ing] up against [them] in a sexual way" (46%), mooning or flashing (45%), and being the target of "sexual rumors" (37%).

Who perpetrated this sexual harassment? Eighteen percent of the 81% who had been targets of sexual harassment in school reported that their harasser was a school employee, such as a teacher, bus driver, or counselor. However, student-to-student sexual harassment was found to be four times more common than student harassment by a school employee. The overwhelming majority (79%) of students who reported experiencing sexual harassment at school identified their harasser as a present or former student.

Sexual harassment that creates a hostile learning environment impacts all students. However, the AAUW Survey clearly indicates

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98 Id. at 4. For criticism of the survey, see John Leo, Expel Georgie Porgie Now!, U.S. News & World Rep., Oct. 14, 1996, at 37. Specifically, the author criticizes the survey because it got the school harassment rate up to 81 percent by including glances and rumors as offenses. (With those standards, plus "body language," discussed as harassment in [the survey], it's surprising the rate didn't hit 100 percent.) The high number is used to depict sexual harassment as uniquely awful, far more serious than other behavioral problems or than girl-to-girl or boy-to-boy harassment, and in need of a strong curriculum reaching down to potential 5- and 6-year-old offenders.

99 Id. at 8-9.

100 Id. In the other categories of sexual harassment, 33% of the students surveyed said they had had their clothing pulled in a sexual manner; 32% had been "shown, given, or left unwanted sexual pictures or notes"; 27% had been "blocked or cornered in a sexual way"; 19% had been "the target of written sexual messages/graffiti"; 18% had been "forced to kiss someone"; 17% had been "called gay or lesbian"; 16% had their "clothing pulled off or down"; 11% had been "forced to do something sexual at school other than kissing"; and lastly, 7% had been "spied on while they dress[ed] or shower[ed] at school." Id. at 9-10 (emphases omitted).

101 See id. at 10.

102 See id. at 11.

103 See id. at 11.

104 See id. For a smaller study of early adolescent experience with, and acceptance of, sexually harassing behaviors, see Bruce Roscoe et al., Sexual Harassment: Early Adolescents' Self-Reports of Experiences and Acceptance, 29 Adolescence 515, 519-20 (1994) (finding that of the 281 females and 280 males surveyed, 50% of the females and 37% of the males reported that their peers had sexually harassed them).

that girls suffer greater negative educational, emotional, and behavioral effects from harassment than boys.\textsuperscript{106} Examining the educational impact, 35\% of girls and 12\% of boys reported "not wanting to attend school" as a result of their experience with sexual harassment, and 32\% of girls and 13\% of boys reported "not wanting to talk as much in class" after experiencing harassment.\textsuperscript{107} Other effects included finding it more difficult to pay attention in class (28\% of girls, 13\% of boys), deliberate absenteeism (24\% of girls, 7\% of boys), and scoring lower on a test or paper (23\% of girls, 9\% of boys).\textsuperscript{108} Students also reported "[finding] it harder to study," earning a lower grade in a class, changing schools, and doubting their ability to graduate as a result of their experiences with sexual harassment at school.\textsuperscript{109}

Emotionally, students reported feeling "embarrassed" (64\% of girls, 36\% of boys), "self-consciousness" (52\% of girls, 21\% of boys), a loss of self-confidence (43\% of girls, 14\% of boys), and "afraid or scared" (39\% of girls, 8\% of boys).\textsuperscript{110} They also reported doubting whether they could "have a happy romantic relationship," as well as feeling uncertain about their identity and feeling less or more popular.\textsuperscript{111} As a result of the sexual harassment, many students altered their behavior. They reported staying away from the person who bothered or harassed them, avoiding particular locations in the school, switching their seat in class, withdrawing from a school activity, "changing their group of friends," and altering their route to and from school.\textsuperscript{112}

\textsuperscript{106} AAUW Survey, supra note 16, at 15. Roscoe and his coauthor's study also demonstrates that the experiences and consequences of sexually harassing behaviors were considerably different for males and females, concluding that "[t]he gender of the harassment perpetrator very likely influences the connotations and consequences of the behaviors to the victim." Roscoe et al., supra note 104, at 520. Females experienced the sexually harassing behaviors primarily from males and viewed these behaviors as "inappropriate, invasive, disruptive, and causing a hostile environment . . . . [Their] experiences were consistent with what is viewed as sexual harassment and resulted in conditions which adversely affected the learning environment." Id. While males experienced harassing behaviors from both men and women, physical harassment and sexual comments came almost entirely from males and "typified a form of physical interaction which occurs among early adolescent males as they explore and deal with physical change and a new dimension of their sexuality." Id. While many male students reported "a dislike for the behaviors when they were the recipients, these behaviors did not appear to result in a hostile or offensive environment which interfered with their ability to learn." Id.

\textsuperscript{107} AAUW Survey, supra note 16, at 15.

\textsuperscript{108} Id. at 15-16.

\textsuperscript{109} Id. at 16.

\textsuperscript{110} Id. at 16-17.

\textsuperscript{111} Id. at 17.

\textsuperscript{112} Id. at 17-18; see also Frank J. Till, National Advisory Council on Women's Educ. Programs, Sexual Harassment: A Report on the Sexual Harassment of Students 26 (1980) (concluding that victims tend to try to cope with incidents of sexual harassment on their own, no matter how severe the harassment, by employing tactics such as rejection, "avoidance," "dressing down," submitting to advances, and "ignoring the incidents");
While Johnathan's\textsuperscript{113} and De'Andre's stories\textsuperscript{114} raised doubt as to the seriousness of sexual harassment in America's schools, one must understand the incidents in the context of the very real and sobering problems that schools are facing. The AAUW Survey clearly demonstrates that both female and male students experience sexual harassment starting at a young age.\textsuperscript{115} The harassment takes on many different forms, and fellow classmates are most often the perpetrators. Although sexual harassment negatively impacts the educational environment in a multitude of ways for all students, young girls suffer the most. More studies will surely follow the media frenzy over recent high profile cases; however, the courts and schools cannot postpone dealing with this issue directly, for the future potential of young students across the country hangs in the balance.

II

THE COURTS IN CONFLICT

By allowing plaintiffs to recover monetary damages for intentional violations of Title IX,\textsuperscript{116} the Franklin decision dramatically increased "the number of Title IX suits brought by employees and students alleging that their educational institutions subjected them to sexual discrimination."\textsuperscript{117} While Franklin clearly demonstrates that "sexual harassment (in all of its forms) is sex discrimination prohibited by Title IX,"\textsuperscript{118} a much disputed issue is "whether, and under what circumstances," courts should impose Title IX liability on school districts in cases of peer sexual harassment, that is, when one student sexually harasses another, creating a hostile educational environ-

\textsuperscript{113} See supra notes 1-5 and accompanying text.
\textsuperscript{114} See supra notes 6-7 and accompanying text.
\textsuperscript{115} See supra text accompanying notes 92-112.
\textsuperscript{116} According to one report, while Franklin stands for the proposition that students sexually harassed by teachers are entitled to collect money damages from their schools and school officials, the reality of the situation is that no victim has yet collected a penny. See Richard Carelli, Sex Law: Standards Too High?, ORANGE COUNTY REGISTER, Aug. 23, 1997, at A17; see, e.g., Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996) (rejecting the imposition of strict liability on a school district under Title IX for teacher-student sexual abuse, and reversing a federal jury verdict of $1.4 million for an eight year-old student who had been molested by her second-grade health class teacher), cert. denied, 117 S. Ct. 2434 (1997). "Suing for monetary damages has been made an empty gesture." Carelli, supra, at A17 (quoting Terry Weldon, the lawyer for the Canutillo plaintiffs). However, "monetary damages have been awarded to students in Title IX cases involving sexual discrimination other than harassment." Carelli, supra, at A17.

\textsuperscript{117} Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1190 (11th Cir.), vacated, 91 F.3d 1418 (11th Cir. 1996), rev'd en banc, 120 F.3d 1390 (11th Cir.), petition for cert. filed, 66 U.S.L.W. 3887 (U.S. Nov. 19, 1997) (No. 97-843).

\textsuperscript{118} Gail Sorenson, Employee Sexual Harassment and Abuse of Students in Schools: Recent Developments in Federal Law, 97 EDUC. L. REP. 997, 998 (1995).
The disagreement between jurisdictions is stark, and there is no consensus about what standard of liability, if any, should apply. The federal courts have developed three conflicting approaches to this problem. The first approach, which the Ninth, Fourth, and Tenth Circuits and many district courts have adopted, borrows from Title VII's standard of liability for employers. This approach applies the Title VII standard to educational institutions and imposes liability in cases where schools knew or should have known about the peer sexual harassment. The second approach, which the Fifth Circuit advocates, employs an "equal protection" test, imposing liability only when a school responded to sexual harassment claims differently based on sex. The third approach, which currently only the Eleventh Circuit applies, refuses to find schools liable for peer sexual harassment under Title IX under any circumstances.

A. Borrowing the Title VII "Employment" Standard

In Meritor Savings Bank v. Vinson, the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." To raise an actionable claim for hostile or abusive work environment sexual harassment, the plaintiff must allege and prove that (1) he or she is a member of a protected class; (2) he or she experienced "unwelcomed sexual harassment"; (3) the plaintiff would not have experienced the harassment but for his or her gender; (4) the sexual harassment was so pervasive that it "alter[ed] the conditions of employment and creat[ed] an abusive working environment"; and (5) "the employer knew or should have known of the harassment in question and failed to take prompt remedial action." In the absence of Supreme Court precedent or legislative guidelines specifically addressing peer sexual harassment in the educational context,

119 See Tukel, supra note 66, at 1154.
120 See id. at 1156; see also Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (noting that "courts that have discussed the standard of liability for school districts under Title IX have failed to reach a consensus regarding the appropriate standard").
121 See infra Part II.A.
122 See infra Part II.B.
123 See infra Part II.C.
125 Id. at 66; see also id. at 65 (noting "a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult"). The federal courts first recognized a hostile work environment as violating Title VII when an employer creates or condones a workplace "which significantly and adversely affects an employee because of his race or ethnicity." Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982).
126 Henson, 682 F.2d at 903-05 (citations omitted); see also Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619-20 (6th Cir. 1986) (requiring similar elements for a prima facie cause of action).
"several courts have referred to Title VII's employment provisions in deciding Title IX educational cases and have adopted at least some of the elements of workplace sexual harassment claims."

127 Jill Suzanne Miller, *Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. Rev. 699, 703 (1995). For examples of courts applying Title VII principles in Title IX sexual discrimination cases involving student-to-student hostile environment sexual harassment, see Doe v. University of Ill., Nos. 96-3511, 96-4148, 1998 WL 88541, at *13, *16 (7th Cir. Mar. 3, 1998) (finding that Title VII cases are helpful in addressing Title IX claims of peer sexual discrimination, and holding that schools are liable under Title IX for failing to respond "promptly and appropriately" to known peer sexual harassment); Doe v. Oyster River Coop. Sch. Dist., No. 95-402-SD, 1997 WL 832794, at *8 (D.N.H. Aug. 25, 1997) (holding that the duty of a school to its students should correlate with that of an employer to its employees," and applying the "knew-or-should-have-known standard" because to hold otherwise would be to give students "less protection from sexual harassment than . . . employees in the workplace"); Doe v. Londonberry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997) (rejecting the argument that "peer sexual harassment is never actionable against a school district under Title IX," but holding that the plaintiff must show, inter alia, that "the school district knew of the harassment and intentionally failed to take proper remedial action"); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1375-77 (N.D. Cal. 1997) (citing with approval the use of Title VII agency principles in holding that "a plaintiff may maintain a Title IX action for damages against a school district when the plaintiff alleges that the school district knew or should have known . . . [of] the plaintiff['s] sexual harassment[ment] by other students and the school district failed to take steps reasonably calculated to end the harassment"); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1213-14 (E.D. Pa. 1997) (concluding that "Title VII is the most appropriate analogue when defining Title IX's substantive standards" and, therefore, under Title IX, a school district can be held liable "for its failure to prevent or eradicate a sexually hostile environment created by students, as that environment discriminates and limits educational opportunities based on sex") (citation omitted); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 746-47 (E.D. Ky. 1996) (equating "sexual harassment/hostile environment in an educational setting with sexual harassment/hostile environment in the workplace," and borrowing the elements of a Title VII hostile environment sexual harassment claim); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1204-05 (N.D. Iowa 1996) (equating a school's duty to prevent harassment under Title IX to that of an employer under Title VII, and finding that plaintiff stated a proper Title IX claim for damages for her school's "knowing failure to take appropriate remedial action in response to the hostile sexual environment created by students"); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (agreeing with cited authority that "Title VII is the most useful and appropriate analogue in Title IX cases" that students bring); Bosley v. Kearney R-I Sch. Dist., 904 F. Supp. 1006, 1021-23 (W.D. Mo. 1995) (concluding that "the same rule as when an employer is held liable for a sexually hostile work environment under Title VII must apply when a school district has knowledge of a sexually hostile school environment and takes no action," and utilizing Title VII principles and standards to enforce Title IX's prohibition on sex discrimination); cases cited infra Parts II.A.1-3.

For similar examples of courts utilizing Title VII principles in cases involving teachers and other employees of educational institutions that have sexually harassed students, see Kracunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997) (holding that liability for a professor's conduct should be determined under the same standard that applies to hostile environment sexual harassment claims arising under Title VII); Doe v. Claiborne County, 103 F.3d 495, 515 (6th Cir. 1996) (holding that "a 'hostile environment' sexual harassment claim is cognizable under Title IX," and that Title VII principles guide the resolution of such a claim); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468-69 (8th Cir. 1996) (equating a school's duty to prevent harassment under Title IX to that of an employer under Title VII, and finding same-sex harassment actionable under Title IX); Preston v.
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SEXUAL HARASSMENT

1. Oona, R.-S.- v. McCaffrey

In Oona, the Ninth Circuit analogized Title IX to Title VII, and held that school officials have a duty under Title IX to take reasonable steps to prevent peer sexual harassment. In this case, the plaintiffs, an 11-year-old sixth-grade student and her parents, brought two sexual harassment claims against the school district and various school employees. First, the plaintiffs alleged that school officials failed to take appropriate measures to prevent a student teacher from engaging in a "pattern and practice" of sexual harassment and assault against Oona and other female students. Second, the plaintiffs alleged that the school failed to prevent male students from sexually harassing Oona and other girls, thereby creating a hostile environment for the female students. The boys' conduct, which often occurred within earshot of school employees, involved "loud and vulgar comments of a sexual nature," repeated references to girls' body parts as "melons" and "beavers," and calling Oona a "ho" [vulgar slang for "whore"] and a "lesbian." After Oona complained, one boy reportedly struck her in the face and told her to "[g]et used to it."

Commonwealth of Va. ex. rel. New River Community College, 31 F.3d 203, 207 (4th Cir. 1994) (noting that Title VII standards and judicial precedent "provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX"); Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988) (holding that Title VII standards apply to employee-related Title IX claims); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, . . . we regard it as the most appropriate analogue when defining Title IX's substantive standards . . . ."). But see Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 656 (5th Cir. 1997) (refusing to "take liberties with statutory language or with the reasoning of the Supreme Court" and finding that "Franklin's single citation to Meritor Savings to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context"); see cases cited infra Parts II.A-1-3.

128 122 F.3d 1207 (9th Cir. 1997).
129 Id. at 1209-10.
131 Id. at 1455-56. The conduct on the part of the student teacher included "staring at, winking to, whispering to, hugging, and otherwise inappropriately touching female students," some of which occurred in front of Oona's teacher and the school's principal. Id. at 1456. On one occasion, the student teacher "approached Oona on the playground and fondled [her] buttocks while whispering . . . in her ear." Id. Oona's parents complained to Oona's teacher, the principal, and the director of Elementary Education, asking the school to immediately remove the student teacher from her classroom. See id. at 1456-57. Several other girls also reported that the teacher had acted inappropriately toward them. See id. at 1456. The school removed the student teacher from his position, though he later visited school grounds during school hours without authorization. See id. at 1456-57.
132 See id. at 1456.
133 Id. at 1457.
134 Id. Plaintiff also alleged that her complaints motivated the defendant school teacher to commit various acts of retaliation including dropping Oona's grade in her writing class, refusing to allow her to stay after class with another student to work on the school newsletter, canceling a school play in which Oona was to perform, failing to properly disci-
October 1993, the Office for Civil Rights made "a tentative finding that student-to-student harassment had occurred in [Oona's] class, that this harassment had created a hostile environment for Oona, and that officials at the school knew or should have known of the harassment but failed to take timely, effective action to prevent it from continuing." 3 The plaintiffs filed suit against the school district and individual employees under numerous theories, including violations of the rights secured by the Equal Protection Clause, 36 the Due Process Clause, 37 42 U.S.C. § 1983, 38 and Title IX. 39

Finding "that the right created by Title IX may be violated when female students are subjected to sexual harassment by their male peers at school," and that "school officials discriminate against the female students on the basis of sex in encouraging or failing to appropriately respond to such harassment," 40 the district court held that the plaintiffs stated a viable cause of action under Title IX based on the peer sexual harassment that Oona suffered. 41 The Ninth Circuit affirmed, holding that Title IX clearly imposed a duty on school officials to prevent peer sexual harassment of its students. 42 The Oona court based its holding on the analogy that the Supreme Court drew between Title VII and Title IX in Franklin, "when it likened the duties of a school district to prevent sexual harassment under Title IX, to the Title VII duties of an employer." 43 In Franklin, the Supreme Court incorporated its rationale from Meritor, the leading case recognizing that an employer can be held liable for hostile-work environment sex-

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135 Id. at 1458.
136 U.S. Const. amend. XIV, § 1.
137 U.S. Const. amend. XIV, § 1.
139 See Oona, 890 F. Supp. at 1458.
140 Id. at 1469. The court went on to say that such discrimination by schools may evidence itself in many different forms, such as the "active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment." Id. The district court based its conclusions on the holding in another peer sexual harassment case in the same district and on strong implications found in dicta of a Ninth Circuit case. See Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1401 (9th Cir. 1994) ("Given the extremely harmful effects [peer] sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools.") (citations omitted); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1575 (N.D. Cal. 1993) ("Surely [a student] is 'denied the benefits of, or subjected to discrimination under' an education program on the basis of sex when, as alleged here, she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program.") (quoting Title IX).
141 Oona, 890 F. Supp. at 1469.
142 Oona, R.-S.- v. McCaffrey, 122 F.3d 1207, 1209-10 (9th Cir. 1997).
143 Id. at 1209 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992)); see also supra text accompanying note 80 (discussing the Franklin Court's analogy).
The Oona court concluded that "by citing [Merit] with approval in the Title IX context, to define the critical concept of discrimination on the basis of sex, the Supreme Court in Franklin was analogizing the duties of school officials to prevent sexual harassment under Title IX, to those of employers under Title VII." Therefore, peer sexual harassment that creates a hostile educational environment is clearly actionable under Title IX, just as similar harassment that creates a hostile work environment is actionable under Title VII. Consequently, the court concluded that schools have the duty to take reasonable steps to prevent exactly the incidents of peer sexual harassment that Oona alleged in her complaint.

2. Brzonkala v. Virginia Polytechnic Institute & State University

The Fourth Circuit's decision in Brzonkala is the most recent case to apply Title VII standards to determine school liability for hostile environment peer sexual harassment under Title IX. In Brzonkala, two members of the university football team repeatedly raped the plaintiff, a freshman at Virginia Polytechnic Institute ("Virginia Tech"). As the basis of her Title IX complaint, Brzonkala alleged "that the university knew of the brutal attacks she received and yet failed to take any meaningful action to punish her offenders or protect her, but instead permitted a sexually hostile environment to flourish." Specifically, she complained that with regard to the one

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144 See Oona, 122 F.3d at 1210; see also supra text accompanying notes 124-26 (discussing Merit).
145 Oona, 122 F.3d at 1210.
146 See id.
147 Id. The court stressed that the issue before it—whether or not schools had a duty—was narrow, and expressly did not consider "what steps school officials may reasonably be required to take to prevent harassment by fellow students, . . . [or] the extent to which such action may differ from the action reasonably expected of employers to prevent harassment by fellow employees." Id. at 1211.
148 132 F.3d 949 (4th Cir. 1997), vacated and reh'g en banc granted (Feb. 5, 1998).
149 See id. at 953. The football players forcibly raped Brzonkala three times without a condom, pinning her arms down and using their knees to force her legs open, and warning her that "[s]he better not have any fucking diseases." Id. As a result of the assault, Brzonkala became depressed, avoided her classmates, and stopped going to class. See id.
150 Id. Seven months after the attack, Brzonkala filed a complaint against her attackers under the university's Sexual Assault Policy, which the school had released a year earlier, but had not made widely available to students. See id. at 953-54. She did not pursue criminal charges against her attackers, thinking it was impossible due to the fact that she did not save any physical evidence of the rape. See id. at 954.

After the first hearing on the complaint, the judicial committee found one of the athletes guilty of sexual assault and suspended him for two semesters. See id. His initial appeal on due process and arbitrariness grounds was rejected. See id. This decision upholding the suspension was final under Virginia Tech's published rules; however, after the
football player who admitted to having forced sexual intercourse with her after she told him "no" twice, university officials imposed a "deferred suspension" until graduation, allowing him to return to school the next fall on a full athletic scholarship.\(^{151}\)

The district court dismissed Brzonkala's complaint for failure to state a Title IX claim under either a hostile environment or disparate treatment theory.\(^{152}\) The Fourth Circuit reversed.\(^{153}\) In addressing the Title IX hostile environment claim, the court noted that the issue was a matter of first impression and concluded it "must look to the extensive jurisprudence developed in the Title VII context . . . and the many cases adopting Title VII analysis in a Title IX hostile environment context" for guidance.\(^{154}\) The court rejected the Fifth Circuit's "deeply flawed analysis" in *Rowinsky v. Bryan Independent School District*\(^{55}\) as incorrectly framing the issue in terms of institutional liability for the acts of third parties.\(^{156}\)

In this vein, the court reasoned, Brzonkala was not seeking to hold Virginia Tech liable for the acts of her classmates, but "for its own discriminatory actions in failing to remedy a known hostile environment."\(^{157}\) This is exactly the type of discriminatory conduct for which Title IX imposes liability on educational institutions.\(^{158}\)

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151 *Id.* at 955. Brzonkala did not learn that the university had set aside the suspension from school officials, but rather from the *Washington Post*. *See id.* She canceled her own plans to return to the university, fearing "for her safety because of previous threats and Virginia Tech's treatment of [her attacker]." *Id.* According to Brzonkala, the university's actions communicated to the violator, "as well as the student body as a whole, that the school either did not believe her or did not view [the] conduct as improper." *Id.*

152 *Id.* at 956.

153 *Id.* at 953.

154 *Id.* at 957.

155 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

156 *Brzonkala*, 132 F.3d at 958.

157 *Id.* (emphasis omitted) (quoting Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996)).

158 *Id.*

159 *Id.*
The court then turned to Title VII principles to determine the boundaries of Brzonkala's hostile environment claim. It held that under Title IX a plaintiff asserting a hostile environment claim must show: “1) that she [or he] belongs to a protected group; 2) that she [or he] was subject to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her [or his] education and create an abusive educational environment; and 5) that some basis for institutional liability has been established.”

With respect to the fourth element, the court found that a sole incident of rape or sexual assault is in itself “plainly sufficient to state a claim for hostile environment sexual harassment.” In this case, given the extreme seriousness of the harassment involved, in conjunction with Virginia Tech's awareness of the situation, its failure to effectively remedy the hostile environment, and Brzonkala's fear of retaliation, Brzonkala alleged facts sufficient to satisfy this element, even though she did not return to school the next year. The court again looked to Title VII precedent to resolve the issue of institutional liability, and held that a Title IX plaintiff must prove that the school “knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action.” Because the university clearly knew about the rapes after Brzonkala filed her complaint, the issue was “whether Virginia Tech took prompt and adequate remedial action once it was on notice.” The court concluded that Brzonkala alleged numerous facts that “if proven, would allow a jury to find that Virginia Tech's response to Brzonkala's gang rape was neither prompt nor adequate.”

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160 Id.
161 Id. (alterations in original) (citing several Title IX hostile environment cases implementing Title VII analysis).
162 Id. at 959 (internal quotation marks and citation omitted).
163 See id. at 959-60.
164 Id. at 960 (quoting Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996)).
165 Id. (citing Paroline v. Unisys Corp., 879 F.2d 100, 106 (4th Cir. 1989), vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990) (en banc)).
166 Id. at 961. These facts included Virginia Tech's toleration of an environment in which male student athletes could gang rape a female student without any significant punishment to the male attackers, nor any real assistance to the female victim, and a legion of procedural irregularities in the hearing process, Virginia Tech's disregard for its own rules of finality, and its eventual decision to impose virtually no penalty for an admitted rape.

Id. at 960-61.
3. Seamons v. Snow

Seamons is thus far the only Title IX suit for student-to-student sexual harassment brought by a male student. Seamons alleged that five football teammates grabbed him in the high school locker room while he was naked, tied him with tape to a towel rack, taped his genital area, and brought in a girl he once dated to look at him, all in the presence of other team members. After Seamons reported the incident to various school officials, his football coach demanded in front of the entire football team that he apologize for complaining to the school administration and betraying the team. Upon Seamons's refusal to apologize, the coach dismissed him from the team. The only action that the school district took was to cancel the last football game of the season, a state playoff game.

While he did not file suit for the initial assault, Seamons did sue based on the school's conduct, alleging that its response to the assault was "sexually discriminatory and harassing," because officials expected him to "have taken it like a man," and the coach dismissed the incident as "boys will be boys." Furthermore, Seamons alleged that he was subjected to a hostile environment as a result of his classmates' retaliatory threats and harassment and the principal's suggestion that he leave the high school.

The district court dismissed Seamon's Title IX claim on a motion for summary judgment. The Tenth Circuit affirmed. According to the court,

[t]o state a cause of action under Title IX, a plaintiff must show: (1) that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program;

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167 84 F.3d 1226 (10th Cir. 1996).
169 See Seamons, 84 F.3d at 1230.
170 See id.
171 See id.
172 See id.
173 Id.
174 See id. Eventually, Seamons chose to leave the school and enroll in a distant county. See id. In addition to filing a Title IX claim, Seamons filed a § 1983 cause of action alleging a violation of "[his] constitutional rights to ... due process, freedom of association, freedom of speech, familial association, and ... equal protection." Id.
175 See id. at 1230-31. The district court noted that a plaintiff must prove discriminatory intent under Title IX, and held that Seamons "failed, as a matter of law, to allege sufficient facts to support his claim that [d]efendants were motivated by an intent to discriminate against him on the basis of his sex." Id. The court refused to apply Title VII principles of hostile environment sexual harassment doctrine because of "important distinctions" between Title VII and Title IX. See id. at 1231.
176 Id. at 1233.
(2) that the program receives federal assistance; and (3) that the exclusion from the program was on the basis of sex.\textsuperscript{177}

To determine whether such exclusion was based on sex, the court implemented the five-pronged test for hostile work environment sexual harassment,\textsuperscript{178} and concluded that the plaintiff did not allege facts sufficient to show discrimination on the basis of sex.\textsuperscript{179} The court found that although the school district might have created and tolerated a hostile educational environment, it was not the type of "sexually charged" hostile environment cognizable as sexual harassment.\textsuperscript{180} Therefore, the plaintiff failed to satisfy the third prong of the test, that the harassment was based on sex, because the facts were not "sufficient to indicate that the conduct being challenged (which it must be remembered, post dates the locker room assault) was ‘sexual’ in nature, as defined in the hostile environment context."\textsuperscript{181} Because of the failure to allege sexual discrimination, the court did not reach the issue of school liability for the conduct of its students.\textsuperscript{182} Although the court only reached the third element of its test, thus avoiding the tougher question of school liability, \textit{Seamons} is significant because of its recognition of hostile environment peer sexual harassment as a Title IX cause of action, its approval of the utilization of Title VII standards to resolve this issue, and because it thus far represents the lone Title IX case brought by a male student.


The Fifth Circuit held in \textit{Rowinsky} that Title IX does not impose liability on a school district for peer hostile environment sexual harassment, absent allegations that the school district "responded to sex-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
\textbf{Element} & \textbf{Description} \\
\hline
1 & He is a member of a protected group. \\
2 & He was subject to unwelcome harassment. \\
3 & The harassment was based on sex. \\
4 & The sexual harassment was sufficiently severe or pervasive so as unreasonably to alter the conditions of his education and to create an abusive educational environment. \\
5 & Some basis for institutional liability has been established. \\
\hline
\end{tabular}
\caption{Elements of Hostile Environment Sexual Harassment}
\end{table}

\textsuperscript{177} \textit{Id.} at 1232 (citing Bougher v. University of Pittsburgh, 713 F. Supp. 139, 143-44 (W.D. Pa.), aff'd, 882 F.2d 74 (3d Cir. 1989)).
\textsuperscript{178} See \textit{id.} The five elements a plaintiff must successively prove are:
\begin{enumerate}
\item that he is a member of a protected group;
\item that he was subject to unwelcome harassment;
\item that the harassment was based on sex;
\item that the sexual harassment was sufficiently severe or pervasive so as unreasonably to alter the conditions of his education and [to] create an abusive educational environment; and
\item that some basis for institutional liability has been established.
\end{enumerate}
\textsuperscript{179} \textit{Id.} at 1232-33.
\textsuperscript{180} \textit{Id.} at 1232.
\textsuperscript{181} \textit{Id.} at 1233. The definition of hostile environment sexual harassment includes "subject[ion] to unwelcomed sexual advances or requests for sexual favors," or "us[ing] sex to contribute to a hostile environment." \textit{Id.}
\textsuperscript{182} See \textit{id.} at 1232 n.7.
\textsuperscript{183} 80 F.3d 1006 (5th Cir.), \textit{cert. denied}, 117 S. Ct. 165 (1996).
ual harassment claims differently based on sex." The court affirmed the district court's dismissal of the suit on a motion for summary judgment for failure to state a claim under Title IX.

The plaintiffs in Rowinsky, two eighth grade sisters, rode a public school bus to and from school on a daily basis. On the bus, a male student repeatedly verbally and physically harassed the two girls. This male student swatted their bottoms when they walked down the aisle, made comments such as, "When are you going to let me fuck you?," and "What size panties are you wearing?," and groped one girl's genital area. The sisters complained at least eight times about the boy's conduct to the bus driver, and the girls' parents reported the problem to the school principal, who admitted that another student had already informed him of the incidents in question. The school suspended the male student from riding the bus for three days, and forced him to sit in the row behind the driver. However, even after his suspension, the remarks and misbehavior continued. Later that year, a second male student on the bus, in two separate incidents, groped at the girls' genital areas and made crude remarks about the areas he was touching. He was suspended from school for three days. A third male student, this time in the classroom, placed his hand under one girl's shirt and unhooked her bra. He was suspended for the remainder of that day and the next. The girls' mother complained to various school officials about their failure to take appropriate action, and reported that other girls were also suffering from sexual harassment. She later sued the school district on behalf of her daughters, alleging that the district and its employees "condoned and caused hostile environment sexual harassment."

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184 Id. at 1016. For an example of such an allegation involving peer sexual orientation harassment, see Carol Ness, Pacifica Schools Hit with Harassment Suit: Boy Says District Didn't Protect Him from Anti-Gay Slurs, S.F. EXAMINER, Aug. 12, 1996, at A3 (reporting a male student's allegations that the "school district had enforced policies and procedures to prevent sexual harassment, discrimination and violence against girls, yet refused to enforce the policies with respect to [this particular male student] and the anti-gay slurs he endured.

185 Rowinsky, 80 F.3d at 1008.

186 See id.

187 See id.

188 Id.

189 See id.

190 See id.

191 See id.

192 See id.

193 See id. at 1009.

194 See id.

195 See id.

196 See id.

197 See id.

198 Id. at 1010.
The district court dismissed the plaintiff’s Title IX claim, concluding that “there was no evidence that [the school district] had discriminated against students on the basis of sex” and that “Rowinsky had failed to provide evidence that sexual harassment and misconduct [were] treated less severely toward girls than toward boys.” The Fifth Circuit agreed. In rejecting the argument that Title IX extends to the discriminatory acts of third parties, the court interpreted the statute to impose liability only for the acts of grant recipients.

Therefore, in determining school liability under Title IX and whether the acts of the school, as a grant recipient, constitute discrimination on the basis of sex for student-to-student sexual harassment, a plaintiff must prove that the school intentionally discriminated against students on the basis of sex. In the case of peer sexual harassment, a plaintiff must demonstrate that

the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.

The majority found the Title VII discrimination theory dealing with the adult employment situation inapplicable to a situation involv-

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199 *Id.* The district court relied on the fact that boys who harassed boys were treated the same as boys who harassed girls and that “any failure to train [school] employees would harm male and female victims of harassment equally.” *Id.*

200 *Id.* at 1012. Judge Smith reasoned that “[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of [Title IX].” *Id.* at 1013. The court relied on three factors to conclude that courts must interpret Title IX to impose liability only for the acts of the school itself: the scope and structure of the statute; the legislative history; and agency interpretation of the statute. See *id.* at 1012-16.

201 See *id.* at 1016. A few district courts that have addressed claims for peer sexual harassment under Title IX have, like *Rowinsky*, required proof of intentional discrimination on the part of the school district in order to establish such a claim; however, unlike *Rowinsky*, these courts have allowed the trier of fact to infer such intent from the totality of proof, including evidence of the school’s failure to prevent or stop the harassment despite actual knowledge, the school’s toleration of the harassing behavior, and the persuasiveness or severity of the harassment. See *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) (stating that discriminatory intent does not “require proof that unlawful discrimination is the sole purpose behind each act of the defendant being scrutinized,” but rather that the plaintiff may rely upon “the cumulative evidence of action and inaction which objectively manifests discriminatory intent”) (citing *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185 (11th Cir. 1983)); *Oona R.--S.-- v. Santa Rosa City Schs.*, 890 F. Supp. 1452, 1469 (N.D. Cal. 1995) (finding that discriminatory intent on the part of the school “may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment”), aff’d sub nom. *Oona K--S.-- v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997).

202 *Rowinsky*, 80 F.3d at 1016.
In support of this conclusion, the court noted that "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker." The court defined sexual harassment as "the unwanted imposition of sexual requirements in the context of [a relationship of] unequal power," demonstrating that the court viewed the power relationship in the educational setting as between the educational institution and the student—not between students. According to the court, in the situation of student-to-student sexual harassment, the key ingredient of power is missing between harasser and victim. For this reason, the court found the importation of Title VII standards from the employment context to be inappropriate.

Judge Dennis wrote a vigorous dissent in Rowinsky, maintaining that the plaintiffs stated a valid claim for relief under Title IX and were therefore entitled to a trial. For Judge Dennis, the Supreme Court's decision in Franklin meant not only that money damages were available under a private right of action based on Title IX, but also that an educational institution receiving federal funds intentionally violates Title IX and engages in sex discrimination against which the statute affords protection when it knowingly fails to take reasonable steps within its power to prevent the sexual harassment or abuse of a student by a teacher that is so severe or pervasive that it creates a hostile and harmful school atmosphere for that student.

Furthermore, Judge Dennis argued that the Supreme Court's citation of Meritor Savings Bank in Franklin indicated that it considered Title VII standards "appropriate criteria for determining when there has been a violation of Title IX giving rise to a claim of 'hostile environment' sex discrimination." Most importantly, Judge Dennis as-

\[203\] Id. at 1011 & n.11. The majority explicitly disagreed with the Eleventh Circuit's initial ruling in Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996), vacated, 91 F.3d 1418 (11th Cir. 1996), reved en banc, 120 F.3d 1390 (1997), criticizing its "statutory construction and selective use of legislative history." Rowinsky, 80 F.3d at 1010 n.8. The court could not find any other federal court of appeals that had held a school liable for student-to-student sexual harassment. See id.

\[204\] Rowinsky, 80 F.3d at 1011 n.11.

\[205\] Id. (quoting CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979)).

\[206\] See id.

\[207\] See id.

\[208\] Id. at 1016-17 (Dennis, J., dissenting).

\[209\] Id. at 1020 (Dennis, J., dissenting).

\[210\] Id. (Dennis, J., dissenting). According to the dissent, coworker sexual harassment is actionable under Title VII based on "the employer's failure to take reasonable corrective measures" after notification of the harassment, if such harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. (citations omitted) (Dennis, J., dissenting). In this case, the plaintiff alleged that the school failed to take the necessary steps to remedy peer sexual harassment...
asserted that the school board "owes a much higher duty to its students and has far greater powers of control over them than that described in the majority opinion."\textsuperscript{211}

C. No Liability for Peer Sexual Harassment Under Title IX: \textit{Davis v. Monroe County Board of Education}\textsuperscript{212}

In a surprising and divided opinion, the Eleventh Circuit, sitting en banc, recently reversed an Eleventh Circuit panel in holding that Title IX does not support a claim for a school official's failure to prevent student-to-student sexual harassment.\textsuperscript{213} The plaintiff in \textit{Davis} alleged that a fifth-grade male student continually sexually harassed her daughter, LaShonda.\textsuperscript{214} The male student, over a six-month period, repeatedly attempted to fondle LaShonda's breasts and genitals, rubbed against her in a sexual manner, and made offensive sexual remarks to her.\textsuperscript{215} LaShonda's mother also alleged that the school "knew of the harassment yet failed to take any meaningful action to stop it and protect her [daughter]."\textsuperscript{216} Specifically, LaShonda and her mother reported the incidents of sexual harassment to her teachers and the principal, yet requests for protection from the male student went unanswered, and "[s]chool officials never removed or disciplined [him] in any manner for his sexual harassment of LaShonda."\textsuperscript{217} A teacher even refused LaShonda's initial requests to move from her assigned seat which was next to the harassing student.\textsuperscript{218} The plaintiff further alleged that as a result of the ongoing sexual harassment and the school's failure to act on it, LaShonda's ability to take advantage of her education was severely hampered, her concentration and grades suffered, and her mental and emotional health deteriorated.\textsuperscript{219} The harassment finally ended only after

and abuse "sufficiently severe and pervasive as to create ... a hostile and offensive educational environment," despite actual knowledge of the harassment. \textit{Id.} at 1024 (Dennis, J., dissenting). For Judge Dennis, this failure constituted a violation of Title IX's requirement that a school "take appropriate measures to protect students from being subjected in the school environment to sexual harassment, abuse and discrimination of which the [school] ... has actual knowledge." \textit{Id.} at 1025 (Dennis, J., dissenting).

\textsuperscript{211} \textit{Id.} at 1024 (Dennis, J., dissenting).
\textsuperscript{212} 120 F.3d 1390 (11th Cir.) (en banc), \textit{petition for cert. filed}, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).
\textsuperscript{213} \textit{See id.} at 1392.
\textsuperscript{214} \textit{See Davis v. Monroe County Bd. of Educ.}, 74 F.3d 1186, 1188-89 (11th Cir.), \textit{vacated}, 91 F.3d 1418 (11th Cir. 1996), \textit{rev'd en banc}, 120 F.3d 1390 (11th Cir.), \textit{petition for cert. filed}, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843). The offensive language included remarks like "I want to get in bed with you," and "I want to feel your boobs." \textit{Id.} at 1189.
\textsuperscript{215} \textit{See id.} at 1188.
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.} at 1189.
\textsuperscript{218} \textit{See id.}
\textsuperscript{219} \textit{See id.} The harassment even led LaShonda to write a suicide note. \textit{See id.}
LaShonda’s mother filed criminal charges of sexual battery against the boy, to which he pled guilty.\textsuperscript{220}

The district court dismissed the plaintiff’s Title IX claim against the school board.\textsuperscript{221} On appeal from the summary judgment dismissal, a divided panel of the Eleventh Circuit reversed, holding that Title IX prohibits peer hostile environment sexual harassment and requires schools to take steps to remedy it when they know, or should know, that it is occurring.\textsuperscript{222} Noting that courts have relied on Title VII standards to prohibit a teacher’s quid pro quo\textsuperscript{223} and hostile environment sexual harassment of a student,\textsuperscript{224} and that the Supreme Court relied on Title VII principles in a Title IX case,\textsuperscript{225} the court concluded that it was appropriate to apply Title VII principles to LaShonda’s case.\textsuperscript{226}

The court held that

\begin{itemize}
\item \textsuperscript{220} See id.
\item \textsuperscript{221} See Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994), aff’d sub nom. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir.) (en banc), petition for cert. filed, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843). The district court concluded that [t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus, any harm to LaShonda was not proximately caused by a federally-funded educational provider.
\item \textsuperscript{222} Davis, 74 F.3d at 1193-95. The Eleventh Circuit’s initial Davis opinion was the first by a circuit court to directly address the issue of school liability for peer sexual harassment. See Tukel, supra note 66, at 1154. This decision became the leading case in the area of student-to-student sexual harassment, and several district courts have followed this reasoning. See, e.g., Doe v. Petaluma Gify Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996); Nelson v. Almont Community Sch., 931 F. Supp. 1345, 1356 (E.D. Mich. 1996); Does v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554, 567-68 (M.D. Ala. 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205-06 (N.D. Iowa 1996).
\item \textsuperscript{223} See Davis, 74 F.3d at 1190-91 (citing Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977), aff’d, 631 F.2d 178 (2d Cir. 1980)). The court in Alexander observed that it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII’s ban against sex discrimination in employment.
\item \textsuperscript{224} See Davis, 74 F.3d at 1191 (citing Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1366 n.2 (E.D. Pa. 1985), aff’d, 800 F.2d 1136 (3d Cir. 1986)). The court in Moire observed that “[t]hough the sexual harassment ‘doctrine’ has generally developed in the context of Title VII, these [Title VII] guidelines seem equally applicable to Title IX.” Moire, 613 F. Supp. at 1366 n.2.
\item \textsuperscript{225} See Davis, 74 F.3d at 1191 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 (1999)). The court acknowledged that several courts have understood the Supreme Court’s decision in Franklin as indicating that “‘in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.’” Id. (quoting Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) and citing Doe v. Petaluma Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993)).
\item \textsuperscript{226} See Davis, 74 F.3d at 1193.
\end{itemize}
as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.227

Judge Birch dissented from the Eleventh Circuit's first Davis opinion, disagreeing with the majority's holding that the plaintiff's allegations stated a valid claim under Title IX.228

The Eleventh Circuit's opinion was vacated and a rehearing en banc was granted.229 Upon rehearing, a divided en banc panel affirmed the trial court's dismissal of the Title IX claim, and held that

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227 *Id.* Therefore, borrowing from Title VII, when a school *knowingly* fails to take action to remedy a hostile environment that student-to-student sexual harassment has caused, the harassed student has "be[en] denied the benefits of, or be[en] subjected to discrimination under" that educational program in violation of Title IX." *Id.* at 1194 (alterations in original) (quoting 20 U.S.C. § 1681(a) (1988)). The court reasoned that "a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education." *Id.* After concluding that Title IX applied, the court used the five-prong test for employer liability for hostile work environment sexual harassment in this new situation. *See id.* at 1194-95. It found that LaShonda sufficiently stated a Title IX claim against the school board for damages based on a sexually hostile educational environment that a classmate created by alleging: (1) that she was a member of the protected group of female students; (2) that she was subject to unwelcome verbal and physical conduct of a sexual nature; (3) "that the harassment was based on sex"; (4) that the five-month period of harassment altered the conditions of her learning environment; and (5) that school officials knew or should have known about the harassment, but failed to take prompt and corrective action. *See id.* The court based its finding, in part, on allegations that the male classmate engaged in sexually abusive conduct, the abuse was severe enough to support criminal charges, the abuse was "physically threatening and humiliating rather than merely offensive," and that school officials had actual and repeated knowledge of the harassment, given that LaShonda and her mother reported the abuse to her teacher and principal on several occasions. *Id.* at 1195.

A few courts have adopted the first four elements of this test, but modified the fifth element. *See, e.g.,* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 176-77 (N.D.N.Y. 1996) (modifying the fifth element such that plaintiffs could establish "institutional liability" only if the school district had actual knowledge of the harassment and failed to take appropriate remedial action); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205-06 (N.D. Iowa 1996) (articulating a different fifth element for proving a prima facie case of peer harassment, "that the educational institution knew of the harassment and intentionally failed to take proper remedial measures because of the plaintiff's sex").

228 *See Davis,* 74 F.3d at 1195-96 (Birch, J., dissenting). For Judge Birch, this case was analytically distinct from *Franklin,* which involved a teacher's sexual harassment and assault of a student, and in which school officials that knew of the teacher's conduct failed to take action against him. *See id.* at 1195 (Birch, J., dissenting). "[T]he majority [ma][de] an unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student." *Id.* at 1196 (Birch, J., dissenting). Even if the scope of Title IX covered student-to-student sexual harassment, Judge Birch "would limit that holding to intentional conduct on the part of the school board," and not extend Title IX to negligent failure to intervene to prevent harassment. *Id.* (Birch, J., dissenting).

229 *Davis v. Monroe County Bd. of Educ.,* 91 F.3d 1418 (11th Cir. 1996).
Title IX does not allow a claim against a school board based on a school official’s failure to remedy a known hostile environment that student-to-student sexual harassment has created.\textsuperscript{230} After an exhaustive examination of Title IX’s legislative history, the court noted that “the drafters of Title IX never discussed student-student sexual harassment or the related issue of school discipline.”\textsuperscript{231} Finding that Congress enacted Title IX under the Spending Clause of Article I, which empowers Congress to spend for the general welfare of the United States,\textsuperscript{232} the court concluded:

When Congress enacts legislation pursuant to the Spending Clause, it in effect offers to form a contract with potential recipients of federal funding. . . .

To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding.\textsuperscript{233}

Based on this analysis, the court held that Title IX only imposes the duty on educational institutions to “prevent their employees from themselves engaging in gender discrimination,” not a nonemployee from discriminating against a student.\textsuperscript{234} In reaching this conclusion, the court explicitly rejected the “invitation to use Title VII standards of liability to resolve this Title IX case.”\textsuperscript{235}

Four judges sitting on the en banc panel dissented.\textsuperscript{236} According to the dissent, the majority ignored the plain meaning of Title IX, its spirit, and its purpose to reach the conclusion that no matter how flagrant or criminal the harassment may be, and how aware of it the school might become, there is no duty to take any steps to stop it “under the very law which was passed to eliminate sexual discrimination in our public schools.”\textsuperscript{237} Concluding that Title IX provides a

\textsuperscript{230} Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1401 (11th Cir. 1997) (en banc). Of the eleven judges, six concurred only in part, and four dissented.
\textsuperscript{231} Id. at 1397.
\textsuperscript{232} See id. at 1399.
\textsuperscript{233} Id. (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).
\textsuperscript{234} Id. at 1401.
\textsuperscript{235} Id. at 1399-1400 n.13. Although acknowledging the Supreme Court’s use of Meritor in Franklin, the court found it more significant that “the Supreme Court has never discussed student-student sexual harassment or generally applied Title VII jurisprudence to Title IX cases.” Id. The court rejected the use of Title VII principles because: (1) “[i]nterpreting the plain language of different statutes does not automatically produce the same result simply because both statutes proscribe similar behavior;” (2) “Title VII was enacted under the far-reaching Commerce Clause and § 5 of the Fourteenth Amendment;” and (3) Title VII liability relies on “agency principles” that are “useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board.” Id.
\textsuperscript{236} See id. at 1411-19 (Barkett, J., dissenting).
\textsuperscript{237} Id. at 1412 (Barkett, J., dissenting).
cause of action for peer sexual harassment," the dissent would follow Supreme Court precedent, and use "Title VII principles to delineate the scope of the school board's duty and identify the elements of a cause of action under Title IX."239

### III

**ANALYSIS: COURTS SHOULD HOLD SCHOOLS LIABLE UNDER TITLE IX FOR PEER SEXUAL HARASSMENT WHILE EMPLOYING A TITLE VII STANDARD**

Title IX should have "a sweep as broad as its language."240 Just as an employer is liable for sex discrimination and sexual harassment in the workplace, a school district should be held liable for the same conduct occurring on its campus.241 In light of the abundance of sexual harassment occurring among students which creates a hostile educational environment, and its harmful and potentially permanent consequences, it is essential that courts "place an affirmative duty on school officials to prevent peer sexual harassment."242 Because of a lack of Supreme Court precedent addressing peer sexual harassment in the educational context, it is proper for courts to refer "to Title VII's employment provisions in deciding Title IX educational cases," and to adopt "the elements of Title VII workplace sexual harassment claims."243

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238 See id. at 1412-13 (Barkett, J., dissenting). Starting with a plain meaning analysis, the dissent concluded that liability under Title IX "hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination," of which hostile environment sexual harassment is one form of such discrimination. *Id.* (Barkett, J., dissenting) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992)). Furthermore, "the absolute prohibition contained in the text is framed solely in terms of who is protected. The identity of the perpetrator is simply irrelevant under the language . . . ." *Id.* (Barkett, J., dissenting). The dissent also found persuasive the fact that the federal agency responsible for enforcing Title IX interprets the statute "to impose liability on school officials for permitting an educational environment of severe, persistent, or pervasive peer sexual harassment when they know or should know about it, and fail to take immediate and appropriate corrective action to remedy it." *Id.* (Barkett, J., dissenting) (citation omitted).

239 *Id.* at 1415 (Barkett, J., dissenting).

240 North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (citations omitted). The Court in *Bell* found that Title IX protected employees of educational institutions. *Id.* at 520-35.

241 See *LAYMAN*, supra note 15, at 90.


243 *Id.* at 703; see *id.* n.40 (noting that many lower federal courts have already done so).

Some commentators argue that there are even more compelling reasons for imposing liability on educational institutions for sexual harassment than those compelling employers' liability in the workplace. *See* Neera Rellan Stacy, *Note, Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. Rev. 1338, 1354 (1996) (citing "six reasons for requiring a stricter standard of liability" for educational institutions, such as "the function and importance of a discrimination-free learning envi-
A. Compatibility of Title VII and Title IX

Title VII and Title IX are analogous, consisting of virtually identical language. 244 Both Title VII and Title IX proscribe sexual harassment as a form of discrimination on the basis of sex. 245 Title IX generally traces the more fully developed case law of Title VII. 246 Moreover, the Supreme Court in Franklin demonstrated that "unlike the Rowinsky court, it does not find use of Title VII analysis 'problematic' in considering Title IX issues." 247 It specifically relied on a workplace decision—Meritor—to support its finding that damages could be recovered in a Title IX harassment suit. 248 The Court also indicated a willingness to allow Title IX hostile environment claims, because the Franklin plaintiff alleged that a school employee had created an "abusive sexual environment," not that she suffered quid pro quo harassment. 249

Finally, "the Franklin court indicated that the overriding principle of Title VII, i.e., the elimination of discriminatory treatment, intimidation and scorn, should extend to Title IX actions brought by students," 250 thus acknowledging that "a student should have the same protection in school that an employee has in the workplace." 251 Several federal appellate and district courts have followed the Supreme Court's lead in recognizing the relevance of Title VII principles to Title IX hostile environment sexual harassment claims. 252 For exam-

244 See supra notes 51-52 and accompanying text.
246 See Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards. . . ."); Layman, supra note 15, at 90; supra note 127 and accompanying text.
247 Tukel, supra note 66, at 1156; see also Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) ("The Supreme Court's utilization of its Title VII case law to interpret Title IX in Franklin strongly indicates that Title VII precedent is appropriate for analysis of hostile environment sexual harassment claims under Title IX."); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022 (W.D. Mo. 1995) ("Franklin supports the conclusion that Title VII law provides standards for enforcing the anti-discrimination provisions of Title IX.").
248 Franklin, 503 U.S. at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).
249 Miller, supra note 127, at 711.
252 See cases cited supra note 127.
ple, in Collier by Collier v. William Penn School District, the plaintiff, a special education student, alleged that male classmates, whose conduct included "offensive language, sexual innuendo, sexual propositions, and threats of physical harm, repeatedly sexually harassed her." In holding that the plaintiff stated a viable cause of action, the court found that "Title VII is 'the most appropriate analogue when defining Title IX's substantive standards.'

B. Comparing the Work and School Environments

Commentators that oppose the application of Title VII principles to Title IX cases argue that the adult employment situation is just too different to import Title VII discrimination theory into a sexual harassment situation involving school children. However, many similarities exist between the employment and school environments that justify using Title VII principles in Title IX situations. In either setting, a victim of sexual harassment is denied the benefits of working or receiving an education in an environment free from discrimination. Schools have at least as much control over their students as employers have over their employees. Moreover, a school that does not intervene when a student sexually harasses another student, like the employer who remains idle while an employee sexually harasses another employee, thereby imprints its stamp of approval on the harassment.

To the extent that the workplace and the school yard do differ, those differences militate in favor of greater protection for students. "The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as stu-

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254 Id. at 1213 (quoting Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987)). The court concluded that because "Title VII imposes liability on employers for their failure to prevent or eradicate a sexually hostile environment created by employees," a school district should be liable under Title IX "for its failure to prevent or eradicate a sexually hostile environment created by students, as that environment discriminates and limits educational opportunities based on sex." Id. (citations omitted).
256 See Miller, supra note 127, at 721; see also Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 149 (5th Cir. 1992) ("There is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former and tolerate it in the latter."); reh'g granted and opinion vacated, 987 F.2d 231 (5th Cir. 1993).
257 Cf. Williams & Brake, supra note 43, at 433 (applying a similar analogy to the situation where a customer sexually harasses an employee).
258 See Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993) (noting that such differences "serve only to emphasize the need for zealous protection against sex discrimination in the schools"). JoAnn Strauss argues that schools must be held to a higher standard than employers because the relationship between a student and
students look to their teachers for guidance as well as for protection." The Supreme Court has also recognized that schools maintain "a degree of supervision and control [over school children] that could not be exercised over free adults.

Furthermore, the negative ramifications of sexual harassment in the academic setting may be even more pervasive and permanent than in the workplace because "the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior." Finally, although it may be economically difficult for an adult employee to change jobs, "it is virtually impossible for a child to leave the school to which he or she is assigned." This discussion of the educational and work environments demonstrates not only that Title IX peer sexual harassment situations are amenable to an application of Title VII principles and standards, but also that policy considerations demand giving students the same broad—if not broader—protection afforded to employees.

C. Final Policy Guidelines of the Office for Civil Rights of the Department of Education

The Office for Civil Rights of the Department of Education ("OCR")—the federal agency responsible for enforcing Title IX—has issued its final policy guidelines which apprise educational institutions of the standards that OCR will use (and that institutions themselves

an educational institution is materially distinct from the employee-employer relationship in many respects:

[a] student's tenure is of a short length, and any individual student has little ability to bring about change. Essentially the student has no where else to go and does not have the option to change jobs to escape from the hostile environment. The institution serves as the parent and the student's "home away from home" for seven or more hours of the day, and generally legislators have adopted protectionist and paternalistic laws to protect those of school age. Additionally, the student, through the taxpayer, is actively purchasing an education, and thus, the obligation of the institution is to provide a learning environment free from distractions such as peer sexual harassment.

Strauss, supra note 17, at 181 (citations omitted).

259 Id.
260 Rowinsky, 80 F.3d at 1024 (Dennis, J., dissenting) (analogizing from a prior Supreme Court case, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995), in which the Court held that a school board may require all participants in high school athletic programs to submit to urinalysis testing regardless of whether any grounds existed to suspect a particular athlete).

261 See AAUW Survey, supra note 16, at 15 (listing several adverse consequences of sexual harassment in schools, such as a desire not to attend school and a greater reluctance to speak in class).
262 Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir.), vacated, 91 F.3d 1418 (11th Cir. 1996), rev'd en banc, 120 F.3d 1390 (11th Cir.), petition for cert. filed, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).
263 Tukel, supra note 66, at 1157.
264 See id.
should use) when investigating and resolving hostile environment claims based on peer sexual harassment.\textsuperscript{265} In enforcing Title IX, OCR has discovered that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remediing sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.\textsuperscript{266}

The OCR guidelines explicitly state that the Department will apply, "as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the workplace developed under Title VII."\textsuperscript{267} Furthermore, the guidelines reference Title VII cases in establishing and defining OCR's standard of liability.\textsuperscript{268}

The OCR takes a position consistent with the Supreme Court case law that sexual harassment of students in certain circumstances is sex discrimination under Title IX.\textsuperscript{269} According to the policy guidelines, such sexual harassment encompasses peer sexual harassment.\textsuperscript{270} A school will be liable for peer sexual harassment if "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action."\textsuperscript{271} According to the OCR guidelines,

\begin{quote}
[u]nder these circumstances, a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school responsible
\end{quote}

\textsuperscript{265} See Sexual Harassment Guidance, supra note 105, at 12,034. Agencies' guidelines on statutes that they are empowered to interpret and enforce are persuasive authority for the courts and thus are entitled to deference. See, e.g., North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982) (noting that the Supreme Court "normally accords great deference to the interpretation . . . of the agency charged with the statute's administration").

\textsuperscript{266} Sexual Harassment Guidance, supra note 105, at 12,034.

\textsuperscript{267} Id. at 12,046 n.2.

\textsuperscript{268} See, e.g., id. at 12,046-47 n.6, 12,047 nn.16-17, 12,048 n.36.

\textsuperscript{269} Id. at 12,038.

\textsuperscript{270} Id. The guidelines define hostile environment sexual harassment as sexually harassing conduct "by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment." Id. (emphasis added). Sexually harassing conduct can include "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." Id. (citation omitted).

\textsuperscript{271} Id. at 12,039 (citation omitted).
for the actions of harassing students, but rather for its own discrimi-
nation in failing to remedy it once the school has notice.\textsuperscript{272}
This interpretation of Title IX, holding schools liable for peer sexual
harassment, is consistent with the Department of Education’s inter-
pretation of Title VI of the Civil Rights Act of 1964, which would hold
schools liable for tolerating peer racial harassment.\textsuperscript{273} The OCR’s in-
terpretation is likewise consistent with the interpretation of Title VII
that the Equal Employment Opportunity Commission (“EEOC”) maintains, which holds employers liable for hostile environment sexual
harassment that co-workers have perpetrated.\textsuperscript{274}

D. How the Fifth and Eleventh Circuits Miss the Point

1. \textit{Rowinsky: The Wrong Standard}

The Fifth Circuit’s reasoning and adoption of a low standard of
care for schools in \textit{Rowinsky}\textsuperscript{275} “is contrary to \textit{Franklin}, as well as the
letter and spirit of Title IX.”\textsuperscript{276} The \textit{Rowinsky} court fundamentally
misconstrued Title IX liability in three ways. First, the court repeat-
edly emphasized that Title IX’s proscription against discrimination ap-
plies only to the acts of grant recipients, reasoning that “[i]nposing
liability for the acts of third parties would be incompatible with the
purpose of a spending condition, because grant recipients have little
control over the multitude of third parties who could conceivably viol-
ate the prohibitions of title IX.”\textsuperscript{277} The court clearly misinterpreted
the plaintiff’s lawsuit as an attempt to hold the school liable for the
behavior of one of its students.\textsuperscript{278} Rather, the plaintiff in \textit{Rowinsky}
expressly sought to hold the school, a grant recipient, liable for its
own conduct, namely “its failure to take appropriate measures in the
face of a known sexually hostile environment.”\textsuperscript{279}

\textsuperscript{272} \textit{Id.} at 12,039-40. Conversely, a school can avoid Title IX liability “if, upon notice of
hostile environment harassment, a school takes immediate and appropriate steps to rem-
edy the hostile environment.” \textit{Id.}

\textsuperscript{273} \textit{See} Racial Incidents and Harassment Against Students at Educational Institutions,

\textsuperscript{274} The EEOC’s Guidelines on Discrimination Because of Sex state that “[w]ith respect
to conduct between fellow employees, an employer is responsible for acts of sexual harass-
ment in the workplace where the employer (or its agents or supervisory employees) knows
or should have known of the conduct, unless it can show that it took immediate and appro-

\textsuperscript{275} Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir.),

\textsuperscript{276} \textit{See} Williams & Brake, supra note 43, at 429.

\textsuperscript{277} \textit{Rowinsky}, 80 F.3d at 1013.

\textsuperscript{278} \textit{See} Williams & Brake, supra note 43, at 430.

\textsuperscript{279} \textit{Id.} at 431; \textit{see also} Sexual Harassment Guidance, \textit{supra} note 105, at 12,036 (stating
the OCR’s belief that \textit{Rowinsky} was based on the mistaken fear of holding a school liable for
the actions of a harassing student, “rather than for the school’s own discrimination in
failing to respond once it knows that the harassment is happening”).
In addition, the Rowinsky court erroneously relied on the absence of a "key ingredient—a power relationship between the harasser and the victim"—to reject the use of Title VII standards in the context of peer sexual harassment situations. Verbal sexual harassment among students frequently occurs in the context of presumptions that women are generally inferior or less competent than men. This form of sexual harassment is usually expressed in the form of "'prove[-it words boys . . . exchange to show that they are strong,'" and gestures, such as "'pointing at [the girls], reducing them, cutting them down to size,'" frequently accompany verbal sexual harassment. "Young men soon learn that acting out their contempt for women is a way of confirming their own manhood." Male rumors about female students' sexual activity and promiscuity, "whether fabricated or real, empower young men at the same time as [they] disempower young women because of the double standard that exists in relation to male-female sexual activity."

Rampant sexual harassment between students is breeding a new generation of male sexual harassers and "[w]hen the sexual harassment that young women experience at school is tolerated, educators contribute to the reproduction of a patriarchal society in which men frequently use violence to express their sexual domination over women." In this manner, "'[s]chools help to reproduce, rather than to change the existing imbalance of power between men and women.'" For these reasons, contrary to the court's conclusion in Rowinsky, the key ingredient of power is not missing from the situation of peer sexual harassment. Rather, sexual harassment between stu-

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280 Rowinsky, 80 F.3d at 1011 n.11.
281 See Jones, supra note 14, at 39 ("Schools do not exist in a social vacuum. They reflect and reproduce the power relations within a male supremacist society—a society in which the dominant group (men) ultimately maintain their power position through force.").
282 See Larkin, supra note 15, at 268.
283 Id. at 263 (quoting MARGARET ATWOOD, CAT'S EYE 244-45 (1988)).
284 Id. at 264.
285 Id. at 270.
286 See Roscoe et al., supra note 104, at 522 (noting that "[m]ost studies show that about one-half of adult sexual offenders committed their first act of sexual aggression as an adolescent and that these offenses increased in severity and frequency over time").
287 Larkin, supra note 15, at 264; see also Jones, supra note 14, at 33 ("Male violence in mixed schools serves to support boys as they practic[e] their sexual domination over girls and it attempts to teach girls that it is 'natural' for them to be tyrannized by men into a subordinate position.").
288 Larkin, supra note 15, at 264 (citation omitted) (noting that schools fail to acknowledge the extent to which young women are victims of sexual harassment, they fail to recognize the tremendous impact that these harassment experiences have on women's lives, and they fail to intervene to stop the harassment).
dents is simply a manifestation of the premature gender power struggle that will one day extend into the workplace.

Finally, the Rowinsky court failed to recognize that, because a female employee can suffer harassment at the hands of her co-worker or a subordinate employee, the essential element of hostile work environment sexual harassment is not necessarily power. The key to hostile work environment sexual harassment is that the harassing behavior is nonconsensual; in short, "the recipient must not desire or welcome the sexual advance."289 Such nonconsensual behavior is arguably more prevalent in schools than in the workplace.290 Viewing it from this perspective, Title IX sexual harassment clearly encompasses situations where a boy grabs a girl's breast or tries to undo her bra strap, when she does not desire this attention. Even if one assumes that no real power relationship exists between a peer sexual harasser and his or her victim, hostile work environment analysis still properly applies to hostile educational environment cases because the behavior is nonconsensual.

2. Davis: Misinterpreting Title IX on the Second Try

The Eleventh Circuit's first opinion in Davis291 was a landmark decision that stood as a guide for many district courts.292 However, in its en banc rehearing,293 the court's decision and rationale, like those in Rowinsky, fail to comport with Franklin and Title IX in fundamental ways. The en banc court's examination of the legislative history, upon which its decision is largely based, is one-sided and ignores basic Supreme Court precedent and explicit OCR guidelines. First, "the mere fact that student-on-student sexual harassment may not have been specifically mentioned in the Congressional debates does not mean that it was not encompassed within Congress's broad intent of preventing students from being 'subjected to discrimination' in federally funded educational programs."294 Under the majority's extremely narrow view of Title IX's legislative history, even claims alleging the same teacher-on-student hostile environment sexual harassment that the Supreme Court recognized in Franklin, would not be actiona-

289 Layman, supra note 15, at 12.
290 See AAUW Survey, supra note 16, at 7 (finding that 81% of students surveyed had experienced unwanted or unwelcomed sexual harassment).
292 See supra note 222.
293 Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir.) (en banc), petition for cert. filed, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).
294 Id. at 1413 (Barkett, J., dissenting).
Furthermore, the majority's surprising conclusion that when Congress used the unqualified phrase, "discrimination under any education program," it "only intended to cover the narrow areas of admissions, services, and employment" further distorts common sense and the plain meaning of the statute.

E. The Proper Test Under Title IX for Peer Sexual Harassment

Under Title VII, an employer can be liable for a coworker's harassment, as well as for hostile work environment harassment. Students who are sexually harassed by their peers deserve as much protection in their school environment as employees who are harassed by their coworkers. Therefore, the liability of schools for sex discrimination under Title IX is properly extended by analogy to Title VII to include claims for sexual harassment by peers, when it is so severe or pervasive as to create a hostile educational environment. If a school knew, or should have known, that a hostile environment created by another student existed in the school, and if it took no action to remedy the situation, then the school should be held liable for monetary damages under Title IX. More specifically, a school should be held liable if the plaintiff can prove: (1) that s/he was a member of the protected group; (2) that s/he was subject to unwelcome conduct of a sexual nature; (3) that the harassment was based on sex; (4) that the harassment was "severe, persistent, or pervasive" enough to have altered the conditions of her learning environ-

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295 See id. (Barkett, J., dissenting). As Judge Barkett stated, "[s]urely the majority would not suggest that the cause of action that the Supreme Court recognized in Franklin does not exist simply because it was not specifically mentioned in the legislative history." Id. at 1414 (Barkett, J., dissenting).
297 Davis, 120 F.3d at 14 (Barkett, J., dissenting).
298 See, e.g., Ellison v. Brady, 924 F.2d 872, 881-83 (9th Cir. 1991) (discussing what remedial actions an employer can take to shield itself from Title VII liability for sexual harassment by coworkers).
300 See Gant, supra note 82, at 508 (noting that the next step, after the Supreme Court's pronouncement that courts may award damages under Title IX in a case of teacher-to-student sexual harassment, "is to offer students who are sexually harassed by their peers as much protection under the law as employees who are harassed by co-workers").
301 Title IX protects any "person" from sex discrimination. See 20 U.S.C. § 1681(a). Thus, both male and female students are protected from peer sexual harassment. See Sexual Harassment Guidance, supra note 105, at 12,039.
302 See Sexual Harassment Guidance, supra note 105, at 12,040 ("Conduct is unwelcome if the student did not request or invite it and 'regarded the conduct as undesirable or offensive.'") (citation omitted).
303 Title IX prohibits sex discrimination "on the basis of sex." 20 U.S.C. § 1681(a). This includes sexual harassment "regardless of the sex of the harasser, i.e., even if the harasser and the [victim] are members of the same sex." Sexual Harassment Guidance, supra note 105, at 12,039.
and (5) that the appropriate school officials failed to take prompt and remedial action, despite having actual or constructive knowledge of the harassment.

The final element of this test is a point of contention for federal courts utilizing Title VII principles in Title IX sexual harassment cases. Currently, the courts disagree on the appropriate standard for institutional liability in cases involving both the sexual harassment of a student by a teacher and peer sexual harassment. Courts that have held that Title IX requires actual notice of the alleged sexual harassment to find school liability maintain that because Congress adopted Title IX pursuant to the Spending Clause, monetary recovery is available only in cases of intentional discrimination of a grant recipient. Given that Title VII's "should have known" prong is a standard based on negligence, not intent, ... negligence cannot support a monetary award for a claim brought under Spending Clause legislation, ... a 'should have known' standard cannot create

See id. at 12,041. In evaluating the harassing behavior for pervasiveness, courts should consider the conduct from an objective and subjective perspective, and should take into account all relevant circumstances: whether the harassment negatively affected more than one student's educational environment; the "type, frequency, and duration of the conduct"; the "identity and relationship" between the perpetrator and the harassment victim(s); the number of students involved; the "age and sex" of the individuals involved; the "size of the school, location of the incidents, and context in which they occurred"; whether or not other similar incidents also occurred at the school; the occurrence of other "incidents of gender-based, but non-sexual, harassment." Id. at 12,041-42.

A school must take "immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again." Id.

A school has constructive knowledge when it "should have known" about the sexual harassment through the exercise of reasonable care. Id.

Compare Kraunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997) (holding that Title VII's actual and constructive notice applies to Title IX hostile environment sexual harassment claims) with Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1226 (5th Cir. 1997) (holding that school districts are not liable for Title IX teacher-student harassment unless a supervisor "actually knew of the abuse, had the power to end the abuse, and failed to do so") (citing Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997)), cert. granted, 118 S. Ct. 595 (1997).

Compare Doe v. Oyster River Coop. Sch. Dist., No. 95-402-SD, 1997 WL 839794, at *8 (D.N.H. Aug. 25, 1997) (applying the "knew-or-should-have-known standard" in a peer sexual harassment case) with Doe v. University of Ill., Nos. 96-3511, 96-4148, 1998 WL 88341, at *8 (7th Cir. Mar. 3, 1998) (holding that a school "may be held liable for . . . student-on-student sexual harassment . . ., provided the [school] actually knew that the harassment was taking place").

See, e.g., Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1028 (7th Cir. 1997). The Seventh Circuit in Smith held that "a school district is liable for teacher-student sexual harassment 'only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so.'" Id. at 1034 (quoting Rosa H., 106 F.3d at 660).
in institutional liability under Title IX."\textsuperscript{310} However, more persuasive reasoning comes from the courts that have held constructive notice—that the school knew or should have known about the harassment—is sufficient for Title IX institutional liability. Proponents of this standard argue that "the plain meaning of Title IX and the \textit{Franklin} decision... put school districts on notice that they [are] liable for failing to take steps reasonably calculated to end... sexual harassment of which they knew or should have known."\textsuperscript{311} Furthermore, constructive notice only holds "an educational institution directly liable for its own misconduct in failing to stop ongoing intentional discrimination."\textsuperscript{312} Rather than opening the liability floodgates, this standard imposes educational liability only where (1) "[the school] has actual knowledge of the sexual harassment"; (2) "the atmosphere at the school is so permeated with harassment that the school must have known of the harassment"; or (3) "[the school] knew enough underlying facts to support a reasonable conclusion that actionable sexual harassment was occurring."\textsuperscript{313} The OCR guidelines also advocate the use of a "knew or should have known" standard for institutional liability.\textsuperscript{314} The Supreme Court will hand down the final word on this issue—at least for teacher-student sexual harassment—when it decides \textit{Doe v. Lago Vista Independent School District} later this term.\textsuperscript{315} However, for now, a few courts' adoption of the higher actual notice standard should not have too negative an impact on peer sexual harassment litigation because, as the case discussion above indicates,\textsuperscript{316} these cases almost always involve situations in which parents complained repeatedly to school officials about the sexual harassment of their children.

\textbf{IV}

\textbf{A\textit{V}OIDING POTENTIAL LIABILITY UNDER \textit{T}ITLE IX: CREATING, IMPLEMENTING, AND ENFORCING A SEXUAL HARASSMENT POLICY}

As the preceding Sections of this Note indicate, the problem of student-to-student sexual harassment and its treatment under Title IX

\begin{itemize}
  \item \textsuperscript{310} \textit{Id.} at 1029 (citations omitted).
  \item \textsuperscript{311} Nicole M. v. Martinez Unified Sch. Sys., 964 F. Supp. 1369, 1378 (N.D. Cal. 1997).
  \item \textsuperscript{312} \textit{Oyster River}, 1997 WL at *9 (D.N.H. Aug. 25, 1997). The court in \textit{Oyster River} held that "an educational institution can be liable under Title IX for student-on-student sexual harassment if it knew or should have known of the harassment and failed to take measures reasonably calculated to end it." \textit{Id.} at *10.
  \item \textsuperscript{313} \textit{Id.} (citations omitted).
  \item \textsuperscript{314} Sexual Harassment Guidance, \textit{supra} note 105, at 12,039.
  \item \textsuperscript{315} \textit{See} Greenhouse, \textit{supra} note 69, § 1, at 22.
  \item \textsuperscript{316} \textit{See supra} Part II and cases discussed therein.
\end{itemize}
remains unsettled. Unfortunately for school officials, students, and parents, no end to the confusion is in sight. Consequently, school officials continue to operate without clear guidance and must “depend upon the advice of their own lawyers about how to react to incidents of harassment.” However, one thing is clear—schools that do not guard against the sexual harassment of their students—whether employees or other students are the perpetrators—face the threat of litigation, exposure to considerable damages, and payment of attorneys’ fees.

In light of such concerns, what should a lawyer advise a school to do? Unfortunately, “[e]ducators are often unaware of sexual harassment of students in their institutions until they have been involved in a sex discrimination lawsuit.” Perhaps the only definite advice that a lawyer can give to a concerned school is to be proactive, not reactive, in terms of confronting the issue of student sexual harassment. Here, the employment context teaches another lesson. In April 1996, the Equal Employment Opportunity Commission filed the largest sexual harassment lawsuit ever against Mitsubishi Motors. The EEOC alleged that hundreds of employees had been sexually harassed, and that Mitsubishi took no effective action to prevent or correct the problems. As a reaction to the lawsuit and the accompanying nega-

317 Opening a new term on October 7, 1996, the Supreme Court declined to render any new legal guidance on this issue, and chose to stay out of the growing debate when it denied certiorari to the appellants in Rowinsky. Rowinsky v. Bryan Indep. Sch. Dist., 117 S. Ct. 165 (1996) (denying certiorari); see also Lyle Denniston, High Court Refuses to Take up Student Sexual Harassment Case: As New Term Begins, Justices Opt to Stay out of Growing Controversy, BALTIMORE SUN, Oct. 8, 1996, at 3A.

318 It appears that the Court may be considering review of Davis v. Monroe County Board of Education, 120 F.3d 1390 (11th Cir. 1997) (en banc). See Ron Martz, High Court Could Get Forsyth Suit: Sex Harassment at School Is Issue, ATLANTA J. CONST., Jan. 27, 1998, at B4 (reporting on the Supreme Court’s recent request for the Justice Department’s opinion on the issue of school liability for peer sexual harassment, perhaps “to determine if there really is a conflict in federal court rulings on the same issue or whether there are different issues at stake”). However, the answer could take months, and it is very unlikely that the Court would grant certiorari to Davis and issue a decision before Spring 1999. See id.

319 Denniston, supra note 317, at 3A.

320 See Lewis & Hastings, supra note 18, at 21.

321 Id. at 20.

322 See id. at 21.


tive press, Mitsubishi hired former Congresswoman and U.S. Labor Secretary Lynn Martin to head a task force to study its workplace and to recommend changes to create a "model workplace environment." Martin unveiled a thirty-four point roadmap that Mitsubishi plans to implement over the next two years. The roadmap recommends sweeping changes that go far beyond sexual harassment. So far, the scandal has cost Mitsubishi $9.5 million to settle a related private lawsuit brought by twenty-seven individual plaintiffs.

One thing is clear for schools. Taking a "boys will be boys" or "children can be so cruel" attitude is not sufficient in a world where "the law . . . in most states . . . requires schools to have sexual harassment policies," and some courts are appropriately holding schools liable under Title IX. Furthermore, it is essential for students' psychological well-being and for the integrity of the learning environment that school officials approach the issue of peer sexual harassment with the same seriousness that it devotes to other prevalent problems in the school environment, such as gang-violence and teenage drug and alcohol abuse. Taking the following steps can help schools address the problem of student-to-student sexual harassment and avoid potential liability under Title IX.

A. Adopt a Written Sexual Harassment Policy

The first step schools must take is to adopt a written sexual harassment policy. "Many courts have found the key determination in cases of sexual harassment is the presence or absence of an effective, publicized and consistently enforced sexual harassment policy and complaint procedure." Though a school may face liability even if it does have a sexual harassment policy, the absence of such a policy will certainly increase the chances that the school district will incur liabil-

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325 The Rainbow Coalition, which Reverend Jesse Jackson and the National Organization of Women headed, led a joint boycott of Mitsubishi products. See Kathy McKinney, Martin to Detail Mitsubishi Report Next Week, THE PANTAGRAPH, Feb. 8, 1997, at Cl.
326 Id.
328 See id. The report suggests, among other things, that Mitsubishi "change its sexual-harassment-complaint procedure, create a discipline committee, increase employee training and launch a 'zero tolerance task force' to prevent harassment." Id.
330 Lewis & HASTINGS, supra note 18, at 25 (stating a "boys will be boys" response by schools to sexual harassment "[m]ay [b]e [c]ostly").
331 How Schools Handle Sexual Harassment, USA WEEKEND, Sept. 6, 1996, at 16 (emphasis added).
332 See supra Part II.A.
333 Lewis & HASTINGS, supra note 18, at 37 (italics omitted).
Therefore, it is absolutely necessary for schools to draft and enforce a written “zero-tolerance sexual harassment policy” that applies to both employees and students, and makes clear that the school will not permit or condone sexual harassment on its campus. The adoption of such a policy demonstrates that there is a real commitment on the part of the administration to provide an educational environment free of sexually harassing conduct. It can also “open the lines of communication [that] encourag[e] victims to report harassment without fear of repercussions.”

There is no doubt that “trying to write detailed regulations about what is permissible between boys and girls during their most chaotic years . . . makes drafting the Code of Federal Regulations look easy.” Writing a sexual harassment policy that addresses the multifaceted behavior of students is a delicate balancing procedure. On the one hand, it is not appropriate to implement a policy that punishes simply flirtatious behavior; on the other hand, schools cannot tolerate peer behavior that is really harassment by dismissing it as “youthful exuberance.”

Clarity is key. “A clear policy will facilitate handling cases and create a school-wide awareness of sexual harassment which may produce a hostile environment.” The sexual harassment policy should clearly define what conduct constitutes sexual harassment in terms the
students can understand.\textsuperscript{341} It should also give examples of the types of prohibited behavior\textsuperscript{342}—to put students on notice of the exact behavior that the school will not tolerate.\textsuperscript{343} The policy should be flexible enough to address the different types and varying degrees of sexual harassment.\textsuperscript{344} For example, “[c]onsideration must be given to verbal, non-verbal and physical harassment, graffiti, sexually explicit material, flashing and other manifestations of unwanted attention.”\textsuperscript{345}

The policy should describe potential perpetrators and victims.\textsuperscript{346} Because there is no one way to deal with all cases, the policy should

\textsuperscript{341} See, e.g., Maria Giordano, \textit{Board Broadens Harass Policy}, \textit{New Orleans Times-Picayune}, July 17, 1997, at B1 (reporting on St. Charles Parish School Board’s adoption of a new policy regarding student sexual harassment that defines sexual harassment as “any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”) (internal quotation marks omitted); Laura Pace, \textit{Harassment the Target of a New Policy}, \textit{Pittsburgh Post-Gazette}, Aug. 6, 1997, at S1 (reporting on a new sexual harassment policy for Mt. Lebanon High School which states that “[s]exual harassment includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact and/or verbal, visual or physical conduct of a sexual nature”); \textit{Shelby School Panel Tightens Definitions of Harassment}, \textit{Com. Appeal}, Sept. 26, 1997, at A15 (reporting on a new sexual harassment policy for Shelby County schools that defines harassment as “conduct, advances, gestures or words either written or spoken that interfere with someone’s work or a student’s education, that create a hostile learning or work environment, or imply that one must submit to advances to earn grades or continue to work”); \textit{Zion Lutheran Schools Board, Student/Youth Sexual Harassment} (last modified Dec. 21, 1993) <http://www.writetype.com/sbm/02-05-06.html> (defining sexual harassment “as including but not limited to unwelcome sexual advances, requests for sexual favors, repeated derogatory sexist remarks, and other verbal, visual, or physical conduct of a sexual nature directed toward a student”).

\textsuperscript{342} See, e.g., Pace, supra note 341, at S1 (reporting on a new sexual harassment policy under which harassment may include “unwelcomed touching, leering, staring, sexual flirtations, propositions, pressures for sexual activities, sexual slurs, threats, spreading of sexual rumors, repeated demeaning remarks or unwelcome jokes”); \textit{Zion Lutheran Schools Board, supra} note 341 (listing types of sexual harassment that include verbal examples—“sexually demeaning comments, sexually explicit statements, questions, slurs, jokes, anecdotes, or epithets”; written examples—“suggestive or obscene letters, notes, or invitations”; physical examples—“sexual assault, touching, impeding or blocking movement”; visual examples—“leering, gestures, displays of sexually suggestive objects or pictures, cartoons, or posters”; “contin[u]ed express[ions of] sexual interest after being informed that the interest is unwelcomed”; and the “making [of] reprisal, or threats of reprisal following a negative response to sexual advances, or following a sexual harassment complaint”).

\textsuperscript{343} \textit{See LAYMAN, supra} note 15, at 122.

\textsuperscript{344} See \textit{id.} at 123. In a study of four Canadian high schools, the author divided student sexual harassment experiences into four categories: verbal harassment (including “put-downs” by male students such as “witch,” “bitch,” “dog,” “bimbo,” “baby,” “chick”); physical harassment (consisting of “grabbing, touching, rubbing, pushing, pinching, kicking, slapping, and sexual assault”); and visual harassment (comprising “leering, ogling, sexual gesturing, teas[ing] with pornography”). Larkin, \textit{supra} note 15, at 268-74; \textit{see also TrL, supra} note 112, at 7-8 (defining a “hierarchical continuum” of sexual harassment: “general[ized] sexist remarks or behavior”; “[i]nappropriate and offensive, but essentially sanction-free sexual advances”; sexual activity or behavior solicited by “promise of reward”; sexual activity coerced “by threat of punishment”; and “[s]exual assaults”).

\textsuperscript{345} \textit{Herbert, supra} note 336, at 49.

\textsuperscript{346} \textit{See Roscoe et al., supra} note 104, at 521.
delineate how the school will address different types of discrimination: "adult to adult, adult to student, student to adult, student to student." It should state the disciplinary penalties that the school may impose for each type of violation. Penalties for violations of the policy should take into consideration "the frequency of the harassment"; "the age of the victim"; the relationship between the perpetrator and the victim; the "nature" of the harassment; the location and time of the conduct; and the "wishes" of the victim. Finally, the school should update and modify the policy as needed.

B. Establish a Complaint Procedure

The procedure that schools implement for reporting harassment complaints must "establish and maintain open lines of communication with educators, administrators and students." The procedure should create a confidential environment in which the school encourages students to report any harassment that they experience. "Assurances of confidentiality, to the greatest degree possible, will . . . increase reporting." The sexual harassment policy should be clear regarding the procedure for filing a grievance, and should include information on how to document sexually harassing behavior as well as a widely disseminated list of trained personnel to whom students can make formal complaints. Possible individuals to whom stu-

347 Herbert, supra note 336, at 49.
348 Id. at 50.
349 Lewis & Hastings, supra note 18, at 39.
350 See Layman, supra note 15, at 121. There are several reasons why victims of sexual harassment stay silent or try to deal with harassment without involving school administration: anxiety that they are in some way responsible for the incident(s); fear that people will not believe them; shame at their involvement "in any form of sexual incident"; a belief that nothing will be done about their complaint; a fear of retaliation by the harasser. Till, supra note 112, at 28.
351 Lewis & Hastings, supra note 18, at 39. See, e.g., Zion Lutheran Schools Board, supra note 341 (stating that "[e]very effort shall be made to protect the privacy of parties involved in any complaint," and that "[f]iles pertaining to complaints are confidential and will only be discussed when necessary for the investigation and/or resolution of the matter").
352 Grievance procedures can be either informal or formal. "Informal procedures place the responsibility on the complainant to attempt to negotiate an end to the harassment by confronting the harasser candidly and directly." Layman, supra note 15, at 151. "Formal procedures are more adversarial and require the filing of a written complaint, investigation, and a factual finding of guilt or innocence." Id. at 152. See, e.g., Giordano, supra note 341, at B1 (reporting on St. Charles Parish School Board's adoption of a new student sexual harassment policy with a formal procedure for addressing complaints, under which students can file a harassment report with the assistant principal); Zion Lutheran Schools Board, supra note 341 (providing a three-step complaint procedure with both informal and formal components, ranging from directly confronting the person responsible for the conduct, to appealing the Senior Partner's adverse decision to the Governing Board).
353 See Herbert, supra note 336, at 50.
dents can complain if they believe they have been sexually harassed include "any principal, assistant principal, administrator, guidance counselor, psychologist, teacher, or school nurse."354

C. Educate Supervisors, Employees, Students, Teachers, and Parents About the Policy and Reporting Procedure

The AAUW Survey documented many alarming statistics, including that more than half of the surveyed students (57%) were unaware of whether their school had a sexual harassment policy.355 "Education is the key to prevention,"356 and "the more efforts that are taken to educate and inform the educational population of harassment and the policy against it, the greater the likelihood that the institution will be absolved of liability for harassment."357 Therefore, an important step in addressing and preventing peer sexual harassment is educating students, teachers, and parents on how to identify sexual harassment, how to report it, and how to respond to an allegation.358 At the very least, the school should disseminate the policy widely and "[a]ll school personnel, . . . staff, parents and students, should have access to a copy of the sexual harassment policy."359 Appropriate places for posting the policy include lunch rooms, lounges, hallways, bulletin boards, and official handbooks.360 The school should redisseminate the policy on a regular basis, perhaps yearly.361

Posting and distribution of the policy should accompany training and discussion for everyone involved.362 "It can be highly advantageous to gather information from students regarding experiences with sexual harassment behaviors prior to an educational program since this information can be used for illustration purposes and to

354 Pace, supra note 341, at 81.
356 Larkin, supra note 15, at 277 (internal quotes omitted); see also Sexual Harassment Guidance, supra note 105, at 12,034 (noting that "school personnel who understand their obligations under Title IX are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs").
357 Lewis & Hastings, supra note 18, at 41.
358 The OCR has developed a useful pamphlet for conveying basic information regarding parties' rights and responsibilities under Title IX. Office for Civil Rights, supra note 1.
359 Herbert, supra note 336, at 52. See, e.g., Zion Lutheran Schools Board, supra note 341 (posting a copy of the policy in each administrative office, providing a copy to all currently enrolled students, distributing a copy at all orientation programs for new students, placing the policy in all Zion policy manuals, and providing a copy for all members of the faculty, administrative staff, and support staff).
360 See Lewis & Hastings, supra note 18, at 40.
361 See id.
362 See Herbert, supra note 336, at 52; Layman, supra note 15, at 120. "Age is a factor to be considered . . . when determining what type of education or training to provide to students in order to prevent sexual harassment from occurring." Sexual Harassment Guidance, supra note 105, at 12,034.
attract and maintain students' interest."363 Educational strategies include distributing questionnaires, conducting in-service workshops,364 and incorporating sexual harassment into the regular curriculum.365 Review of peer harassment issues and policies can take place in public hearings, interviews, and evaluations.366 Schools should encourage student government and organizations to become involved in the effort. "Periodic or regular newsletters distributed to employees and students could contain additional information regarding the policy, reporting procedure or harassment."367 Additionally, sexual harassment training should be a regular part of the orientation of any new student or employee.

D. Address Complaints and Conduct Investigations

Schools should investigate and resolve all sexual harassment complaints, large and small, in a quick and equitable manner.368 The strategy should be to remedy the situation as quickly as possible and to protect the privacy and confidentiality of the students involved.369 A school's prompt and corrective response to reported harassment can limit its liability in later suits.370 Furthermore, "[p]rompt action will prevent the escalation of smaller incidents like teasing."371 Because it is unclear exactly what student behavior might be actionable and create institutional liability, "educators should err on the conservative side, promptly investigating complaints and sincerely enforcing any policies via appropriate warnings and discipline."372

Taking into consideration the age and maturity of the students involved when addressing allegations of sexual harassment will promote an appropriate response to allegations and will guard against overreaction.373 "[A]ge is relevant in determining whether sexual harassment occurred in the first instance, as well as in determining the

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363 Roscoe et al., supra note 104, at 521 (emphasis omitted).
364 See, e.g., Lisa Renfro & Steve Moore, Sexual Harassment Forum Educates Parents, THE PRESS-ENTERPRISE, Nov. 7, 1996, at B9 (reporting on a forum for parents at West Valley High School that addressed "how to identify sexual harassment, how to report it and how to respond when an allegation is made").
365 See Roscoe et al., supra note 104, at 521 (recommending "that educational sessions be held at the intermediate school level to inform students about sexual harassment and its potential consequences to both victims and perpetrators").
366 See Lewis & Hastings, supra note 18, at 41. Another idea involves setting up support groups for female students to share their experiences and to discuss appropriate action. See Jones, supra note 14, at 35.
367 Lewis & Hastings, supra note 18, at 41.
368 See Layman, supra note 15, at 121.
369 See id.
371 Id. at 407.
372 Lewis & Hastings, supra note 18, at 28.
373 See Sexual Harassment Guidance, supra note 105, at 12,034.
appropriate response by the school." In cases like Johnathan’s and De’Andre’s, a general student conduct code, rather than a specific sexual harassment policy, may provide a more “age-appropriate” method of handling innocent but unwelcome kisses that “do[] not rise to the level of harassment prohibited by Title IX.” In the final analysis, a sexual harassment policy should guide, but not replace reliance on judgment and common sense.

CONCLUSION

Schools serve as the “principal instrument in awakening [children] to cultural values, in preparing [them] for later professional training, and in helping [them] to adjust normally to [their] environment.” Sexual harassment interferes with these common goals of education, the very goals that Title IX seeks to advance. Children are legally required to go to school—they do not have a choice: “[t]hey have a right to feel safe” and unthreatened in the school environment. More importantly, “[a] safe and equitable learning environment is fundamental to academic success.” Getting an education is difficult enough without adding the additional obstacle of rampant sexual harassment in school. Sexual harassment interferes with the education of a student, and turns an environment of learning into one of humiliation. The potential for physical and psychological damage as a result of sexual harassment is great: “Girls stop eating, fall ill and see their grades plummet.... [B]oys learn attitudes that carry over to the adult workplace....” Furthermore, the consequences may be permanent: “Being harassed at school teaches young women to accept this behavi[or] as an inevitable component of their everyday life.” Finally, sexual harassment in school

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374 Id. The OCR Guidelines state that age considerations can help determine “whether a student welcomed the conduct and . . . whether the conduct was severe, persistent, or pervasive.” Id.
375 See supra notes 2-7 and accompanying text.
376 Sexual Harassment Guidance, supra note 105, at 12,034.
377 See id.
378 Brown v. Board of Educ., 347 U.S. 483, 493 (1954); see also Lewis & Hastings, supra note 18, at 29 (“[r]ecognizing that school teaches [children] social skills, as well as academic [skills].”).
379 See Roscoe et al., supra note 104, at 515 (noting that sexual harassment hinders learning, “making it an issue of concern” with regard to older adolescents “since the mid-1970s”).
380 Bryant, supra note 89, at 40.
381 AAUW Survey, supra note 16, at 15.
382 See id. at 21.
383 See Lehrman, supra note 9, at A16.
384 Id. (citing court testimony and educators).
385 Larkin, supra note 15, at 264. The sexual harassment that young women encounter at school establishes “a precedent for the type of behavi[or] they expect[ ] to encounter
is even more devastating to young women because education is the path to future jobs and financial security. The vast disparity between men and women in the workforce makes it obvious that the underpinnings of sexual harassment begins well before entry into the workforce.

Sexual harassment is unwelcomed sexual conduct, including sexual jokes, comments, gossip, pinching, touching, blocking movement, or actual sexual assault. If an employee does not have to tolerate unwanted groping or sexual innuendo in the workplace, neither should a girl or boy in the classroom. Though it is easy to make light of Johnathan’s and De’Andre’s stories, the reality is that student-to-student sexual harassment is creating a hostile environment that jeopardizes the educational, emotional, and behavioral lives of America’s children. In response, most parents do not want to sue, “they want the harassment [of their child] to stop.” They only sue after their complaints to teachers, principals, and superintendents go unheeded. The challenge facing schools today is to address complaints, and to ensure that harassment does not continue.

Until that happens, the courts should continue to hold schools liable for money damages under Title IX when they fail to react in an appropriate and timely manner to student and parental complaints of persistent harassment. Application of Title VII principles and standards in the school setting is appropriate and necessary. Perhaps liability is the wake-up call schools need to compel them to approach the problem with the seriousness that it deserves. However, fear of liability should not push schools to the other extreme in attempting to regulate behavior and interaction among students. Mutual respect and responsible behavior is a lesson that today’s children and young adults need to learn, and it is the lesson that teachers should teach in the classroom along with reading, writing, and math.

[387] Lewis & Hastings, supra note 18, at 25.
[391] See, e.g., Delgado, supra note 21, at A14 (reporting the case of Tianna Ugarte, whose parents contacted a lawyer only after the school superintendent refused to act on their complaints of sexual harassment).
[392] See Larkin, supra note 15, at 267 (explaining that her intent in conducting the study was not to blame teachers for the peer sexual harassment that occurs in their classrooms, but “to emphasize that [teachers] need to acknowledge and confront it”).
[393] See supra Part III.
[394] See Lewin, supra note 27, at A22 (“Education experts say the fear of liability has led some schools to go to extremes, whether by forbidding students to hold hands or, as in both Queens and North Carolina, suspending boys for kisses on the cheek.”).
By refusing to address the problem of peer sexual harassment in their schools, "administrators not only increase their own liability, they also forego the opportunity to remedy a problem that deprives girls of an equal education with boys." While implementing and enforcing a no-tolerance sexual harassment policy can help a school avoid liability for sexual harassment, in the end, avoiding liability is not the best reason for acting to eliminate harassment in schools. "The best reason is that ending harassment enables all students to pursue their education more freely, to cooperate and learn from each other, and to contribute to their schools and community." Ultimately, one hopes that the question of whether or not a school district should be held liable for student-to-student sexual harassment becomes a moot point as school districts across the nation—in concert with their principals, teachers, parents, and students—actively work to eliminate peer sexual harassment in schools.

395 Layman, supra note 15, at 27.
396 See id. at 16.
397 Id.; see also Lewis & Hastings, supra note 18, at 25 (stating that "[t]here are ethical or moral reasons for burdening educational institutions with responsibility for sexual harassment of its students by other students").