STUDENT DESIGNED HOME WEB PAGES: DOES TITLE IX OR THE FIRST AMENDMENT APPLY?

Susan H. Kosse*

> *Liability for failing to prevent or rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measures would be to expose the school to a suit by the victim of the alleged harassment.*[1]

Imagine John Williams, a student at Washington Middle School, designed a web site at home that was very critical of his school and classmates. He specifically identified Mary Kinkaid, another student at Washington, on the page as a whore, slut and other equally derogatory names. He vividly described parts of Mary's body and graphically detailed what he wanted to do with Mary. He e-mailed all his friends in the sixth grade and provided them with a link to his web page so they could view it too.

Mary learned about the web page when many of the male students started teasing her about it and repeating information found on the web page. Mary became extremely depressed and had trouble sleeping and eating. She had always been a straight "A" student but started receiving failing grades. Mary asked her parents daily if she could "cut" school. Mary's parents met with the principal and informed him of John's web page and asked him to do something about it.

The principal comes to you for advice. He wants to know if he can discipline John for the web site. He also wants to know whether he can be liable to

---

* Susan H. Kosse is an Assistant Professor of Law at the Louis D. Brandeis School of Law, University of Louisville. J.D., University of Louisville School of Law, 1991; B.A., Miami University, 1987. I wish to thank my husband, Glenn Kosse, and my colleagues, Prof. Les Abramson, Prof. Carolyn Bratt, Prof. Kathy Bean and Prof. David Leibson, for all their helpful comments with earlier drafts.

1. Doe v. Univ. of Ill., 138 F.3d 653, 679 (7th Cir. 1998) (Posner, C. J., dissenting from denial of rehearing en banc).

Mary under Title IX if he fails to take action against John. What do you tell the principal?

Web pages designed by students to criticize, stigmatize and traumatize their classmates are becoming more and more common. For example, a web site called www.SchoolRumors.com "offered virtual scrawlings on a bathroom wall, and in two weeks it let 67,000 students into that bathroom for a peek. The stuff was scurrilous and vicious, cyberspace blood sport. One girl was reportedly ready to kill herself because of what the web site said about her."[2]

This and other types of student-on-student harassment are a major problem for schools today. Estimates from a 1993 study indicate that of the 1600 public high school students polled eighty-five percent of the girls and seventy-six percent of the boys reported experiencing some sort of sexual harassment.[3] The harassment takes many forms, from unwanted touching to minor insults or teasing.[4] It is against this backdrop that the Supreme Court in *Davis v. Monroe County Board of Education* decided in a 5–4 decision, that schools may be liable under Title IX in certain circumstances for failing to address peer-on-peer sexual harassment.[5]

Whether or not a school may be liable for the harassing material posted by John on his web site is somewhat difficult to ascertain, because the First Amendment may be implicated. Relatively little case law addresses students' speech rights in relation to web pages. Courts must adapt traditional tests regarding student speech to fit the entirely new medium of the Internet. It is not always easy to adapt law arising out of on-campus activities, for web pages are usually designed after school and not on school property. It is unclear whether schools have a right to discipline a student who designs a harassing web page from home.

The school is in a "catch-22." If school officials discipline the student-author, he may sue them on First Amendment grounds. If the administration fails or refuses to discipline the author, the school could face a lawsuit by the victim of the sexual harassment under Title IX. As discussed later in this Article, *Davis v. Monroe's* clear message to school districts is that they may be liable (under certain limited circumstances) for failing to address peer-on-peer sexual harassment. So what should a school district do?

This Article will examine the tension between liability for peer-on-peer harassment under Title IX and students' rights of free expression as guaranteed by

---

2. Patt Morrison, *Behind the Tragedy, the Despair of an Outcast*, L.A. TIMES, Mar. 7, 2001, at B1. The site was shut down days before high school student Andy Williams killed students at Santana High School in Southern California.

3. *See* AM. ASS'N OF UNIV. WOMEN, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993).

4. *See id.* at 9. Types of sexual harassment students experienced in school include: sexual comments, jokes, gestures or looks; touched, grabbed, or pinched in a sexual way; sexual rumors spread about them; had clothing pulled off or down; forced to do something sexual other than kissing.

5. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999). Title IX prohibits sexual discrimination by educational facilities.

the First Amendment.[6] Part I of the Article examines the trilogy of cases, *Tinker-Fraser-Hazelwood*, that established the rules for regulating student speech. Courts have adapted the holdings in these cases to controversies involving student web sites designed off school grounds. Part II explores the background of Title IX and the evolving law regarding peer-on-peer harassment. Finally, Part III analyzes whether student-generated harassing web pages create liability for a school under Title IX for peer-on-peer sexual harassment. The Article concludes by exploring whether a school, to avoid Title IX liability, can discipline a student for posting a harassing web page outside of school without running afoul of the First Amendment.

I. FREEDOM OF SPEECH AND THE WEB PAGE DILEMMA

A. The Tinker-Fraser-Hazelwood *Trilogy*

The United States Supreme Court has treated students' freedom of expression rights differently from those same rights for adults.[7] In large part, whether a student's speech is protected depends on how it is classified. A brief background of three pivotal Supreme Court cases concerning student speech illustrates this point.

In 1969, in the midst of the Vietnam War Protest era, the Supreme Court considered the case of *Tinker v. Des Moines Independent Community School District*.[8] One junior high and two high school students filed a Section 1983 action after they were sent home and suspended from school until they removed black armbands they were wearing to protest the war.[9] No acts of violence or any other disruption in the school occurred because of the students' attire.[10]

In holding for the students, the Court formulated a test to be used to determine the constitutionality of an attempt by a school to regulate student speech.[11] Restrictions on speech were constitutional only if the school administrators showed that the conduct somehow "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the

---

6. Although there have been some excellent articles written on the topics of web pages and the First Amendment, as well as Title IX and the First Amendment, there appears to be no commentary specifically addressing the collision of web pages designed outside of school, the First Amendment, and Title IX. *See* Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123 (2000); David L. Hudson, *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. MICH. ST. U.-DET. C.L. 199 (2000); Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205 (1999).

7. The student First Amendment rights cases show the Court's desire to more narrowly interpret what constitutes freedom of expression for students.

8. 393 U.S. 503 (1969).

9. *See id.* at 504.

10. *See id.* at 509, 514.

11. *See id.* at 509.

school."[12] The Court specifically acknowledged that students had the same rights as other persons under the Constitution and were entitled to free expression of their views in the absence of any disorder in the school.[13]

Less than two decades later, the Court seemed to retreat from its earlier protection of student speech. In *Bethel School District v. Fraser* the Court expanded school administrators' authority to regulate student speech.[14] A student was disciplined for giving a campaign speech for a fellow classmate that contained lewd language.[15] There was no evidence that the speech, heard by 600 students, resulted in any substantial disruption.[16] Despite its holding in *Tinker*, the Supreme Court ruled that the First Amendment did not prevent the school administrators from disciplining the student for giving the speech.[17] The Court carved out an exception to *Tinker* when the student's speech involves the use of vulgar or offensive language at a school sponsored event.[18] Despite the fact that an adult's vulgar or offensive speech is more fully protected by the First Amendment,[19] the Court held that schools are not constitutionally required to give student speech the same latitude.[20]

In explaining its decision, the Court noted that there must be a balance between the student's right to advocate unpopular and controversial views and society's countervailing interest in teaching students the boundaries of socially appropriate behavior.[21] A school is not only obligated to teach its students academic subjects but also has a duty to teach "by example shared values of a civilized order."[22] Thus, the Court held that the school acted appropriately in disciplining the student for his lewd and indecent speech.[23]

The last case of the trilogy also conferred on school administrators more power to regulate student speech, even if similar speech could not be regulated outside of school. In *Hazelwood v. Kuhlmeier*, a high school principal prevented the printing of two articles from a student run newspaper.[24] The first article described students' experiences with pregnancy and the second article discussed the impact of divorce on students at the school.[25] The principal was worried that

---

12. *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
13. *See id.* at 511. From this case comes the oft-quoted language of Justice Fortas: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506.
14. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
15. *See id.* at 677–78. Throughout the speech Fraser referred to the candidate with a sexually explicit metaphor.
16. *See id.* at 677.
17. *See id.* at 685.
18. *See id.*
19. *See* U.S. CONST. Amend. I.
20. *See Fraser*, 478 U.S. at 682.
21. *See id.* at 681.
22. *Id.* at 683.
23. *See id.* at 685.
24. Hazelwood v. Kuhlmeier, 484 U.S. 260, 264 (1988).
25. *See id.* at 263.

the articles might identify and embarrass students. He also felt the topic matter was inappropriate.[26] In ruling that a First Amendment violation had not occurred, the Court held that a school need not tolerate speech that is inconsistent with its educational mission.[27] The test, therefore, for regulations that censor student-run newspapers or yearbooks was whether or not the rules "reasonably related to legitimate pedagogical concerns."[28] The Court distinguished *Tinker* indicating that the *Tinker* test was not the appropriate test when school-sponsored speech, such as a newspaper, was involved.[29]

In summary, *Tinker-Frazier-Hazelwood*, establish three examples in which student speech can be regulated without violating the First Amendment. A school can prohibit speech if it: (1) will cause a material and substantial disruption to the school; (2) is lewd or offensive; or (3) is related to a legitimate pedagogical concern.

B. Students' First Amendment Rights with Web Pages

1. Beussink v. Woodland

Student designed web pages are anything but rare. Just a simple search for web pages containing "School Sucks!" produces a plethora of hits.[30] Despite the fact that there are hundreds of student-designed web pages, there is little case law about the school's right to discipline a student for designing such pages. The most widely cited decision is *Beussink v. Woodland R-IV School District*.[31] This case centered on a homepage Brandon Beussink, a student at Woodland High School, designed and posted on the Internet in 1998.[32] It used vulgar language and was highly critical of Woodland High School's administration, teachers and principal.[33] In addition, the homepage contained a hyperlink that would connect a viewer to the high school's official homepage.[34] The evidence showed that Beussink did not design the web page at school nor had it ever been accessed at school before the events leading up to the lawsuit.[35]

---

26. *See id.*
27. *See id.* at 266.
28. *Id.* at 273.
29. *See id.*
30. *See, e.g., School Sucks (And Here's Why), at* http://showcase.netins.net/web/Comput-IT/scott/schoolsux/ (last visited Apr. 19, 2001); *Seneca Valley High School SUCKS!!!!!!, at* http://members.tripod.com/~seneca_sucks/ (last visited April 19, 2001); *SchoolSux.com, at* http://www.schoolsux.com (last visited Apr. 19, 2001) (containing forum entries that range from requests for homework help to explicit, vulgar comments about teachers and classmates).
31. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).
32. *See id.* at 1177.
33. *See id.*
34. *See id.*
35. *See id.*

Prior to February 17, 1998, Amanda Brown, a classmate of Beussink viewed the web page while using Beussink's home computer.[36] Evidently Ms. Brown had a subsequent argument with Beussink and decided to retaliate on February 17, 1998, by showing the page to the computer teacher at their high school.[37] The teacher reported the web page to the principal who decided that Beussink's conduct merited some type of punishment.[38] It is unclear how many more times the page was accessed from the school that day but there was no evidence that any disruption occurred because of it.[39]

Ultimately Beussink received a ten-day suspension.[40] The school's absenteeism policy dropped a student's grade by one letter grade for each unexcused absence in excess of ten days.[41] Because suspension days were counted as unexcused absences, and because Beussink already had 8.5 days of unexcused absences, application of the policy resulted in his failing all his classes.[42] Beussink requested a preliminary injunction to prevent the school from enforcing the suspension.[43]

The United States District Court for the Eastern District of Missouri agreed with Beussink's belief that his free speech rights had been violated and enjoined the high school from using the suspension and enforcing any other sanction against Beussink for the homepage.[44] In addition, the court enjoined the high school from preventing Beussink from reposting the homepage.[45] The court was forced to decide which of the trilogy cases applied to Beussink's situation. If the speech was just political speech, *Tinker's* substantial disruption test would apply. If the speech was classified as lewd or offensive, *Fraser* would be determinative. Finally, if the speech was classified as school sponsored, the rational basis standard articulated in *Hazelwood* would be the correct standard. The court, mindful that society is best served by a wide dissemination of ideas, used the *Tinker* test to determine whether the punishment violated Beussink's freedom of speech.[46] Although the court was sympathetic to the school's need to maintain discipline, that need did not outweigh the student's freedom of expression when there was no showing that any disruption occurred in the school as a result of the web page.[47]

The Court did not discuss *Fraser* and relied solely on a *Tinker* analysis, despite the fact that the web page contained vulgar language, which would seem to call for analysis under *Fraser*. In *Fraser* the Court appeared to be impressed by the

---

36. *See id.*
37. *See id.* at 1177–78.
38. *See id.* at 1178.
39. *See id.* at 1178–79.
40. *See id.* at 1179.
41. *See id.*
42. *See id.* at 1180.
43. *See id* at 1177.
44. *See id.* at 1182.
45. *See id.*
46. *See id.* at 1181.
47. *See id.*

fact that the 600 students attending the school sponsored assembly were a captive audience.[48] By contrast, Beussink had no intention of anyone accessing his homepage and its design was not school sponsored.[49]

2. Emmett v. Kent

The same result was reached by the United States District Court for the Western District of Washington in *Emmett v. Kent School District*, when the school district was enjoined from suspending Emmett for creating a web page on the Internet from his home.[50] Emmett, a 3.95 grade point average student and captain of the basketball team, designed a web page that made derogatory references concerning the faculty.[51] The web page also included a section titled "Obituaries," which contained obviously fictional obituaries of several students.[52] In addition it contained a page that asked viewers to vote on "Who Should Die " and receive the next satirical obituary.[53] In ruling for the student the court focused on the fact that the web page involved out-of-school conduct without any evidence that it caused any school disruption.[54]

Judge Coughenour, unlike the judge in *Beussink*, addressed the *Fraser* decision directly stating that it was not applicable because the web page was not school-sponsored.[55] The Judge noted that the web site "was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control."[56] Therefore, Judge Coughenour held that the correct standard was *Tinker*, which Emmett could satisfy since there was no evidence of any disruption having occurred.[57]

3. Killion v. Franklin Regional School District

In one of the most recent student speech cases, *Killion v. Franklin Regional School District*, Paul Killion, was suspended for ten days after compiling a "Top Ten" list about the athletic director of his school.[58] Killion compiled the list

---

48. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677 (1986).

49. One could argue that designing a page to be displayed on the web necessarily indicates a desire to have it accessed.

50. Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

51. *See id.* at 1089.

52. *See id.*

53. *See id.*

54. *See id.* at 1090. After the Court's ruling, the school district dropped all disciplinary action and awarded Emmett $6,000 in attorney's fees. *See also Washington School District Pays More Than $60,000 to Student Suspended for Web Site Parody, at* http://www.splc.org/newsflashes/2001/020801washington.html (last visited Feb. 21, 2001).

55. *See Emmett*, 92 F. Supp. 2d at 1090.

56. *Id.*

57. *See id.*

58. Killion v. Franklin Reg'l Sch. Dist., No. CIV. A. 99-731, 2001 WL 321581, at *12–*13 (W.D. Pa. Mar. 22, 2001).

on his home computer and e-mailed it to other students' personal e-mail accounts, where it was then accessed from home.[59] Although, Killion did not distribute the list on school property, it was brought to the school by an undisclosed student and was found in the Franklin Regional High School teacher's lounge and the Franklin Regional Middle School.[60]

In ruling for Killion, the United States District Court for the Western District of Pennsylvania thoroughly analyzed the precedent regarding student speech. Citing *Emmett* and *Beussink,* the court noted that other courts have held that school officials' authority over off-campus speech is substantially more limited than their authority over speech on school grounds.[61] The court, however, refused to determine whether those holdings were correct since the list had actually been brought to the campus, though not by Killion.[62] Using the test in *Tinker*, the Court concluded that Killion's freedom of speech rights had been violated because there was no evidence that the list caused any disruption or was threatening.[63] The court also analyzed the facts under the *Fraser* test.[64] Concluding that the Court in *Fraser* was limiting its holding to lewd or indecent speech in the school environment, the district court refused to find it relevant since the list was made off school property.[65]

4. J.S. v. Bethlehem Area School District

Not all reported cases have resulted in student victories. In *J.S. v. Bethlehem Area School District* the court upheld a student's permanent expulsion for posting a web site at home that was threatening and critical of the principal and a teacher.[66] J.S., a middle school student, posted a web site titled "Teacher Sux" in which he made several derogatory comments about his algebra teacher and his principal.[67] A teacher at J.S.'s school learned about the web site through an

59. *See id.* at *1
60. *See id.*
61. *See id.* at *7.
62. *See id.* at *8.
63. *See id.*
64. *See id.* at *9–*10.
65. *See id.* The court likewise held students' First Amendment rights were violated when they were disciplined for off-campus conduct (citing several cases, including Thomas v. Bd. of Educ., 607 F.2d 1043 (2d. Cir. 1991) and Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986)).
66. *See* J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000). The web site commenting on why the algebra teacher should be fired included the following statements: "She shows off her fat fucking legs." "The fat fuck smokes." "She's a bitch!" "Fuck you [teacher]. You are a Bitch. You are a Stupid Bitch" (listed 136 times). As to the principal, the web page accused him of seeing another principal naked and "fuck[ing]her." *Id.* at 416.
67. *See id.* at 415.

anonymous e-mail and reported it to the principal.[68] The student voluntarily removed the web site; however, the School District still expelled him.[69]

At the expulsion hearing the school district made numerous findings of fact. These included that the web site solicited twenty dollars to help pay for a hit man to kill the algebra teacher and contained a picture of her with her head cut off, blood dripping from her neck and her face morphing into Hitler's face.[70] The school district also found that viewing the web site had severely affected the algebra teacher who lost weight, had trouble sleeping and ultimately was unable to return to the classroom.[71] As a result the school community was very demoralized and the educational process was disrupted.[72]

The court acknowledged that schools have great discretion in how they discipline their students and that it is normally not the judiciary's function to second-guess those decisions.[73] Like *Beussink*, the court used *Tinker's* First Amendment analysis.[74] Although the court mentioned *Fraser*, the court examined whether the school was correct in determining that J.S.'s web site materially and substantially interfered with the educational process.[75] The court upheld the expulsion, holding that the web site had a profoundly disturbing impact on the algebra teacher, which affected the educational process.[76]

The court explored in much depth whether the school could punish a student for conduct occurring outside of school.[77] Although admitting there is little case law on the issue, the court did analyze three cases addressing the problem.[78] The first, *Donovan v. Ritchie*, dealt with a "shit list" composed by several students off campus that made fun of other classmates' behavior, looks and character.[79] The list was discovered in a trashcan at the school. [80] Although the Fifth Circuit concentrated on the plaintiff's due process arguments, the court was satisfied that the off-campus activity had enough of a nexus to the on-school discovery of the list to justify the discipline.[81]

---

68. *See id.*
69. *See id.*
70. *See id.* at 416.
71. *See id.*
72. *See id.* at 417.
73. *See id.*
74. *See id.* at 418.
75. *See id.* at 421.
76. *See id.* An appeal was granted by the Pennsylvania Supreme Court on March 13, 2001. *See* J.S. v. Bethlehem Area Sch. Dist., 771 A.2d 1290 (Pa. 2001).
77. *See J.S.*, 757 A.2d. at 419–21.
78. *See id.*
79. *See id.* at 419 (discussing Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995)). The court in Killion v. Franklin Reg'l Sch. Dist., No. CIV. A. 99-731, 2001 WL 321581, at *11 (W.D. Pa. Mar. 22, 2001) distinguished *Donovan* because Donovan actually helped distribute the list at his school, unlike Killion, and the focus was primarily on whether the student had received due process.
80. *See J.S.*, 757 A.2d at 419.
81. *See id.*

Likewise, a student's suspension was upheld by the United States District Court for the Western District of Pennsylvania in *Fenton v. Stear*.[82] This case involved a student calling a teacher "a prick" on a Sunday night in the parking lot of a shopping mall.[83] The court refused to find Fenton's First Amendment rights had been violated holding that "[t]o countenance such student conduct even in a public place without imposing sanctions could lead to devastating consequences in the school."[84]

The court analyzed *Beussink*, acknowledging that the situation was different than the other two cases cited because the school did not have grounds to punish Beussink since there was no evidence of any disruption or interference with the educational process.[85] Instead the court in *Beussink* determined the only reason for the punishment was that the principal was upset by the web page's content.[86] The court distinguished the facts in *J.S.* because, unlike *Beussink*, there were threats the principal took seriously and the school environment was disrupted by the web page.[87]

5. Other Cases

Although not discussed by the court in *J.S.*, there are other cases that hold students' First Amendment rights were violated when they were punished for off-campus behavior. For example, in *Thomas v. Board of Education, Granville Central School District*, the Second Circuit held the students' rights were violated when they were punished for publishing a newspaper called *Hard Times*.[88] Although the students used typewriters at school, the publication, which contained sexually explicit articles about masturbation and prostitution and parodies of teachers, was for the most part created and sold off school grounds.[89] The court noted that, "the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon."[90]

---

82. *See id.* at 419–20 (discussing Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976)).

83. *See id.* at 419.

84. *Id.* at 420 (quoting *Fenton*, 423 F. Supp. at 772). *But see* Klein v. Smith, 653 F. Supp. 1440 (D. Me. 1986) (student's First Amendment rights were violated when school disciplined him for giving the middle finger to a teacher off school grounds).

85. *See J.S.*, 757 A.2d at 421.

86. *See id.*

87. *See id.* at 422.

88. *See* Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d. Cir. 1991).

89. *See id.* at 1045.

90. *Id.* at 1051. *But see* Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 527 (C.D. Cal. 1969) (holding students' First Amendment rights were not violated when they were suspended for using profane and vulgar language in an off-campus newspaper that was published and distributed outside school's main gates). The opinion ends with a lecture to the students involved:

Although there may not be many cases to analyze, there is an abundance of reported instances of schools trying to discipline students for web pages created at home.[91] Often times the schools agree not to discipline students when a lawsuit is threatened or the school is defeated at the trial court level.[92] For example, after a Thurston County Superior Judge in Washington ruled that North Thurston County School District could not punish Karl Biedler for his web page, the district agreed to settle the case with him for over $60,000 ($10,000 damages and $52,000 for attorney fees).[93] Another student, Sean O'Brien, filed suit for $50,000 against Westlake City Schools' Board of Education in Ohio alleging his First Amendment rights were violated when his school suspended him for eight days and threatened expulsion for a web site he created.[94] The web site made fun of his band teacher describing him as "an overweight middle-aged man who doesn't like to get haircuts."[95] After his suit was filed the school agreed to settle the case with O'Brien for $30,000.[96] In Ocala, Florida, administrators of Bellview High School allowed Aaron Fiehn to return to school after completing four days of a ten-day suspension for creating a derogatory web site.[97] Mr. Fiehn's ACLU attorneys were able to negotiate with school officials and basically get the school officials to admit they were wrong for disciplining Fiehn.[98] Fiehn's attorney felt it was extremely important that the web page was created off of school grounds, which as

---

> Regardless of how this litigation may ultimately terminate, should appeal be perfected, it would surely be a source of great satisfaction to all concerned if David Baker and Bill Schaffner could, during the last semester in high school, bring themselves to directing their abilities to the interest of Earl Warren High School within the rules which are required to effect its educational program in a good moral environment. They could well graduate with honors for their efforts in the school's behalf rather than be remembered as leaders who finished high school contesting the rights of the administration to encourage and enforce good moral standards for the members of the student body, both on and off campus.

Id.

91. For even more examples see Kathleen Conn and Perry A. Zirkel, *Legal Aspects of Internet Accessibility and Use in K–12 Public Schools: What Do School Districts Need to Know?*, 146 EDUC. LAW REP. 1, 14–16 (2000) (Ohio School Board dropped suspensions of eleven students for their contributions to a gothic web site after the ACLU threatened to file suit; Washington School Board reversed disciplinary proceedings over a student-created web page called "Eaztlake Phantom" when the ACLU intervened.).

92. *See id.*

93. *See id.*; *Washington School District Pays More Than $60,000 to Student Suspended for Web Site Parody*, *supra* note 54. For more on this case see the discussion of it in Hudson, *supra* note 6.

94. *See* Conn & Zirkel, *supra* note 91, at 14.

95. Harpaz, *supra* note 6, at 152

96. *See* Conn & Zirkel, *supra* note 91, at 14.

97. *See News Flash: Florida Principal Reinstates Student Suspended for Web Site*, *at* www.splc.org/newsflashes/2001/022101florida.html (last visited Feb. 21, 2001).

98. *See id.*

a result gave the school no authority to punish his client.[99] Finally in Utah, Ian Lake agreed to drop his civil rights lawsuit if his principal would drop his libel complaint filed against Lake.[100] The two lawsuits were the result of a web page Lake designed when he was a Middle School student that among other things called his classmates "sluts" and his principal "the town drunk."[101] Although these suits were dropped Lake is still considering filing a suit against the school district.[102] Lake is also facing a criminal charge for libel, which his attorneys argue is unconstitutional.[103]

In summary, school districts have good reason to be reluctant to discipline students who create web sites from home. Based on the harmful case precedent and the number of settlements with students, school districts should not act too quickly over these matters. It is unclear whether *J.S.* (one of the few cases in which the school district was successful) will be an anomaly or a trend. Perhaps the holding was different from the others because J.S. was a middle school student, the web page contained threats to kill a teacher that were taken seriously and the school proved that substantial disruption to the educational environment occurred. What is clear is that the presence of these web pages seems to be a problem that is not going to go away any time soon for school districts.

II. TITLE IX LIABILITY FOR PEER-ON-PEER SEXUAL HARASSMENT

Although the First Amendment values must be protected, if action is not taken by a school to remedy the effects of a student designed web page with harassing content, such could give rise to liability under Title IX of 42 U.S.C.

A. Background to Title IX

In 1972, Congress passed Title IX largely to help women gain access to the same educational opportunities as their male counterparts.[104] There was debate in Congress whether Title IX was actually needed or if instead Congress could just add the word "sex" to Title VI which prohibited racial discrimination.[105] However, the proponents of Title IX ultimately prevailed and Title IX was passed providing that:

---

99. *See id.* Fien's attorney was quoted as saying, "Various courts have already held that you can't suspend or punish a student for speech off campus. The school may have some ability to control what students write as part of a school-sponsored newspaper or a school-sponsored Web site, but certainly students don't lose their constitutional rights simply because they're students." *Id.*

100. *See News Flash: Utah Student Principal Drop Dueling Lawsuits* www.splc.org/newsflashes/2001/032901utah.html (last visited Apr. 6, 2001).

101. *Id.*

102. *See id.*

103. *See id.*

104. *See* Kelly Titus, *Students, Beware: Gebser v. Lago Vista Independent School District*, 60 LA. L. REV. 321, 327 (1999).

105. *See id.* Although Title VII prohibited sexual discrimination, educational facilities were exempted.

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....[106]

At the time of its passage, there was uncertainty about whether Title IX was intended to cover sexual harassment.[107] In fact, not until the 1990s did the Supreme Court hear a case pertaining to sexual harassment and Title IX. One of the first of these cases, *Gebser v. Lago Vista Independent School District,* involved alleged sexual harassment of an eighth grader by her teacher.[108] The student claimed that the teacher made sexually suggestive comments to her and other female students.[109] The teacher also fondled Gebser's breasts and ultimately engaged in sexual intercourse with her.[110]

The Court in *Gebser* set out a two part standard for holding schools liable under Title IX.[111] First, an official with authority to address the problem must have actual knowledge of the harassment.[112] Second, the official must fail to respond adequately.[113] This is a fairly difficult standard for the plaintiff to satisfy since it does not require a school to stop the harassment. Liability is established only if the official acts with "deliberate indifference" or makes an official decision not to correct the violation.[114] In *Gebser,* the school officials knew about the teacher's sexually inappropriate comments to the female students and warned him to watch his classroom comments.[115] However, because the school did not have actual knowledge of the teacher's sexual acts with Gebser, the Court refused to find the school liable under Title IX for the sexual harassment.[116]

B. Davis v. Monroe County Board of Education

In 1999 the Supreme Court once again accepted a case involving Title IX and sexual harassment issues.[117] However, instead of teacher-on-student sexual harassment, the sexual harassment was peer-on-peer. The plaintiff sued the school district, not for the other student's actions, but for its own actions of allowing the known harassment to continue against her. During the school year of 1999, Davis, a fifth grade girl, endured continual verbal and physical harassment by one of her classmates. Davis was subjected to her fellow classmate rubbing against her genital areas and breasts as well as his constant verbal comments to her such as "I want to

---

106. 20 U.S.C. § 1681(a) (1994).
107. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 663 (1999).
108. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).
109. *See id.* at 277–78.
110. *See id.* at 278.
111. *See id.* at 292.
112. *See id.* at 288.
113. *See id.* at 290.
114. *See id.*
115. *See id.* at 278.
116. *See id.* at 291.
117. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

feel your boobs" and "I want to get in bed with you."[118] The girl's mother complained to the school; however, nothing was ever done to stop the harassment.[119] It only stopped when the fellow classmate was charged with sexual battery.[120]

Both the District Court and the Eleventh Circuit dismissed Davis' Title IX claim "on the ground that 'student-on-student,' or peer, harassment provides no ground for a private cause of action under the statute."[121] The Supreme Court reversed the Eleventh Circuit's holding that schools could not be liable for peer-on-peer harassment. Instead, a recipient of federal funds could be liable for its own misconduct but not for the harasser's.[122] The Court held that "[t]he recipient itself must 'exclud[e] [persons] from participation in,...den[y] [persons] the benefits of, or...subjec[t] [persons] to discrimination under' its 'program[s] or activit[ies]' in order to be liable under Title IX."[123] In remanding the case to the district court for further proceedings, the Court found that the school might have created a hostile environment for the plaintiff by failing to take disciplinary actions against the student.[124]

After determining a private remedy was available under Title IX for peer-on-peer harassment, the Court defined sex discrimination in the same fashion as it had done with Title VII.[125] Prior Title VII cases included sexual harassment as a form of sex discrimination.[126] Under Title VII employers can be liable for both quid pro quo sexual harassment and hostile environment sexual harassment.[127] Adopting this approach for Title IX, the Court concluded that a school district could be liable for hostile environment sexual harassment when the student's behavior is so "severe, pervasive, and objectively offensive" as to deprive the victim of the educational opportunities provided by the school.[128] Unlike Title VII, which uses agency principles, liability only attaches if the school has actual knowledge of the harassment and acts with deliberate indifference.[129]

Just what is "severe, pervasive, and objectively offensive" is the subject of much disagreement.[130] Justice Kennedy's dissent in *Davis* anticipated that such

---

118. *Id.* at 633.
119. *See id.* at 634.
120. *See id.*
121. *Id.* at 633.
122. *See id.* at 640.
123. *Id.* at 640–41.
124. *See id.* at 649.
125. *See id.* at 636.
126. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).
127. *See id.* at 65–66. Quid pro quo sexual harassment is defined as "advances or requests for sexual favors in return for advancements or other employment decisions, and 'hostile environment' involves an environment that interferes with performance." Titus, *supra* note 104, at 324–25.
128. *Davis*, 526 U.S. at 650.
129. *See id.* at 643.
130. *Id.* at 676.

a nebulous standard would result in widespread problems for schools.[131] The Office of Civil Rights (OCR) of the United States Department of Education publishes a guide to aid schools in determining their responsibilities for peer-on-peer sexual harassment.[132] That guide says, "[I]t is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists."[133] Among the factors that should be considered are: the degree to which the conduct affected one or more students' education, the type, frequency, and duration of the conduct, the identity of and relationship between the alleged harasser and the subject or subjects of the harassment, the number of individuals involved, the age and sex of the alleged harasser and the subject or subjects of the harassment, the size of the school, location of the incidents and context in which they occurred, and other incidents at the school.[134] These guidelines, although helpful, illustrate the problem schools and courts must face with Title IX lawsuits. The facts must be examined on a case-by-case basis. What may qualify as a hostile environment at one school may not be actionable at another. As a result a bright line test would be very difficult for a court to apply.

III. WEB PAGES: SHOULD TITLE IX OR THE FIRST AMENDMENT APPLY?

Student designed web pages highlight the conflict between Title IX and the First Amendment. While students should have freedom of speech, especially when off school grounds, does that freedom include designing web pages that criticize, attack, humiliate and threaten other students? The answer to this complicated query depends both on whether Title IX holds schools liable for off-campus behavior and which First Amendment test a court chooses to use when evaluating the constitutionality of a student speech regulation.

A. Does Davis *Extend to Web Pages Created Off Campus?*

In order to recover damages under Title IX, a victim of a harassing web page must prove that school officials had actual knowledge of the harassment.[135] This requirement should not be a problem when the victim reports the web page directly to the administration and even perhaps accessed the site for the administration. The greater problem will be to show that the school acted with deliberate indifference to the known harassment. In *Davis*, the Court stated that

131. *See id.* at 654–85. The dissent comprised Justice Kennedy, Chief Justice Rehnquist, Justice Scalia and Justice Thomas. "The majority's opinion purports to be narrow, but the limiting principles it proposes are illusory. The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion." *Id.* at 657.

132. *See Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, Or Third Parties, at* http://www.ed.gov/offices/OCR/shguide/index.html (last modified Jan. 16, 2001).

133. *Id.*

134. *See id.*

135. *See Davis*, 526 U.S. at 650.

"[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks authority to take remedial action."[136] Not only must the school have control over the harasser but it must also have control over the context in which the harassment occurs.[137]

A successful argument by the school to avoid Title IX liability may be that it cannot discipline a student for creating an off-campus web page because of the First Amendment. This presupposes that no harassment is occurring on school grounds. However it is highly likely that students are talking about the web page at the school. This may be a sufficient link to find liability if the courts require that some type of behavior occur at the school.[138] In addition, the unique nature of the Internet makes material posted on it "present" anywhere there is an Internet connection. In actuality, the page is always at the school waiting to be accessed. This makes it uniquely different from the cases where the behavior happens totally outside the workplace or school since it is "virtually" on campus.

Second, as the discussion in Part I indicates, it is unclear whether the school has authority to discipline student behavior that occurs off-campus under Title IX. Title IX requires the school to have control over the harasser.[139] The *Davis* Court notes the clearest example of control is when the offender "is an agent of the recipient."[140] The harasser is also under the control of the school "where...the misconduct occurs during school hours and on school grounds."[141] Yet the Court never directly states that these are the only two situations in which a school may have control. There is no hint as to whether the Court believes that the school may ever have control over misconduct that occurs after school hours and off school grounds. The split of authority on this issue relating to freedom of speech cases is likely to occur in the Title IX setting, too, until the Supreme Court is presented with the issue directly.

The United States District Court for the Southern District of New York has addressed the off-campus conduct dilemma in *Crandell v. New York College of Osteopathic Medicine.*[142] In that case a female physician sued her school for sexual harassment that occurred during her training at the New York College of Osteopathic Medicine.[143] Among other things, she complained that professors had made sexually suggestive comments to her and a professor tried to kiss her while

136. *Id.* at 644.

137. *See id.* "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient...the harassment must take place in a context subject to the school district's control." *Id.* at 645.

138. The court in *J.S.* found it highly relevant that the "students discussed the web-site while at school and at school-sponsored events." J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 424 (Pa. Commw. Ct. 2000). Accordingly, the court concluded that the student's web site materially disrupted the school. *Id.*

139. *See Davis*, 526 U.S. at 644.

140. *Id.* at 645.

141. *Id.* at 646.

142. 77 F. Supp. 2d 304 (S.D. N.Y. 2000).

143. *See id.* at 306.

visiting her apartment.[144] In addition, a cardiologist (and former professor of plaintiff) pressed his erect penis on her hand during an examination at his off-campus private office, and her supervising resident had made comments about her breasts and threatened to fail her if she did not eat lunch with him.[145] The defendants argued the case should be dismissed for failure to state a claim because several of the actions occurred off campus and, therefore, did not occur in connection with an educational program or activity as required by Title IX.[146]

The court refused to accept this argument stating:

> Defendants analysis of *Davis* is logically flawed. That the misconduct took place during school hours and on school grounds was found by the Court [in *Davis*] to be a sufficient, not a necessary, condition for liability. In other words, *Davis* did not limit the circumstances in which institutional liability will lie to harassment occurring during school hours and on school grounds, but found merely that such conditions give rise to an inference of control by and therefore liability of the institution.[147]

B. Title VII Compared

A similar, but not identical situation, has also already arisen under Title VII. In *Blakey v. Continental Airlines, Inc.*,[148] a female pilot sued her employer, Continental Airlines, for sex discrimination claiming a hostile environment resulted from Continental's failure to take action against male pilots who were posting derogatory comments on a company electronic bulletin board.[149] As part of its company web page, Continental contracted with CompuServe to set up an electronic bulletin board called the CrewMembers Forum.[150] The bulletin board was designed for crewmembers to exchange ideas and information.[151] Employees posted information on computers away from work premises.[152] Blakey complained to Continental management numerous times about things some co-workers posted about her that she felt were untrue and derogatory.[153]

Blakey's suit against Continental was dismissed at both the trial court and appellate court levels.[154] The appellate division ruled that Continental had no liability to the plaintiff because the employees were not required to use the forum.[155] The New Jersey Supreme Court, reversing the lower courts, held there

---

144. *See id.* at 307–08.
145. *See id.* at 308–10.
146. *See id.* at 315.
147. *Id.* at 316 n.130.
148. 751 A.2d 538 (N.J. 2000).
149. *See id.* at 543.
150. *See id.* at 544.
151. *See id.* at 545.
152. *See id.* at 544.
153. *See id.* at 550.
154. *See id.* at 547–48.
155. *See id.* at 548.

could be liability for harassment occurring outside the workplace. Specifically the court found that "if the employer had notice that co-employees were engaged on such a work-related forum in a pattern of retaliatory harassment directed at a co-employee, the employer would have a duty to remedy harassment."[156] The case was remanded to the trial court to establish whether the relationship between the forum and the employer established a close enough connection to impose liability on the employer.[157] If the plaintiff could show the employer benefited from the forum, the forum could be classified as the workplace even if it was not on the actual business premises.[158]

In reaching this result, the court analyzed several prior decisions exploring whether employers could be liable for sexual harassment that occurred outside the workplace.[159] In fact the court acknowledged that in certain situations an employer would have a responsibility to correct off-site harassment by co-employees.[160] Furthermore, the court noted that, if harassment was occurring at the work site too, any incidents outside of work may become especially relevant in proving the plaintiff experienced a hostile work environment.[161]

The decision in *Continental* seems only logical. To prohibit recovery for sexual harassment just because the actual behavior occurred off the employer's property seems to place form before substance. The trauma to an employee from a co-worker's harassment is likely to be the same whether that behavior is occurring during business hours or not. Of course each situation must be examined individually to determine whether it makes sense to hold an employer liable under a particular set of facts. In the *Continental* case it seems entirely appropriate to expect the airlines to do something to address the harassment in their own company sponsored forum.

This decision may be distinguishable from anything that would arise under the school setting because it appears the employer's liability hinges on whether it derived a substantial workplace benefit from the forum.[162] Only then would the forum be viewed as an extension of the workplace, and only then could the employer be liable for known harassment.[163] Surely a school would derive no benefit from a student's personal web page. Therefore, it would be difficult for a court to hold that the web page was an extension of the school.

In addition, most courts in the Title VII setting have refused to hold an employer liable for conduct that occurred outside of the workplace. For example,

---

156. *Id.* at 543.
157. *See id.*
158. *See id.*
159. *See id.* at 549–50.
160. *See id.* at 549.
161. *See id.* at 549–50 (discussing McGuinn-Rowe v. Foster's Daily Democrat, No. 94623-SD,1997 WL 669965, at *4 (D.N.H. July 10, 1997), a case involving harassment at work and at a tavern. The court allowed evidence of the tavern incident despite the fact that it occurred away from the work site.).
162. *See id.* at 543.
163. *See id.*

the Ninth Circuit in *Candelore v. Clark County Sanitation District* refused to hold an employer liable for sexual harassment based on "conduct away from the workplace or outside business hours."[164] In another case, a victim, a woman employee, complained that her supervisor had sexually harassed her.[165] After investigating the woman's claim, the company fired the supervisor.[166] In addition, the company fired the plaintiff because she had tested positive for drugs.[167] The plaintiff alleged she had been fired for reporting the incident involving the supervisor.[168] The court did not find the company liable for creating a hostile environment since neither of the parties returned to work after the plaintiff reported the incident.[169] In addition, the court found it particularly relevant that the incident complained of occurred on a Friday night after work and could not be controlled by the company.[170]

In an even factually more egregious case, the United States District Court for the Eastern District of Pennsylvania refused to find a hostile environment existed subsequent to the plaintiff's rape by a co-worker with whom she had been socializing after work.[171] In this case the plaintiff worked for the IRS in Philadelphia while the coworker was stationed in the Salt Lake City IRS office.[172] They were working on a special project that brought them both to Atlanta.[173] It was at the end of one of these work sessions that they went to a bar for a drink.[174] The plaintiff alleged that the co-worker later forced his way into her hotel room and raped her.[175] Since the two never worked together again but were separated by many miles, the court refused to find that there was any type of hostile environment present for the plaintiff.[176] The court did acknowledge that this might not always be the case. Although recognizing that normally a hostile work environment is not created by behavior outside of work and after business hours, "an employee who is forced to work for or in proximity to someone who is

164. Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992) (plaintiff claimed she was sexually discriminated against because she would not respond to employer's sexual advances while other co-workers did have affairs and were subsequently treated more favorably).

165. *See* Darland v. Staffing Res., Inc., 41 F. Supp. 2d 635, 637 (N.D. Tex. 1999).

166. *See id.* at 638–39. The supervisor allegedly told the plaintiff that he had extramarital affairs and he wanted to have sex with her. While driving her home after a football game he touched himself and then put her hand on his leg. *See id.* at 637.

167. *See id.* at 638.

168. *See id.*

169. *See id.* at 638–39. (One employee was given time off with pay, and the other was placed on administrative leave by the company.)

170. *See id.* The court cited *Morrison v. Carelton Woolen Mills, Inc.*, 108 F.3d 429 (1st Cir. 1997), which stated behavior could not affect working conditions when the plaintiff was not presently working for the employer.

171. *See* Temparali v. Rubin, No. CIV. A. 96-5382, 1997 WL 361019 (E.D. Pa. June 20, 1997).

172. *See id.* at *1.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.* at *3.

harassing her outside the workplace may reasonably perceive the work environment to be hostile as a result."[177]

All of these cases are probably distinguishable from the hypothetical facts of John and Mary at Washington Middle School. Unlike the employees who were no longer at their jobs following the harassing behavior, the hypothetical of this Article imagines both students remaining at the school. In addition, John and Mary will not be separated geographically as the plaintiff and her harasser were in the *Temparali* case. Therefore, it is conceivable that a court may find Mary to be acting reasonably in perceiving the school environment as hostile when she is forced to study and learn in close proximity to someone who is harassing her outside of school on a web page.[178]

Finally, for a Title IX claim even if the victim could prove actual knowledge and deliberate indifference, the student would need to prove the harassment was severe and pervasive. Some of the effects resulting from peer-on-peer harassment include "decreased school performance..., 'loss of appetite, loss of interest in usual activities; nightmares or disturbed sleep; feelings of isolation from friends and family; and feeling sad, nervous, or angry.'"[179] In the extreme some victims may actually contemplate suicide.[180] A comprehensive analysis of what has and has not satisfied this standard is beyond the scope of this Article. Suffice it to say that the courts that have grappled on a case-by-case basis with that question and have come to various resolutions.[181] Based on these cases it is likely that the web pages discussed in this Article could satisfy the pervasiveness and severity requirement of Title IX sexual harassment. The psychological effects the web page could have on the targeted student appear no less than those that could result from in-person peer-on-peer harassment. The student may very likely suffer academically and socially for the rest of her life from the material posted on the web page.[182]

It is important to remember, however, that at least four Supreme Court justices do not acknowledge a Title IX cause of action for peer-on-peer harassment.[183] It is their opinion that the plain meaning of Title IX implies no

---

177. *Id.*

178. *See* Crandell v. N.Y. Coll. of Osteopathic Med., 77 F. Supp. 2d 304 (S.D.N.Y. 2000) (holding off-campus conduct was actionable given nexus between such conduct and on-campus environment).

179. Jill S. Vogel, *Between a (Schoolhouse) Rock and a Hard Place: Title IX Peer Harassment Liability After Davis v. Monroe Co. Bd. of Educ.*, 37 HOUS. L. REV. 1525, 1546–47 (2000).

180. *See id.* at 1547.

181. *See* Vance v. Spencer County Pub. Sch., 231 F.3d 253, 262 (6th Cir. 2000) (holding the pervasiveness and severity requirement was met where male students yanked off student's shirt, pulled her hair, tried to disrobe her and verbally assaulted her); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1171 (N.D. Cal. 2000) (holding the pervasiveness and severity requirement was met where classmates repeatedly harassed, intimidated and threatened boy because of their belief he was a homosexual).

182. *See* AM. ASS'N OF UNIV. WOMEN, *supra* note 3, at 15–18.

183. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654–85 (1999).

private cause of action for this type of harassment.[184] Instead Justice Kennedy argued that under the express terms of the statute, the only time a school can be liable is if the sex discrimination occurred "under" the school's program or activity.[185] He concluded that peer-on-peer harassment cannot be included within the common definition of "under" which is defined by case law as "pursuant to," "in accordance with" or "as authorized or provided for."[185] He refused to accept the majority's opinion that it is enough to show the alleged discrimination occurred in a context under the school's control.[187]

In addition, the *Davis* dissenters argued that Title IX does not encompass peer-on-peer harassment because the conduct complained of does not rise to gender discrimination under the statute.[188] Instead the dissent labeled such behavior as simply, "immature [and] childish," not sexual harassment.[189] If the behavior in person is not considered sufficient to be deemed sexual harassment, it is highly unlikely placing the same material on a web page would change that conclusion.

C. First Amendment vs. Title IX

Assuming that the situation involving Mary and John falls within Title IX's coverage, should Title IX or the First Amendment take precedence in such a unique, but unfortunately common, case? Can John's First Amendment rights coexist with Mary's right to be free from sexual harassment? It is arguable that these rights can actually exist side by side.

Under *Fraser,* school officials may regulate student speech that is lewd or offensive.[190] At first glance, this would appear to solve the debate. Since often the harassing "speech" on a student web page is offensive, crude and vulgar, there should be no First Amendment problem if the school disciplines the author. The problem, however, is that *Fraser* involved a school sponsored forum with a captive audience of students.[191] In the case of student web pages, the school does not sponsor their creation through a class or extracurricular activity. In addition, since web pages must be individually accessed there is not a captive audience like Fraser had at the school assembly.[192]

The same concerns would be used to argue *Hazelwood's* ruling upholding school censorship is not applicable. *Hazelwood* involved a school-sponsored

---

184. *See id.* at 659.
185. *See id.*
186. *Id.* at 659–60.
187. *See id.* at 660.
188. *See id.* at 673.
189. *Id.*
190. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).
191. *See id.* at 677.
192. The court in *Killion v. Franklin Reg'l Sch. Dist.*, No. CIV. A. 99-731, 2001 WL 321581, at *11 (W.D. Pa. Mar. 22, 2001), specifically addresses this issue concluding that the *Fraser* holding should be read narrowly to apply only to lewd, explicit language in the school environment.

newspaper with a captive audience.[193] Again, since there is no argument that web pages are sanctioned by the school, it is distinguishable.

That leaves the issue of whether a school could meet the standard set out in *Tinker*. The court in *Tinker* held a school had the authority to regulate speech if the school officials could show the speech caused a substantial and material disruption of the educational process.[194] This test, when closely examined, is not all that different from the test employed under Title IX, which requires the harassing behavior to be so pervasive and severe that it deprives a student of her access to an educational benefit. If that test can be satisfied it is very likely the harassing behavior also caused a substantial and material disruption of the educational process. Surely it would cause such a disruption for the victim of the harassment and very likely could cause disruption for other students who were upset or afraid that they may be the harasser's next targets. As seen from some of the cases discussing web pages, material that criticizes and makes fun of others in the school can have an impact on the morale of the school.[195] Most of the problems with the cases thus far, except *J.S.*, are that the schools did not prove that disruption.

A recent case addressed the free speech and harassment issues in the context of an anti-harassment policy passed by a school district in Pennsylvania.[196] Although *Saxe v. State College Area School District* dealt with the school district's proactive approach to this problem, instead of a reactive measure to behavior that already occurred, the opinion is useful in ascertaining what a court may do. The Third Circuit found a Pennsylvania public school district violated students' First Amendment rights when the district adopted an anti-harassment policy.[197] The

---

193. *See* Hazelwood v. Kyhlmeier, 484 U.S. 260, 268 (1988).

194. *See* Lisa M. Pisciotta, Comment, *Beyond Sticks & Stones: A First Amendment Framework for Educators Who Seek to Punish Student Threats*, 30 SETON HALL L. REV. 635, 665 (2000) (advocating schools punishing the offender if schools can show the speech causes disruption). *But see* Hudson, *supra* note 6, at 221 (arguing for freedom of speech). Not all commentators, however, agree with this approach. Some think off-campus speech should never be regulated by school officials, following the approach the court used in *Emmett*. Paul Hudson, a staff attorney for the First Amendment Center at Vanderbilt University, argues that "[s]peech on a web site should be no different than if a student had a conversation with other students off campus about a school administrator. The discipline, if any, should come from parents rather than school administrators." *Id.*

195. J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 417 (Pa. Commw. Ct. 2000). The school district included in its findings of fact that:

> (27) The Website had a demoralizing impact on the school community. (28) Mr. Kartsotis [the principal] stated that the effect on Nitschmann Middle School caused the school to be at a low point which was worse than anything he had encountered in his forty [] years of education. (29) The effect on the staff at Nitschmann Middle School was comparable to the effect on the school community for the death of a student or staff member because there was a feeling of helplessness and a plummeting morale.

Id.

196. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).

197. *See id* at 217.

policy sought to eliminate disrespectful behavior to help meet its goal of "providing all students with a safe, secure, and nurturing school environment."[193]

> Harassment that was prohibited was defined as:
>
> [v]erbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.[199]
>
> Prohibited conduct included:
>
> any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any characteristics described above, [including] unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written materials or pictures.[200]

Punishments for the harassment included "warning, exclusion, suspension, expulsion, transfer, termination, discharge..., training, education, or counseling."[201]

A guardian of two public school students brought the lawsuit alleging the policy was unconstitutional on its face.[202] The students, avowed Christians, believed their religion required them to "speak out about the sinful nature and harmful effects of homosexuality."[203] The students requested that the Court declare the policy unconstitutionally vague and overbroad.[204]

The federal district court dismissed the case holding that the policy was facially constitutional.[205] The court read the policy as mirroring the standard already codified in Pennsylvania's Human Relations Act, Title VI and Title IX.[206] It read the second paragraph defining harassment as prohibiting "language or conduct which is based on specified characteristics and which has the effect of 'substantially interfering with a student's educational performance' or which creates a hostile educational atmosphere."[207] This language is virtually the same standard used by Title IX and therefore does not prohibit anything that is not already illegal.[208] The court also refused to accept the plaintiff's vagueness

198. *Id.* at 202.
199. *Id.*
200. *Id.* at 202–03.
201. *Id.* at 203.
202. *See id.*
203. *Id.*
204. *See id.* at 203–04.
205. *See* Saxe v. State Coll. Area Sch. Dist., 77 F. Supp. 2d 621 (M.D. Pa. 1999).
206. *See id.* at 626.
207. *Id.* at 625.
208. *See id.* at 626.

argument since defining harassment any more precisely may be impossible.[209] Finally, the district court opined that the First Amendment did not protect harassment.[210]

In reversing the district court, the Third Circuit refused to accept a "harassment exception" to the First Amendment.[211] In addition, the harassment policy extended beyond the scope of the anti-discrimination laws.[212] While Title VI and Title IX cover only discrimination based on sex, race, color, national origin, age and disability, the policy covered "other personal characteristics" such as "clothing," "appearance," "hobbies and values" and "social skills."[213]

Besides being too broad to survive constitutional scrutiny, the court held that the policy could not satisfy the tests the Supreme Court has provided to determine when student speech can be permissibly regulated.[214] Since the policy extended to non-vulgar, non-school sponsored speech, the proper test the court must use was set out in *Tinker*.[215] The policy failed *Tinker's* test because it included speech that did not actually cause disruption but merely intended to do so.[216] The court stated:

> [A]s *Tinker* made clear, the 'undifferentiated fear or apprehension of disturbance' is not enough to justify a restriction on student speech. Although [State College Area School District] correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the policy.[217]

This case at first glance appears to show courts' strong support for students' First Amendment rights. However, unlike the anti-harassment policy in *Saxe*, which covered a broad category of harassment beyond the scope of anti-discrimination laws, any lawsuit filed against a school under Title IX would be based on a legally recognized form of discrimination—sex discrimination. In addition, the court would be analyzing behavior that allegedly actually caused disruption. In contrast, the anti-harassment policy involved in *Saxe* included prohibiting speech that may or may not cause disruption.[218] The result, therefore, may likely be different if the concerns of broadness and satisfying the *Tinker* test are not issues.

---

209. *See id.* at 625.
210. *See id.* at 627.
211. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).
212. *See id.* at 210–11.
213. *Id.* at 210.
214. *See id.* at 216–17; *see also* Killion v. Franklin Reg'l Sch. Dist., No. CIV. A. 99-731, 2001 WL 321581, at *11–*13 (W.D. Pa. Mar. 22, 2001) (also holding that a school district's policy was overbroad and vague).
215. *See Saxe*, 240 F.3d at 216.
216. *See id.*
217. *Id.* at 217.
218. *See id.* at 216.

IV. CONCLUSION

The ultimate question then, which the Supreme Court has avoided, is whether the school has control and authority to discipline a harasser outside of the school setting. This issue is important in determining both the existence of Title IX liability for peer-on-peer sexual harassment and a First Amendment violation. If the school does not have control over the harasser because the behavior occurred off campus, then officials should not fear liability under Title IX. However, if the school does have control over the students, school officials must proceed with great caution to avoid a civil rights lawsuit filed by the harasser. The school must be absolutely certain it can prove that the web page has caused a substantial disruption in the education process.

The principal at Washington Middle School needs to be cognizant of several issues when deciding what action to take with John and Mary. First, he needs to be sure that, before he decides to discipline John, the harassment Mary has endured is severe and pervasive enough to limit her educational opportunities. This will depend on how often John has posted material, the subject of the material, the number of individuals who have seen the material and their subsequent behavior and other incidents at the school. He also needs to find out exactly what the harassment has done to Mary. The cases allowing recovery under Title IX have involved plaintiffs who exhibited substantial effects from the harassment. Minor inconvenience or annoyance is not enough. Finally, the principal should be prepared to prove a substantial disruption has occurred at the school if he disciplines John. Only then could he hope to survive a First Amendment challenge by John.

Schools should make every effort to find solutions that address the harassment problem without violating the author's freedom of speech rights. *Davis* specifically advised school officials that to avoid liability it was not necessary "to purge their schools of actionable peer harassment or that administrators must engage in [a] particular disciplinary action."[219] Although the courts may have held the First Amendment prohibits schools from suspending or expelling students for creating these web sites, can a school official talk to the student author and his or her parents? Can a school official move the victim to another class? Can the school administration conduct programs that inform the student body about what harassment is and how to avoid it? Maybe these actions will be the only ones that satisfy the school's duties under Title IX without violating any other students' First Amendment rights.

This Article cannot offer a perfect solution that would ensure students freedom from sexual harassment without chilling any other student's freedom of speech. Children can be cruel, and unfortunately there is no bright line for school administrators in determining when that cruelty passes from childish insults to damaging sexual harassment. Yet, when the behavior causes substantial disruption to the educational environment, the school can and should take some action. If we are to exist in a civilized world our children must learn from their parents, their

219. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999).

schools and other role models that we cannot use the freedoms granted by our Constitution to harm others.

Schools need to anticipate these problems and develop proactive alternatives that are as least restrictive of students' freedom of speech rights as possible. There are no checklists that can be used for each fact scenario. Instead school officials will have to use common sense and make sure they thoroughly investigate the effect of the web page on the school environment before deciding what action to take. Many of the reported cases reflect the schools' rash decisions. School officials punished students without even analyzing whether the web sites actually disrupted the school environment. If schools change procedures to safeguard against such impulsive reactions, the balance between freedom of speech rights and the right to be free from sexual harassment can be preserved. It may not be easy but freedom of speech issues rarely are. Third Circuit Judge Rendell said it well in his concurrence in the *Saxe* case: "While reliance on provisions of harassment laws or policies might be an easy way to resolve difficult cases...therein lies the rub–there are no easy ways in the complex area of First Amendment jurisprudence."[220]

220. *Saxe*, 240 F.3d at 218 (Rendell, J., concurring).