Notes

KIDDIE SEX HARASSMENT: HOW TITLE IX COULD LEVEL THE PLAYING FIELD WITHOUT LEVELING THE PLAYGROUND[1]

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> A girl should not expect special privileges because of her sex, but neither should she "adjust" to prejudice and discrimination.
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> She must learn to compete...not as a woman, but as a human being.[2]

INTRODUCTION

If you cross the Taft bridge in Northwest Washington, D.C., and stop at the intersection of Connecticut Avenue and Calvert Street, raise your eyes and look at the buildings in front of you; on one building face, you will see a wall mural of Marilyn Monroe's sultry pout looking down upon you. On the building opposite, scrawled across a mammoth brick face you will see two words spray painted by a minimalist graffiti tagger: Anita Hill. It is a strange paradox to confront. The whole scene conjures up competing images: one of the coy, naive, sexual femininity triumphed by 1950s Hollywood; the other of the woman who nearly brought down then-Supreme Court nominee, now-Justice Clarence Thomas, with allegations of persistent sexual harassment in the Department of Education at the Office for Civil Rights (OCR) and later at the Equal Employment and Opportunity Commission (EEOC).[3]

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1. This Note contains some language that the reader may find offensive. The author believes that authenticity requires the use, when possible, of the original comments directed towards the victims of peer sexual harassment. Sanitization would have the unfortunate effect of de-emphasizing the negative impact that the unembellished language was intended to convey.

* I would like to express my gratitude to Professor Katherine Franke for suggesting this topic to me and providing me with valuable editorial assistance. Many thanks also to Professor Toni Massaro who inspires me and keeps me from becoming too jaded. As always, I am also grateful to my parents, Myrna and Monem Abdel–Gawad, for their love, support, and occasionally picking me up when I was a child.

2. BETTY FRIEDAN, THE FEMININE MYSTIQUE 374 (1963).

3. *See generally* TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES (1992)

Competing ideas of womanhood have been facing women and girls for time immemorial. On the one hand, girls are encouraged to become the kind of sensual, sexual, Marilyn-like ideal that no man can resist, while on the other hand, girls are told that they can grow up to become astronauts and lawyers or anything else their brothers or boys at school can be. Few have ever felt the need, or the urgency, to tell little girls about how to handle the colliding worlds when they grow up, join the workforce, and then get sexually harassed by their coworkers or superiors.[4] For many children, those worlds collide sooner than we might expect.[5]

According to the American Association of University Women (AAUW), eighty-five percent of girls in grades eight through eleven report that they have been sexually harassed at some point during their school-going lives.[6] While in 1986, the United States Supreme Court first recognized sexual harassment of

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(explaining the events leading up to and including the Senate confirmation hearings of Justice Thomas and the allegations of Anita Hill). Given that the EEOC is the federal agency primarily responsible for protecting against discrimination in the workplace, Professor Hill's claim was "especially noteworthy." Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L. J. 85, 86 n.3 (1992).

4. This is not to say that all women who work outside the home are sexually harassed, but studies indicate that it is not an uncommon phenomenon. Surveys in 1981 and 1988 by the U.S. Merit Systems Protection Board on sexual harassment in the government found that 42% of the women questioned had experienced sexual harassment. A November 1976 survey from REDBOOK found that of 9,000 working women, almost 90% reported having experienced sexual harassment. NANCY S. LAYMAN, SEXUAL HARASSMENT IN AMERICAN SECONDARY SCHOOLS 20 (1994).

One notable exception to the dearth of information about sexual harassment that is available to children comes from the Girl Scouts of the U.S.A. In their *Cadette Girl Scout Handbook* for girls in grades 6 through 9, there is an extensive discussion about peer sexual harassment in schools and gender bias in school settings. GIRL SCOUTS OF THE U.S.A., CADETTE GIRL SCOUT HANDBOOK 92, 54–55 (1995). Moreover, further treatment of sexual harassment in the workplace, gender differences, and issues like date rape are discussed in the Girl Scout Resource Book for girls in grades 9 through 12. GIRL SCOUTS OF THE U.S.A., A RESOURCE BOOK FOR SENIOR GIRL SCOUTS 109–10, 84–85, 54–57 (1995).

5. Although when surveyed, both boys and girls report experiencing sexual harassment in school settings, girls experience sexual harassment with greater frequency and severity than boys. AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7–10 (1993) [hereinafter HOSTILE HALLWAYS]. For this reason, this Note will be sex and gender specific to females. However, the proposed remedy should be available to any student experiencing peer-to-peer sexual harassment, regardless of the sex or gender of either the harasser or the victim, and whether or not the harasser is or is not the same sex or gender as the victim.

6. Sexual harassment in this study was defined as "unwanted and unwelcome sexual behavior which interferes with your life. Sexual harassment is not behavior that you like or want (for example: wanted kissing, touching, or flirting)." A list of fourteen forms of sexual harassment were to be considered by students as sexual harassment. The list included, inter alia, making sexual comments, jokes, gestures, or looks; writing sexual messages/graffiti on bathroom walls, in locker rooms, and so on; touching, grabbing, or pinching in a sexual way; forced kissing; or forced sexual behavior other than kissing. HOSTILE HALLWAYS, *supra* note 5, at 5–6.

women in the workplace in *Meritor Savings Bank v. Vinson*,[7] the American public's awareness of the issue is due largely to the televised Clarence Thomas-Anita Hill Senate hearings in 1991.[8] When more than twenty women accused former Senator Bob Packwood of sexual harassment,[9] at least one of them mentioned Anita Hill as her catalyst for coming forward, while another mentioned Hill as her reason for holding back.[10] Not only did the Thomas-Hill hearings alert the public to an issue that had been given short shrift for years,[11] but according to Harriet Woods, head of the National Women's Political Caucus, "Anita Hill emboldened women. We're stepping forward now and saying, 'Knock it off.'"[12] This "Anita Hill effect," as it has been called,[13] has trickled down and finally reached American schoolchildren.

After her first week at a reputable private school in Manhattan, 8-year-old Alexandra didn't want to go back. A 9-year-old boy had

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7. 477 U.S. 57 (1986).

8. "The most significant Anita Hill effects were not political, but social. Suddenly, sexual harassment was *the* issue in the workplace.... The seriousness with which Americans began to take sexual harassment, as well as the passage of time during which people could reflect on what happened in the hearings, produced a dramatic change in the attitude toward Hill. One year later, polls showed that more Americans believed Hill than Thomas." PHELPS & WINTERNITZ, *supra* note 3, at 427.

9. Commentators on the accusation and resignation of Senator Packwood noted that he was, ironically, one of two Republican Senators who voted against the confirmation of Clarence Thomas. *Larry King Live: Interview with Senator Bob Packwood* (CNN television broadcast, Mar. 30, 1994).

10. Julie Williamson, one of Packwood's accusers, said she might never have told her story were it not for the Thomas hearings. "When Anita wasn't believed, I was so furious and I wondered why that was," Williamson said. "And then I [realized] I was reliving my feelings about not being believed when Packwood assaulted me." *Inspired by the Anita Hill Case*, STRAITS TIMES, Nov. 16, 1993, at 4. Contrast this to what Gilliam Butler, another Packwood accuser, said about Anita Hill's treatment at the Thomas confirmation hearings: "I don't want to be put in the position Anita Hill was put in." *Oregon: Packwood Oblivious During Eastern Oregon Tour*, HOTLINE, Feb. 9, 1993, *available in* LEXIS, Nexis Library.

11. Accuser Julie Williamson agreed with what most commentators and scholars have asserted about the attention being paid today to sexual harassment issues: "The reason I didn't talk about what happened to me for 23 years is that nobody cared.... Sexual harassment is an issue whose time has come." *Inspired by the Anita Hill Case*, *supra* note 10, at 4.

Author Susan L. Webb had a different interpretation of the significance of the Thomas–Hill hearings. "Despite the fact that sexual harassment has been getting a great deal of attention as a concept and as an identified problem since at least 1980, we seemed to have made very little progress at the time of the Thomas–Hill hearings." SUSAN L. WEBB, SHOCKWAVES: THE GLOBAL IMPACT OF SEXUAL HARASSMENT 4–5 (1994). "Things have not been the same since Senate confirmation hearings for Supreme Court Justice Thomas riveted the nation...following Hill's allegations of sexual harassment. Nor will they ever be the same again. This...explosion...was the public airing of very private issues, witnessed by the world. Not only did the hearings push the issue of sexual harassment to the front burner in the United States, but everywhere, throughout the world, we also began hearing stories of sexual harassment...." *Id.*

12. *Women Strike Back: Packwood is the Latest Senator to Be Accused of Sexual Misconduct*, TIME, Dec. 7, 1992, at 23.

13. PHELPS & WINTERNITZ, *supra* note 3, at 426.

> been harassing her: "He said he wanted to hump me." She wasn't sure what "hump" meant, but she was ashamed at being singled out.
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> ...A few weeks after the incident at school, hearing Anita Hill's testimony over the radio, Alexandra exclaimed, "That's what happened to me! He didn't touch me, but his words upset me!"[14]

Other girls in American schools have experienced even more troubling and traumatic harassment experiences, literally at the hands of their peers. The two Rowinsky sisters attended Sam Rayburn Middle School, a public school in Bryan, Texas.[15] They were subjected on a daily basis to harassment by boys while on the schoolbus heading to school.[16] The sisters were called derogatory names like "whore," "trick" and "slut."[17] They were subjected to comments like, "When are you going to let me fuck you?" "What bra size are you wearing?" and "What size panties are you wearing?"[18] On one occasion in the classroom, a boy forced his hand up one of the girls' skirt and blouse and unfastened her bra.[19] Others touched them on their legs, genital areas, buttocks and breasts.[20] The behavior continued for five months until the girls themselves left the bus and eventually the school because they feared that the actions would escalate further—they feared being raped.[21] More and more stories like these are finding their way into newspapers,[22] television reports,[23] and, now, courtrooms[24] because girls and their parents complain that school officials have been less than helpful in preventing the harassment before it starts[25] and in stopping the harassment once made aware of the problem.[26] By

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14. Melinda Blau, *Close Encounters*, NEW YORK, Nov. 16, 1992, at 54, 63.

15. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

16. *Id.*; A. Phillips Brooks, *When Flirting Becomes Hurting in the Schools*, AUSTIN AMERICAN-STATESMAN, July 7, 1995, at A1.

17. Brooks, *supra* note 16; *see also Rowinsky*, 80 F.3d at 1008.

18. *Rowinsky*, 80 F.3d at 1008.

19. *Id.* at 1009; Brooks, *supra* note 16, at A1.

20. *Rowinsky*, 80 F.3d at 1008–09; Brooks, *supra* note 16, at A1.

21. Brooks, *supra* note 16, at A1.

22. *See* Jack Cheevers, *Juvenile Sex Harassment*, L.A. TIMES, July 5, 1995, at B10; Sherrell Evans, *Schools Get Tough on Sexual Harassment*, ATLANTA J.-CONST., Dec. 17, 1995, at 8G; Tamar Lewin, *Students Use Law on Discrimination in Sex-Abuse Suits*, N.Y. TIMES, June 26, 1995, at A1; Beth Warren, *Sixth-Grader Complains of Harassment on School Bus*, TENNESSEAN, Nov. 29, 1995, at 5B.

23. *See Dateline NBC: All About Eve* (NBC television broadcast, Sept. 15, 1996); *Nightline: Just A Kiss?* (ABC television broadcast, Oct. 6, 1996); *Santa Clara School Faces Sexual Harassment Battle* (CNN television broadcast, Jan. 6, 1996).

24. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), *vacated, reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993) [hereinafter Petaluma I], *rev'd*, 54 F.3d 1447 (9th Cir. 1995) [hereinafter Petaluma II], *reh'g granted*, 949 F. Supp. 1415 (N.D. Cal. 1996) [hereinafter Petaluma III].

25. *See Petaluma I*, 830 F. Supp. at 1560; Cheevers, *supra* note 22, at B10; Evans, *supra* note 22, at 8G; Lewin, *supra* note 22, at A1.

26. *See, e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1008–09 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996) ("Janet complained to [the bus driver] no fewer than eight times.... Janet eventually stopped reporting the incidents.... Mrs. Rowinsky

intentionally ignoring the complaints or dismissing them as "unimportant," school officials have, in effect, allowed the behavior to continue unchallenged.[27]

Until recently, girls who complained to school administrators to stop the sexual harassment in their schools were met with responses like "boys will be boys"[28] or "just get on with your life."[29] That is no longer acceptable to many children who are recognizing their right to be educated in an environment free from hostility and harassment and the right to be secure in their bodily integrity.[30] In Petaluma, California, one junior high school girl, Jane Doe, suffered from persistent peer sexual harassment.[31] Unlike the Rowinsky sisters in Texas, Jane Doe was being harassed by both male and female peers.[32] Her peers made persistent comments about Jane "having a hot dog in her pants or that she had sex with hot dogs."[33] She was called a "hot dog bitch," "slut," and "ho" (slang for whore) by girls instigating a fight.[34] The taunting eventually spread from the schoolyard into Jane's English class, as well as onto the bathroom walls in the form of graffiti.[35] Because the graffiti reappeared on the bathroom walls daily, Jane stopped going to the bathroom during the day.[36] After enduring two years of repeated harassment, Jane and her parents decided that she should transfer to another public school.[37] The same sexually harassing verbal conduct followed her to the new school, and she ultimately transferred to a private girls' school to escape the cycle.[38]

Jane brought an action against the Petaluma City School District due to the repeated failure of school officials to remedy the problem despite numerous complaints from both her and her parents over the two year period.[39] She asserted

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visited Petty [the vice-principal] and complained about [the breast-grabbing, bra-unfastening classroom incident]; Petty responded that she did not consider [the] conduct to be sexual.").

27. "School teachers and administrators rarely intervene [in peer sexual harassment cases] because they do not realize the damage done or because they are afraid to confront the perpetrators. So the harassment continues, uninterrupted and unchallenged." MYRA & DAVID SADKER, FAILING AT FAIRNESS 113 (1994).

28. Todd Woody, *School Counselor Entitled to Immunity, Court Says,* RECORDER, May 15, 1995, at 3; Jim Herron Zamora, *Ex-Student Can't Sue Counselor over Harassment,* S.F. EXAMINER, May 13, 1995, at A3. *But cf.* Brooks, *supra* note 16, at A1 (Shellie Hoffman, director of legal services for the Texas Association of School Boards said: "In every presentation I give, I advise school districts to remove the words 'Boys will be boys' or 'kids will be kids' from their vocabularies.").

29. Nina J. Easton, *The Law of the School Yard,* L.A. TIMES MAG., Oct. 2, 1994, at 16 (quoting Maryland junior high school student, Lisa Bye, who was the target of a boy who grabbed at her shirt and crotch: "I felt so sick and ashamed. My counselor said I should just get on with my life.").

30. Cheevers, *supra* note 22, at B10; Evans, *supra* note 22, at 8G; Lewin, *supra* note 22, at A1.

31. Petaluma II, 54 F.3d 1447 (9th Cir. 1995).

32. *Id.* at 1449.

33. *Petaluma I,* 830 F. Supp. 1560, 1564 (N.D. Cal. 1993).

34. *Id.* at 1565.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1564–65.

that her claim arose under Title IX of the Education Amendments of 1972 (Title IX).[40] The Ninth Circuit granted qualified immunity to the school counselor who initially heard Jane's oft-repeated complaints on the suit brought against him under 42 U.S.C. § 1983[41] in his individual capacity.[42] It thereby rejected the prior ruling of the district court.[43] Although Jane settled her case against the school district after a long, contentious battle, many of the questions her case raised remain unsettled.[44]

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40. *Id.* at 1566. Title IX, 20 U.S.C. §§ 1681–86 (1988), provides in relevant part: "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 educational program or activity receiving Federal financial assistance...." § 1681(a). Title IX defines an educational institution as "any public or private preschool, elementary, or secondary school, or any institutional of vocational, professional, or higher education." § 1681(c).

41. 42 U.S.C. § 1983 (1988). Section 1983 provides in relevant part:

> Every person, who under color of any statute, ordinance, regulation, custom or usage of any state...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

§ 1983.

Because section 1983 does not in itself have a substantive law provision, individuals could bring a section 1983 action asserting either that Title IX is the source of the substantive law claim or that there was a deprivation of a protected constitutional right—for example, a liberty interest in being free from persistent sexual harassment. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.4, at 14, § 3.1, at 93 (2d ed. 1991). The question of whether or not a section 1983 cause of action would provide an adequate remedy for students sexually harassed by their peers remains open largely because of the lack of litigation on this subject and because of the state actor immunities that are affirmative defenses raised under section 1983 claims. *See id.* § 1.2, § 9.1.

Because this Note argues that Title IX provides its own substantive law, cause of action, and acceptable remedies, the Note does not address the efficacy or adequacy of bringing a peer sexual harassment claim against school districts under section 1983.

42. *Petaluma II*, 54 F.3d 1447, 1452 (9th Cir. 1995).

43. *Id.*

44. *See School District in California Settles Sex Harassment Suit*, N.Y. TIMES, Dec. 27, 1996, at A24. Without any admission of guilt from the school district, Jane Doe agreed to settle her one million dollar lawsuit for $250,000. *Id.* The last court decision that bore upon the outcome of the *Petaluma* case was handed down in *Petaluma III*, 949 F. Supp. 1415 (N.D. Cal. 1996). *Petaluma III* granted Jane Doe's motion for reconsideration. *Id.* at 1416. It further explicitly rejected the Fifth Circuit holding in Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996), for its "extreme results inconsistent with the body of discrimination law." *Petaluma III*, 949 F. Supp. at 1421. More importantly, *Petaluma III* held that the applicable standard under which the *Petaluma* case is to proceed is:

> the traditional Title VII hostile environment standard. Thus, the elements which Plaintiff must prove are that Plaintiff was subjected to unwelcome harassment based on her gender, that the harassment was so severe or pervasive as to create a hostile educational environment, and that the Defendants knew, or should in the exercise of their duties have known, of the hostile environment and failed to take prompt and appropriate remedial action.

Id. at 1427. For further discussion on the issue of relevant Title IX standard of proof and

Her case truly had an "Anita Hill effect" in cities all over the country, as other girls are following her example by suing their school districts under Title IX.[45]

This Note argues that the Title IX remedy can best be enforced by imposing a Title VII standard of liability on school districts.[46] Plaintiffs should ask courts to recognize that Title IX provides students with a right to sue for hostile environment sexual harassment and a remedy for redress[47] in accordance with Title VI[48] and Title VII of the Civil Rights Act of 1964.[49]

In order to make the Title IX-Title VII analysis complete, Title IX must also be understood in context and in connection to Title VI. Both Titles IX and VI reach conduct in schools; Title VII does not.[50] Furthermore, Title IX was patterned after and contains virtually identical language to Title VI.[51] As a result, the Supreme Court has found that both Title VI and Title IX liability rest upon intentional discrimination,[52] but has rejected a strict liability analysis in Title VII cases.[53] This Note will show that the peer sexual harassment cases can meet the most reasonable interpretation of intentional discrimination imputing school district liability under the Title VII "knew or should have known" intent standard.

The early indicators suggest that courts and juries are not "getting it." The

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intent, see *infra* notes 222–65 and accompanying text.

45. Although Jane Doe of *Petaluma* was the first to file suit, a number of other cases filed subsequently were decided earlier. *See, e.g.*, Bruneau v. South Kortright Central Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (1996); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. (1996).

46. *See* 42 U.S.C. §§ 2000e–2000e–2(a)(1) (1994).

47. *See* Kristina Sauerwein, *Districts Get Word: Control Sex Behavior*, ST. LOUIS POST–DISPATCH, Nov. 26, 1995, at 1A. Carol Bohmer, attorney and professor at the University of Pittsburgh said, "cases have been popping up across the country as more parents realize their children's rights [under Title IX]." *Id.*

48. 42 U.S.C. § 2000d (1994). Title VI provides, in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." § 2000d.

49. 42 U.S.C. §§ 2000e–2000e–17 (1994). Title VII provides, in relevant part: "It shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex...; or...to limit, segregate, or classify his employees or applicants for employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...sex...." § 2000e–2(a)(1)–(2).

50. *Compare* 20 U.S.C. §§ 1681–86 (1994) (Title IX) *and* 42 U.S.C. § 2000d (1994) (Title VI) *with* 42 U.S.C. §§ 2000e–2000e–17 (1994) (Title VII). Furthermore, Title IX's original provisions incorporate Title VI's regulations into those of Title IX. 34 C.F.R. § 106.71 (1996).

51. *Compare* 28 U.S.C. § 1681 (1988) *with* 42 U.S.C. § 2000d (1994).

52. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70 (1992) (finding that damages are available under Title IX in an action seeking remedies for an intentional violation and further explaining that in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), "a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation").

53. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 72–73 (1986).

analysis that links Title IX to Title VII amounts to only a minor extension of well-established legal precedent and can provide an adequate legal remedy for victims of peer sexual harassment in elementary and secondary schools. Part I of this Note defines and addresses the nature and consequences of peer sexual harassment.[54] It also examines the traditional Title VII definition of sexual harassment and its application to peer sexual harassment;[55] it looks at the Department of Education's definition of peer sexual harassment under Title IX;[56] and it addresses the Supreme Court's definition and application of sexual harassment doctrine in Title IX cases.[57] Finally, Part I looks at how some states and individual school districts have attempted to address and remedy peer sexual harassment.[58] Part II outlines the statutory authority, regulatory authority, and regulatory scheme of Title IX.[59] It examines how a Title IX sexual harassment analysis is inextricably connected to Title VI and Title VII.[60] Further, it addresses the derivation of the Title IX remedy for peer sexual harassment.[61] Part III examines how courts should find that peer harassment in schools is analogous to the hostile environment harassment recognized under Title VII.[62] Part III also analyzes the elements of a prima facie case under Title VII[63] and determines that, when schools fail to remedy repeated incidents of peer sexual harassment of which they knew or should have known, the elements establishing entity liability under Title IX should be the same as the elements establishing entity liability under Title VII.[64] Part III also analyzes how Title IX and Title VI depart from traditional analyses under Title VII,[65] examines the differing constructions of intent and their relative usefulness to understanding Title IX sexual harassment doctrine, and looks at how lower courts have applied Title IX sexual harassment doctrine.[66] Part III concludes by addressing how courts have found that the most crucial difference between traditional workplace sexual harassment scenarios and Title IX educational sexual harassment scenarios is that children deserve even more protection than that which the doctrine gives adults.[67] This Note concludes that a school should be found liable under Title IX for peer sexual harassment if (1) a hostile environment exists in the school's programs or activities; (2) the school knew or should have known of the harassment; and (3) the school failed to take immediate and appropriate corrective action.[68]

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54. *See infra* notes 69–119 and accompanying text.
55. *See infra* notes 74–88 and accompanying text.
56. *See infra* notes 89–97 and accompanying text.
57. *See infra* notes 98–119 and accompanying text.
58. *See infra* notes 120–48 and accompanying text.
59. *See infra* notes 149–82 and accompanying text.
60. *See infra* notes 154–62 and accompanying text.
61. *See infra* notes 183–89 and accompanying text.
62. *See infra* notes 190–221 and accompanying text.
63. *See infra* notes 190–202 and accompanying text.
64. *See infra* notes 203–21 and accompanying text.
65. *See infra* notes 222–25 and accompanying text.
66. *See infra* notes 226–304 and accompanying text.
67. *See infra* notes 305–11 and accompanying text.
68. *See infra* notes 312–13 and accompanying text.

I. DEFINING AND RESPONDING TO PEER SEXUAL HARASSMENT

One problem in discussing sexual harassment is the inconsistency and range of definitions for "sexual harassment."[69] The most frequently quoted studies about peer sexual harassment in schools are criticized for defining sexual harassment in broad terms that encompass virtually any exchange between children just discovering their sexual identities.[70] However, it would trivialize the importance of the legal harm of peer sexual harassment, as well as the experiences of children suffering from harassment, to suggest that an occasional innuendo, dirty joke, or bra snapping incident should be actionable. Vocal opponents of sexual harassment claims arising in school environs proudly point to the so-called overreaction scenarios where seven year old boys are "charged" with sexual harassment for the stray kissing of little girls.[71] Nevertheless, such incidents never reach litigation stage, and the news reports invariably are greatly exaggerated.[72] Furthermore, not

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69. "[L]ittle agreement exists as to the definition of sexual harassment." Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1371 (1993).

70. "Critics said the definition of harassment used in the [HOSTILE HALLWAYS] survey—everything from grabbing or pulling off clothing to making sexual jokes—was too broad." Evans, *supra* note 22, at 8G. *See also* Easton, *supra* note 29, at 16 ("[T]he studies that purport to prove that sexual harassment is rampant on schoolyards cast a wide net. The most widely quoted research [HOSTILE HALLWAYS]...included dirty jokes and gestures, spying in the showers and 'mooning' alongside forced kissing, grabs or pulling at clothes.").

It is interesting to note that critics of sexual harassment school surveys and data tend to "clean up" what is said or done to girls by using words like "dirty jokes and gestures" or "rude comments." June Larkin remarks on this phenomenon by recounting the following incident that was told to her by a female high school student:

> "I was talking to a guy who sits behind me. I did not insult him when I was talking to him but he said a sentence and ended calling me 'a bonehead.' I then said, 'You're the one who's a boner.' He said, 'You better shut up before I stick my dick up your ass so hard you won't be able to breathe.'"... When a young woman's warning that some guy may "stick his dick up [her] ass" gets translated as a "rude comment," we lose the impact. If we cringe when we hear such horrific words, we are more apt to understand their devastating impact on a fifteen-year-old girl.

JUNE LARKIN, SEXUAL HARASSMENT: HIGH SCHOOL GIRLS SPEAK OUT 84 (1994).

71. *Saturday Night Live: "Weekend Update with Norm MacDonald"* (NBC television broadcast, Sept. 28, 1996). *The Tonight Show: Jay Leno Monologue* (NBC television broadcast, Sept. 25 & 26, 1996).

72. In an interesting twist, it appears that the initial news reports of the two six-year-old "Romeos" did not accurately tell the whole story. *See Nightline*, *supra* note 23. Little Jonathan Prevette, the Lexington, North Carolina, boy:

> who became the poster child for the excesses of (1) the school system, (2) the legal system, (3) political correctness and (4) feminism.... wasn't suspended—[he was] just sent to another room for misbehavior. Nor was his act defined as sexual harassment. It was unwanted touching that violated the student behavior code.
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> It also turns out that school policy does distinguish between big and little kids in assessing motives and actions. And it wasn't the teacher

one proponent of allowing a Title IX remedy to peer sexual harassment cases has attempted to argue that mere social science studies and surveys alone should suffice to establish the definition of sexual harassment.[73]

A. Quibbling over How Hostile Hostility Must Be

The harassment described in the various complaints filed in federal courts across the country is horrifying and severe. Reading the shocking fact patterns of these cases should satisfy critics who suggest that a Title IX-based hostile environment sexual harassment theory could flood courts with thousands of frivolous claims.[74] As in any "traditional," that is, Title VII, sexual harassment

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> who turned the kid in. It was the little girl who complained to the teacher....
>
> [A] similar story [appeared] on Page 1 of The New York Times about a second-grader, De'Andre Dearinge. This school had suspended the boy and called it sexual harassment. But it turns out that De'Andre had been pestering a number of girls, a parent had complained, and De'Andre's mom had been called to school twice before....
>
> Meanwhile back in North Carolina...some folks are worrying about the 6-year-old girl.... [T]he chair of the school board, is appalled at reports that she is blaming herself for the whole furor. "She is worried, 'Did I do something wrong?'"

Ellen Goodman, *The Truth Behind "The Kiss,"* BOSTON GLOBE, Oct. 13, 1996, at D7.

73. In fact, it should be clear by even a casual reading of some of the cases being litigated in lower courts, that the plaintiffs are not seeking relief from occasional "minor" incidents that fall within a broadly defined scope of sexual harassment. Plaintiffs have complained of pervasive and ongoing groping of their body parts, particularly their breasts and genital areas. *See, e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996). Others report frequent verbal slurs about their physical appearance with an emphasis on their intimate body areas, as well as continual requests for the performance of various sex acts. *See, e.g.*, Rorie Sherman, *School Districts Sued on Sexual Harassment by Fellow Students*, NAT'L L.J., Dec. 13, 1993, at 10.

> [I]n April 1993...the [OCR] found probable cause that a Minnesota district discriminated under Title IX against a [seven]-year-old girl and her female classmates because it failed to treat boys who were sexually harassing them as violators of the district's sexual-harassment policy. The boys swore at the girls on the school bus, commented lewdly about female sexual organs and made suggestions for oral sex. The Minnesota Human Rights Department issued an opinion in November that seconded that of the division.

Id.

Still others reported repeated verbal assaults regarding fictionalized accounts of personal sexual habits and/or proclivities of the plaintiffs. *See, e.g., Petaluma I*, 830 F. Supp. 1560 (N.D. Cal. 1993). In Connecticut there is yet another troubling case winding its way through the courts: where "a suit claims that a school district failed to deal adequately with a teenage boy who, in front of a teacher, groped and threatened to rape a high school girl." Sherman, *supra*, at 10 (referencing Mennone v. Gordon, 889 F. Supp. 53 (D. Conn. 1995)).

74. There are two forms of sexual harassment recognized by federal courts in Title VII cases, "quid pro quo type–'Have sex with me or you are fired'" and hostile environment harassment, which "could be created by the use of vulgar and offensive language and "sexually related epithets," by being subjected to "kissing, moaning, sighing and other

claim, Title IX plaintiffs would be required to meet minimum standards to establish a cause of action.[75]

B. Applying Title VII's Definition of Workplace Sexual Harassment to Peer Sexual Harassment

In order to establish an appropriate definition of sexual harassment, it is instructive to look to the definition of sexual harassment used by the EEOC and courts that have confronted the issue of workplace hostile environment sexual harassment.[76] A sexually discriminatory hostile environment is created by "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[77] Because hostile environment harassment can take many forms, the EEOC employs a totality of circumstances approach and looks to a number of different factors in determining whether a Title VII violation has occurred.[78] Relevant factors include: 1) whether the conduct was verbal,

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disruptive noises" along with offensive pictures in the workplace, or by receiving bizarre love letters in the workplace.... Inclusion of less overt forms of sexual harassment in the definition of that term, such as comments about a woman's body or pornography in the workplace, both of which could constitute a hostile work environment, is more controversial." Korn, *supra* note 70, at 1371–72 (citations omitted).

Quid pro quo harassment can lend itself easily to an educational institution setting if the harasser is a teacher, supervisor, or administrator. In the case of peer sexual harassment, a hostile environment sexual harassment analysis provides a more appropriate framework for examining the nature of the problem as well as the legal remedy.

75. These minimum standards for hostile environment sexual harassment cases were derived from Title VII litigation and have been applied in Title IX hostile environment sexual harassment cases. For example, in Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297 (N.D. Cal. 1993), the court found that "[l]iability of the BUSD defendants is conditioned on both a finding of hostile environment and their knowing failure to act." A more thorough breakdown of this two-step analysis can be found in Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996). In identifying the elements of a Title IX hostile environment case, the court in *Brown* held that the plaintiff was (1) a member of a protected class; (2) subjected to unwelcome sexual harassment; (3) harassed on the basis of sex; that (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of the plaintiff's education and create an abusive educational environment; and finally that (5) some basis for liability had been established. *Id.* at 540 (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 66–73 (1986)). While the first four elements establish a prima facie case of hostile environment sexual harassment, the fifth element requires that liability be established using agency principles with a "knew or should have known" standard. *Id. See also* Bosley v. Kearney R–1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995) (Title IX peer sexual harassment hostile environment case adopting the two-prong analysis and denying defendants' motion for summary judgment). For an examination of this two-prong analysis, see *infra* notes 203–221 and accompanying text.

76. Although quid pro quo sexual harassment has been litigated under Title IX as well as Title VII, this Note emphasizes that hostile environment sexual harassment, which has also been litigated under both Title VII and Title IX, imports an analysis that is more fitting in a peer sexual harassment context.

77. 29 C.F.R. § 1604.11(a)(3) (1996).

78. For a more thorough treatment of how sexual harassment in schools is sufficiently analogous to Title VII workplace sexual harassment see *infra* notes 190–221 and accompanying text. However, because Title IX, which governs discrimination in

physical, or both; 2) the frequency of incidents; 3) whether the conduct was patently offensive; 4) whether the alleged harasser was a coworker or a supervisor; 5) whether others joined in perpetrating the harassment; and 6) whether the harassment was directed at more than one individual.[79] In a school setting where the complaining plaintiff is charging sexual harassment, only the fourth factor would require some modification. The word "peer" would be the most analogous word to "coworker" and the words "teacher," "administrator," or "other supervisor" are the most analogous to "supervisor."

The EEOC guidelines state that sexual harassment occurs when conduct has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[80] Again, it might be helpful, albeit not necessary, to substitute "school performance" for "work performance" and "educational environment" for "working environment."[81] Moreover, the Supreme Court adopted a standard for establishing a Title VII hostile environment sexual harassment claim in *Meritor Savings Bank v. Vinson*,[82] and later reaffirmed the standard in *Harris v. Forklift Systems, Inc.*[83] The Court stated in *Harris* that a hostile environment sexual harassment is supported "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,'"[84] which is "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[85] Hence, "normal" use of obscenity, isolated suggestions of sexual activity, or a single unwelcome touching will not rise to the level of infecting the environment.[86] For the most part, hostile environment claims require a showing of pervasiveness and a pattern of offensive conduct.[87] However, "the more severe the incident, the less need there is to show a repetitive series of incidents. In particular, intentional touching of a victim's 'intimate body areas' is sufficiently offensive to alter the conditions of her working environment."[88]

C. Examining the Department of Education's Definition of Sexual Harassment Under Title IX

The Department of Education's Office for Civil Rights (OCR) has acted by

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educational institutions, does not, in itself, provide a definition of sexual harassment, it is necessary to establish a working definition of sexual harassment that courts would be likely to apply in determining whether plaintiffs have an actionable claim.

79. 29 C.F.R. § 1604.11.

80. *Id.*

81. While these linguistic constructs may be helpful, they may not be necessary to establish a cause of action. *See, e.g.*, Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992); *see also infra* notes 98–106 and accompanying discussion of the Supreme Court's opinion in *Franklin*, where the court applied the employment context supervisory language to a teacher-student educational context sexual harassment case.

82. 477 U.S. 57 (1986).

83. 510 U.S. 17 (1993).

84. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 65).

85. *Id.* (quoting *Meritor*, 477 U.S. at 67).

86. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).

87. LAYMAN, *supra* note 4, at 57.

88. *Id.*

issuing policy memoranda adopting its own definition of sexual harassment in cases regarding teacher-student harassment and peer sexual harassment under Title IX.[89] OCR's teacher-student sexual harassment definition provides that: "[S]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX."[90] On March 17, 1997, OCR issued a final guidance document that combined the teacher-student and peer sexual harassment policies.[91] This guidance and the related documents preceding it state that the Department of Education believes that school districts may be held liable for peer sexual harassment.[92] DOE offers its definition of hostile environment sexual harassment at the outset as:

> Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) 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.[93]

Despite the issuance of the final guidelines, the definition of sexual harassment remains somewhat fluid. The fact that working definitions of sexual harassment vary is a problematic factor, but not a wholly destructive one, to school-aged children seeking to bring suit under Title IX. Until these guidelines, the policy memoranda were meant to assist in the investigation of Title IX complaints involving teacher-student sexual harassment.[94] As such, they were not necessarily binding on courts.[95] With the issuance of the new guidance document, school districts in the future may find it difficult to avoid liability in a *Rowinsky*-like or

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89. Under the Department of Education (DOE), the OCR is the administrative body charged with reviewing complaints and investigating institutional compliance with Title IX. *See* 20 U.S.C. § 3414 (1988).

90. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1986) (quoting OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)).

91. SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12034 (1997) [hereinafter PEER SEXUAL HARASSMENT GUIDANCE]. *See also* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC (1997) <http://www.ed.gov/offices/ocr/ocrshpam.html>; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE: PEER SEXUAL HARASSMENT (1996) (draft of PEER SEXUAL HARASSMENT GUIDANCE) (on file with author) [hereinafter DRAFT PEER SEXUAL HARASSMENT GUIDANCE]; 61 Fed. Reg. 42728 (1996) (notice of availability and request for comments on DRAFT PEER SEXUAL HARASSMENT GUIDANCE).

92. *See generally* PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91; DRAFT PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 1.

93. PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 12038 (citations omitted).

94. *Id.* at 12034.

95. *See Petaluma II*, 54 F.3d 1447, 1452 (9th Cir. 1995).

Petaluma-like case.[96] Still, this definition, while persuasive, is not yet binding on courts. Also not binding on courts examining Title IX actions are definitions of sexual harassment that arise out of federal cases under Title VII actions.[97]

D. The Supreme Court's Definition of Sexual Harassment Under Title IX

1. Franklin v. Gwinnett County Public Schools *and* Meritor Savings Bank, F.S.B. v. Vinson: *The Title IX-Title VII Connection*

In *Franklin*, the Court examined a sexual harassment claim brought by a

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96. Prior to the issuance of this guidance, several courts had attempted to determine school district liability for peer sexual harassment under Title IX. One of these cases, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996), was recently denied certiorari by the Supreme Court. "Very recently...a divided panel of the Fifth Circuit has ruled that peer sexual harassment is not, in and of itself, cognizable under Title IX. In doing so, the court rejected other federal opinions on the subject, misconstrued existing statements of OCR policy, and dismissed OCR's deliberate and settled practice." DRAFT PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 1 n.1. The final *Guidance* outrightly rejects the *Rowinsky* holding. PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 12048. There had been speculation that the issuance of guidelines that were in direct contradiction to the Fifth Circuit holding and supported the now-vacated holding in the Eleventh Circuit case of Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *vacated, reh'g en banc granted*, 91 F.3d 1418 (1996), would have encouraged the Supreme Court to grant certiorari. However, the Court's certiorari policy suggests otherwise. Consistent with the Court's heightened obligation to promote uniformity in federal law and provide guidance on federal law issues, the Court says that it chooses cases where two or more federal circuit courts are in conflict and cases that present "important" or "significant" legal questions. SUP. CT. R. 10; *see also* STERN ET AL., SUPREME COURT PRACTICE 165–210 (1993) (discussing cases construing the rule). The apparent federal circuit conflict between the Fifth and Eleventh Circuits was "eliminated" when the Eleventh Circuit vacated its prior decision in *Davis*. Although initially proponents of school district liability under Title IX were dismayed, the denial of certiorari could actually prove to be helpful to students alleging a cause of action.

> "We'll just keep litigating the issue. If women in the workplace should not have to endure sexual harassment, why should young girls have to endure it at school?" said Julie Goldscheid, a NOW Legal Defense Fund lawyer in New York.
>
> She predicted that the high court would take on the issue after another appeals court weighs in on the matter.

David G. Savage, *High Court Lets Stand Harassment Suit Barrier*, L.A. TIMES, Oct. 8, 1996, at A1.

The *Rowinsky* case had procedural and substantive problems including that the petitioner, Debra Rowinsky, is the mother of the two young victims and may not have had standing under Title IX to bring a cause of action. Furthermore, the very fact that the Fifth Circuit misconstrued the cause of action and generated such a negative holding could have proven difficult to overcome before the Rehnquist Court. These factors when taken together suggest that the issue of school district liability for peer sexual harassment under Title IX borders on ripeness but that Title IX litigants were fortunate that the Court denied certiorari in *Rowinsky*. As a result, potential litigants are not immediately foreclosed from bringing causes of action against school districts, and the Supreme Court "[sent] a message that it isn't ready to rule in this area." Goodman, *supra* note 72, at D7.

97. *Petaluma II*, 54 F.3d 1447, 1450 (9th Cir. 1995).

student harassed by a teacher who was also a coach at her school.[98] Christine Franklin, the student, argued that her teacher made the school environment sexually hostile.[99] In deciding that damages should be available to students bringing Title IX actions for sexual harassment, the Supreme Court looked to *Meritor*, a hostile environment sexual harassment case.[100] The Court said:

> Unquestionably, Title IX placed on the...[s]chools 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.[101]

Perhaps to avoid deciding an issue arguably not before it, the Court specifically did not address the merits of whether a Title IX sexual harassment claim should import all of the Title VII sexual harassment framework, analysis, and jurisprudence.[102] In remanding the case to a lower court for further proceedings, the Court stated that the proceedings must be "consistent with this opinion."[103] Surely the Court was aware that its reliance upon the definitional parameters of *Meritor*, a Title VII case, in a Title IX sexual harassment context would require that a lower court, in order to be consistent with the Court's opinion, apply a Title VII definition of sexual harassment to the suit. The Court's directive should not be taken lightly. It should follow that because (1) sexual harassment jurisprudence has largely been litigated under Title VII,[104] and (2) the Supreme Court in its evaluation of sexual harassment claims under Title IX has applied reasoning derived from

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98. 503 U.S. 60 (1992).

99. *Id.* at 75. Lower courts have recognized Title IX hostile environment claims by specifically referring to *Franklin*'s implicit recognition of such claims. *See* Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292 (N.D. Cal. 1993); *Petaluma I*, 830 F. Supp. 1560 (N.D. Cal. 1993). *But see* Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989) (holding that it would not recognize a hostile environment claim under Title IX absent additional congressional or administrative direction). *See supra* notes 74–76 and accompanying text for discussion of quid pro quo and hostile environment sexual harassment claims.

100. *Franklin*, 503 U.S. at 75. *See* Stephen G. Hirsch, *Schoolgirls Seek New Protection from Harassment*, LEGAL TIMES, July 26, 1993, at 12.

> [Plaintiffs' attorneys say that] because *Franklin* was a hostile environment suit, the high court's opinion serves as tacit endorsement of the notion that Title IX covers such cases. The plaintiffs' lawyers base their arguments in part on the high court's reliance on its 1986 decision in Meritor Savings Bank, F.S.B. v. Vinson, which drew the distinction between hostile-environment and quid pro quo harassment, and said that both were prohibited under Title VII.

Id. (citation omitted).

"Importantly, the Court [in *Franklin*] relied on Title VII principles and cited *Meritor*, a Title VII case, to resolve the issue." Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1191 (11th Cir.) *vacated, reh'g en banc granted*, 91 F.3d 1418 (1996).

101. *Franklin*, 503 U.S. at 75 (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986)).

102. *Id.* at 65 nn.4–5.

103. *Id.* at 76.

104. *See generally* Korn, *supra* note 70.

Title VII jurisprudence,[105] the most appropriate definition of sexual harassment for the courts to apply in Title IX cases would be the analogous definition found in Title VII case law.[106]

2. *The* Harris v. Forklift Systems, Inc. *Standard of Psychological Harm in the Peer Sexual Harassment Context*

In further interpreting the standard set forth in *Meritor*,[107] *Harris*[108] established that to bring an actionable suit against their employers, employees need not prove that the sexual harassment severely damaged them psychologically or seriously impaired their work performance.[109] This is instructive but not binding for courts that are looking to determine how sexual harassment claims arising under Title IX should be assessed. Notwithstanding the lower standard, the circumstances under which girls and their parents ultimately bring Title IX claims could easily meet the higher standard rejected by the *Harris* court. The records are replete with evidence of severe psychological distress and serious impairment of the ability to effectively function in school once harassment rises to the level of an actionable claim.[110] One girl, whose case eventually settled, had written out her "last will and testament" because the harassment she endured during eighth grade had traumatized her so.[111] The American Association of University Women survey documents recounting how boys and girls feel they have suffered as a result of sexual harassment, but the numbers indicate that girls as a whole report greater injury to their psyche and self-

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105. *Franklin*, 503 U.S. at 75.

106. *Petaluma II*, 54 F.3d 1447, 1453 (9th Cir. 1995) (Pregerson, J., dissenting).

107. 477 U.S. 57 (1986).

108. 510 U.S. 17 (1993).

109. *Id.*

110.

> Harassment can become commonplace. Girls get so used to being grabbed on their breast or worse that they expect it. They don't know they're victims but it wears away at their self-esteem. And it can become severe trauma or result in post-traumatic stress syndrome. Students' grades may drop, or their absenteeism rise. It impacts their learning and thus their career options and economic potential.

John M. Leighty, *When Teasing Goes over the Line*, S.F. CHRON., Nov. 8, 1992, at 12Z–1.

> Girls exhibit the same symptoms as women who are persecuted by sexual harassment: They become withdrawn and fearful, feel intimidated, and may display the physical symptoms of illness. They often transfer out of courses or programs and sometimes drop out of school altogether. But schoolgirls are doubly endangered by harassment. They are at an age of confusion when they are struggling to define their sexual identity. Sexual harassment can stunt and twist their normal development. Without the range of knowledge or experience that comes with maturity, female children are even more powerless and more defenseless than adults. When a student is harassed by peers in public, observers as well as the victim feel threatened and intimidated. All students, those victimized and those who watch, lose faith in grown-ups and in the ability of the school to safeguard and protect them.

MYRA & DAVID SADKER, *supra* note 27, at 115.

111. Leighty, *supra* note 110, at 12Z–1.

esteem.[112] The survey itself highlights two opposing sentiments regarding sexual harassment: an African-American fourteen-year-old girl reported that, "It made me feel low. Thought I was dirt. I just wanted to die,"[113] whereas a white fourteen-year-old boy said, "I don't care. People do this stuff every day. No one feels insulted by it. That's stupid. We just play around. I think sexual harassment is normal."[114] It is no wonder that the young boy considered sexual harassment "normal," with children in schools across the country reporting that boys routinely taunt girls with, "Get down on your knees and give me a blow job,"[115] or "[l]ook at that juicy behind,"[116] while subjecting girls to Flip-Up Fridays where boys compete to lift up more girls' skirts.[117] *De rigueur* or not, once a cognizable sexual harassment claim has been asserted, school districts may be forced to answer for what they did to encourage the behavior by not stopping it. Similarly, a school district may be held liable for taking minimal action, but action that nonetheless allowed the sexual harassment to continue. For example, in *Petaluma*, the city school district administrators merely doled out sporadic, de minimis punishments to several of the alleged harassers.[118] Administrators allegedly never referred Jane or her parents to

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112. HOSTILE HALLWAYS, *supra* note 5, at 24–25.

113. *Id.* at 25.

114. *Id.* at 24.

115. MYRA & DAVID SADKER, *supra* note 27, at 109.

116. *Id.* at 89.

117. *Id.* at 111; Jerry Adler & Debra Rosenberg, *Must Boys Always Be Boys?* NEWSWEEK, Oct. 19, 1992, at 77.

118. There is a factual dispute on the type and frequency of punishments meted out in the *Petaluma* case.

> From the beginning of the harassment in the fall of seventh grade until her withdrawal from the school in the eighth grade (fall 1990 to spring 1992), Jane and her parents repeatedly reported the harassment to Jane's school counselor, Richard Homrighouse. He immediately identified the problem as sexual harassment. Jane spoke to Homrighouse about the harassment both formally at office visits and informally on the school grounds, and her parents both telephoned and met with Homrighouse. Other teachers and school employees similarly knew or should have known about the harassment, either from Jane's complaints or from their own observations of the widespread harassment. In spite of these repeated complaints and the counselor's assurances that he was handling the problem, the harassment persisted. Rather than take steps to stop the harassment, the counselor dismissed it with such comments as "boys will be boys" and that they "will grow out of it."

Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment at 4, *Petaluma I*, 830 F. Supp. 1560 (N.D. Cal. 1993) (No. C 93–0123 CW) (citations omitted).

After one of many incidents, Homrighouse finally called the offenders into his office and warned them. The warning did not stop the harassment. Homrighouse never reported the incidents to the school's Title IX officer, nor did he ever tell Jane or her parents that the school had a Title IX policy and a Title IX officer who was responsible for enforcing the policy. Homrighouse declared that he did not inform the Title IX officer of the harassment because he "didn't feel it was important." *Petaluma II*, 54 F.3d 1447, 1456 (9th Cir. 1995). Nonetheless, Jane Doe alleges that she was harassed by thirty to thirty-five students on numerous occasions over a year-and-a-half period. Plaintiff's Memorandum of Points and Authorities at 3, *Petaluma I*, 830 F. Supp. at 1560 (No. C 93–0123 CW).

the school's Title IX administrator, which all schools in the Petaluma City School District were required to have.[119]

E. Policies, Procedures, and Legislation Countering Sexual Harassment

Despite evidence to the contrary, some school administrators suggest that peer sexual harassment is not problematic within schools.[120] For example, when one school superintendent in Baltimore, Maryland, was asked why his district was the only school district that had not yet implemented a policy governing peer sexual harassment, despite the recommendation of that state's Education Department more than two years prior, he stated:

> I don't think we need a policy around sexual misconduct... We expect children to conduct themselves as decent citizens while they are in school....
>
> There are no procedures that identify how to deal with student sexual behavior per se, but I don't think there should be.... We're not a court system. We're a school. Policies for violent behavior and disruptive behavior are in place.[121]

The recommended adoption of a sexual harassment policy for Baltimore city schools came on the heels of the alleged rape of a ten-year-old girl at North Bend Elementary School in April, 1995.[122] Police charged two ten-year-old boys with rape.[123] Subsequently, the school suspended the two boys as well as, without explanation, the alleged victim.[124] Under pressure from the mayor and others in the community, the ten-year-old girl was reinstated.[125]

Perhaps to avoid liability, or in anticipation of negative court rulings, or simply to make it clear to school districts, administrators, teachers, parents, and students alike, some states are requiring school districts to instate sexual harassment policies that govern student behavior toward one another. California[126] and Minnesota[127] have been joined by Florida[128] and Washington[129] in passing state

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119. *Petaluma I*, 830 F. Supp. at 1560. Because of an earlier Title IX case in the city of Petaluma which resulted in a settlement for the victim as well as a voluntary Title IX compliance agreement between the Petaluma School District and the OCR, the Petaluma School District was required, inter alia, to update their sexual harassment policy and instate a Title IX coordinator at each school. *Petaluma II*, 54 F.3d at 1455 (Pregerson, J., dissenting). By the actions alleged in the *Petaluma* case, the plaintiff argued that the school district was in clear violation of the inadequate policy which it did have as a result of the compliance order. *Id.* By instituting adequate policies and by a strict adherence to and enforcement of such policies, thereby avoiding *Petaluma*-like stonewalling, school districts would have a "safe harbor" from Title IX liability.

120. Jean Thompson, *City Schools Lack Policy on Students' Sex Offenses*, BALTIMORE SUN, May 9, 1995, at 1B.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. CAL. EDUC. CODE § 212.6 (West 1994).

127. MINN. STAT. § 127.46 (1997).

128. FLA. STAT. ch. 230.23(6)(c)(2)(d)(8) (1997).

legislation to respond to peer sexual harassment.

1. The States Act

The California statute became effective in 1993.[130] It requires that every California school must: (1) develop a written sexual harassment policy for staff and students;[131] (2) display it prominently on campus;[132] and (3) distribute a copy to each student and staff member.[133] Moreover, it permits a principal to suspend or even expel students as young as the fourth grade level who engage in sexual harassment.[134]

Nonetheless, even with a state mandated policy in effect, the law is not immune to criticism.[135]

> Ideally, the new California law would help redress the power inequities between boys and girls. And the legislation does take a step in that direction: by requiring a sexual harassment policy it admits to the existence of a problem. By stipulating a punishment, it offers girls a measure of the institutional support that they've been sorely lacking, and puts the burden of change squarely on boys.... Yet in spite of its good intentions, the law, which may well become a model nationwide, is essentially toothless. Gender equity specialist Nan Stein has pointed out that the state offers no guidance for the development of these new sexual harassment policies and, more importantly, its approach is solely punitive: there are no provisions either for staff training or for a curriculum that would help students define the boundaries of appropriate behavior and dissect power relations. In fact, since the state has no means of enforcing the law, principals are free to soft-pedal it.[136]

Florida's statute is likewise exclusively punitive in nature; it too provides for notice to parents, teachers, staff, and students through distribution of a sexual harassment policy embedded within a student handbook code.[137] Minnesota law

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129. WASH. REV. CODE § 28A.640.020(2)(a)–(f) (1997).
130. CAL. EDUC. CODE § 212.6.
131. CAL. EDUC. CODE § 212.6(b).
132. CAL. EDUC. CODE § 212.6(d).
133. CAL. EDUC. CODE § 212.6(e)–(f).
134. PEGGY ORENSTEIN, SCHOOLGIRLS 113 (1994).
135. *Id.* at 117–18.
136. *Id.* at 117–18 (citation omitted).
137. FLA. STAT. ch. 230.23(6)(c)(2)(d)(8) (1997) provides that schools must

> [a]dopt a code of student conduct for elementary schools and a code of student conduct for secondary schools and distribute the appropriate code to all teachers, school personnel, students, and parents or guardians, at the beginning of every school year. A district may compile the code of student conduct for elementary schools and the code of student conduct for secondary schools in one publication and distribute the combined codes to all teachers, school personnel, students, and parents or guardians at the beginning of every school year. Each code of student conduct shall be developed by the school board; elementary or secondary school teachers and other school personnel, including school

requires each school district to adopt a policy prohibiting sexual, religious, and racial harassment and violence.[138] Minnesota, which passed its law in 1989, was the first state to enact legislation prohibiting sexual harassment in schools. The state also provides a model curriculum for use in junior and senior high schools.[139] Washington, on the other hand, has perhaps the most comprehensive policy on sexual harassment in the country. Not only does the policy virtually mimic the guarantees of equal educational access and nondiscrimination standards embodied in Title IX and Title VII, but it also defines sexual harassment by encompassing both quid pro quo and hostile environment standards.[140] In addition, it requires that the school districts' sexual harassment policies apply to employees, volunteers, parents, and students, and it specifically mentions applicability to conduct between students.[141]

> administrators; students; and parents or guardians. The code of student conduct for elementary schools shall parallel the code for secondary schools. Each code shall be organized and written in language which is understandable to students and parents and shall be discussed at the beginning of every school year in student classes, school advisory councils, and parent and teacher associations. Each code shall be based on the rules governing student conduct and discipline adopted by the school board and be made available in the student handbook or similar publication. Each code shall include.... [n]otice that violation of the school board's sexual harassment policy by a student is grounds for in-school suspension, out-of-school suspension, expulsion, or imposition of other disciplinary action by the school and may also result in criminal penalties being imposed.

Id.

138. Minnesota's statute reads:

> Each school board shall adopt a written sexual, religious, and racial harassment and sexual, religious, and racial violence policy.... The policy shall apply to pupils, teachers, administrators, and other school personnel, include reporting procedures, and set forth disciplinary actions that will be taken for violation of the policy. Disciplinary actions must conform with collective bargaining agreements.... The policy must be conspicuously posted throughout each school building, given to each district employee and independent contractor at the time of entering into the person's employment contract, and included in each school's student handbook on school policies. Each school must develop a process for discussing the school's sexual, religious, and racial harassment and violence policy with students and school employees.

MINN. STAT. § 127.46 (1997).

139. ORENSTEIN, *supra* note 134, at 301 n.7.

140. Washington's school sexual harassment law has a provision which required the development of criteria for school district sexual harassment policies, grievance procedures, remedies and disciplinary procedures. Another provision required each school district to adopt and implement a written sexual harassment policy which applies to employees, volunteers, parents, and "students, including, but not limited to, conduct between students." The statute provides that the school district policy is widely disseminated and that the provisions and definitions (both quid pro quo and hostile environment types) are discussed and addressed. WASH. REV. CODE § 28A.640.020(2)(a)–(f) (1997).

141. *Id.*

2. School Districts Respond

Nevertheless, as one Minnesota school district learned, having state-mandated policies in place is helpful, but they do not guarantee a harassment-free educational environment.[142] In Minnesota, seven-year-old Cheltzie Heintz became the youngest child in the country to assert that a school district failed to stop peer sexual harassment at her elementary school despite the district's sexual harassment policy.[143] She and other female classmates complained that boys swore at them, "comment[ed] lewdly about female sexual organs and [made] suggestions for oral sex."[144] Other school districts have not waited for their respective state legislatures to jump on the legislative bandwagon.[145] Some school districts have instituted sexual harassment training of administrators and teachers to avoid the problem of intentionally allowing harassment to continue with dismissive stonewalling.[146] Perhaps most importantly, students are now being instructed in the differences between flirting and sexual harassment, as well as the consequences of sexual harassment.[147] Ultimately, the hope is that students will learn respect for one another that will stop sexual harassment before it starts.[148]

II. TITLE IX STATUTORY AND REGULATORY SCHEME PROHIBITS SEXUAL HARASSMENT

With most jurisprudence on sexual harassment arising out of a Title VII employment context, it is plain to see why schoolchildren might be without remedy were it not for Title IX. Title VII clearly governs the area of sex discrimination in the employment context.[149] In fact, the legislative history of Title VII indicates that educational institutions were explicitly left out of Title VII[150] until 1972, when the

142. *See generally supra* note 72 and accompanying text; Sherman, *supra* note 73.

143. Leighty, *supra* note 110, at 12Z–1.

144. Sherman, *supra* note 73, at 10.

145. *See, e.g.*, ORENSTEIN, *supra* note 134, at 301 n.7. "Individual schools, such as Minuteman Tech and Amherst Regional High School—both in Massachusetts—have also developed sexual harassment policies that are educational rather than merely disciplinary. Both schools place a premium on mediation between students, allowing the harassee to maintain a sense of control over the proceedings." *Id.*

146. *See, e.g.*, Janine DeFao, *What Is Sex Harassment? Schools Struggle to Learn*, SACRAMENTO BEE, Nov. 8, 1994, at A1. "Local districts have trained administrators and some teachers on the issue, hoping the message will trickle down to students through teachers' examples or interventions when problems occur.... But none has instituted any formal anti-harassment training for students, either through special programs or existing classes—which some say are needed" *Id. See also,* Brooks, *supra* note 16, at A1; Easton, *supra* note 29, at 16; Woody, *supra* note 28, at 3; Zamora, *supra* note 28, at A3.

147. *See, e.g.*, Maria Alicia Gaura, *Boys Accused of Sex Harassment*, S.F. CHRON., Jan. 5, 1996, at A19. In response to incidents of sexual harassment, "[t]he first of two seminars on acceptable behavior were offered at Santa Clara High School.... Some women's groups said such training is long overdue, and abusive behavior from boys has been tolerated for too long by school officials." *Id.*

148. Brooks, *supra* note 16, at A1; Defao, *supra* note 146, at A1; Easton, *supra* note 29, at 16; Woody, *supra* note 28, at 3; Zamora, *supra* note 28, at A3.

149. 42 U.S.C. §§ 2000e–2000e–17 (1994).

150. Civil Rights Act of 1964, Pub. L. No. 88–352, § 702, 78 Stat. 241, 255. The

educational institution exemption was eradicated by Congress.[151] Furthermore, in enacting the 1972 Education Amendments to the Civil Rights Act, Title IX, with its broadly sweeping reformist language, was adopted.[152] Schools that receive federal funding were then prohibited from discriminating in any educational program on the basis of sex.[153]

A. The Authority for the Title VI, Title VII, and Title IX Trio

The language of Title IX is virtually identical to that of Title VI of the Civil Rights Act of 1964.[154] Title VI, like Title IX, prohibits schools that receive federal funding from discrimination in any educational program; however, the Title VI prohibition is on the basis of race, color, or national origin, and the Title IX prohibition is on the basis of sex.[155]

The most relevant distinction of the titles' legislative history regards the authority under which each title was passed. Titles IX and VI both appear to have been passed under the authority of the Spending Clause of the Constitution.[156] Title VII, on the other hand, was most likely passed under the authority of the Commerce Clause of the Constitution.[157] For reasons that will be described later, courts have therefore established different standards of liability in Spending Clause versus Commerce Clause cases.[158] Furthermore, other distinct differences in statutory interpretation have developed over time.[159] Until recently, Title IX had typically been litigated to counteract the unequal funding of boys and girls sports and unequal access to vocational classes.[160] Like Title VII, the explicit words of

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original wording of § 702 entitled "Exemptions" reads: "This title shall not apply to...an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." *Id.* (amended in 1972, amendment codified at 42 U.S.C. § 2000e–1 (1994)).

151. Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103, 103–04 (codified at 42 U.S.C. § 2000e–1 (1994)).

152. 20 U.S.C. § 1681(a)–(c) (1994).

153. 20 U.S.C. § 1681(a).

154. *Compare supra* note 40 *with* note 48 (contrasting the relevant language of Titles IX and VI, respectively).

155. *Id.; see* Cannon v. University of Chicago, 441 U.S. 677, 694–96 (1979); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (explaining that Title IX's prohibition of sex discrimination in education was patterned after Title VI's prohibition of racial discrimination in education).

156. U.S. CONST. art. I, § 8, cl. 1; *see Petaluma III*, 949 F. Supp. 1415, 1417–18 (N.D. Cal. 1996).

157. U.S. CONST. art. I, § 8, cl. 3; *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (Brennan, J. concurring); Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?* 12 HOFSTRA LAB. L.J. 39, 41 (1994).

158. *See infra* notes 222–25 and accompanying text.

159. *See infra* notes 221–33. *See also infra* notes 230–34 and accompanying text for a discussion of how the Court in Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 602–03 (1983), determined that Title VI does not support a monetary damages remedy for Title VI violations not involving intentional discrimination.

160. "Title IX is usually invoked in connection with issues such as equality in sports programs and equal access to vocational/technical classes." Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment,*

Title IX refer not to "sexual harassment" but mandate an outright prohibition on discrimination on the basis of sex. However, in the Title IX case *Franklin*, where the Supreme Court analogized sexual harassment on the job to sexual harassment in school, the Court essentially relied upon the Title VII case *Meritor* to establish a definition of sexual harassment under Title IX.[161] In doing so, the Court reaffirmed that sexual harassment was a form of sex discrimination.[162]

B. The Regulatory Scheme of Title IX

In order to find that an institution has violated Title IX, three criteria must be met.[163] The institution's program or activity must: (1) be educational;[164] (2) receive federal funds;[165] and (3) engage in discrimination on the basis of sex.[166] Title IX is enforced through the federal regulations promulgated by the Office for Civil Rights (OCR) within the Department of Education (DOE).[167] Title IX requires that a complaint be brought against the educational institution rather than against the individual who allegedly discriminated against the complaining party.[168] Title IX

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141 U. PA. L. REV. 2119, 2123 n.21 (1993). *See also* Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 655 (6th Cir. 1981) (invoking Title IX in a case involving inequality in sports programs); Canterino v. Barber, 564 F. Supp. 711, 715 (W.D. Ky. 1983) (invoking Title IX in a case involving unequal access to vocational classes).

161. *See supra* notes 98–106 and accompanying text.

162. *See* Alexander v. Yale Univ. 459 F. Supp. 1, 5 (D. Conn. 1977) (holding that a plaintiff who alleges sexual harassment "is within the class Title IX was designed to protect"), *aff'd on other grounds*, 631 F.2d 178, 185 (2d Cir. 1980) (agreeing with district court that a justiciable claim for relief under Title IX was presented).

163. 20 U.S.C. §§ 1681–86 (1988).

164. "Title IX coverage extends to *any* educational program receiving federal financial assistance, whether or not a school or school district sponsors the program. Such informal programs as 4-H Clubs and on-the-job training programs are included." LAYMAN, *supra* note 4, at 79.

165. "Most private as well as public schools receive federal funds. Regardless of whether the objectionable acts occurred in a program that was federally funded, if *any* program in the school receives federal assistance, then the school may be held liable under Title IX." *Id.*

166.

> As in Title VII, the statute does not define sex discrimination. Regulations and interpretations of Title IX by the courts have included discrimination on the basis of parental or marital status, discrimination in athletics, discrimination in course offerings, discrimination in counseling students, discrimination in admissions policies, discrimination in employment, and sexual harassment.

Id.

167. The main regulations are 34 C.F.R. § 106.1–.71 (1996), with procedural provisions in 34 C.F.R. § 100.6–.11 (1996) and 34 C.F.R. § 101.2 (1996).

168. 34 C.F.R. § 100.6–.13 (1996). Because Title IX regulations require that grievances be resolved by naming the institution (as the recipient of federal funds) rather than individuals, the section 1983 dilemma of bringing a claim against a state actor who must be acting within the scope of his duty by discriminating on the basis of sex is avoided. *Id.* For a discussion of the functional role of section 1983 and its pleading requirements, see SCHWARTZ & KIRKLIN, *supra* note 41, § 1.4, at 13–16, § 1.6, at 17–25. Title IX regulations define "recipient" as "any public or private agency, institution...to whom Federal financial

regulations also require the school to notify employees, students, and their parents that the school or school district does not discriminate on the basis of sex in its programs or activities.[169] School districts must publish a policy on sex discrimination and inform each employee and student of its existence and substance.[170] It must also institute adequate grievance procedures to receive, investigate, and resolve complaints.[171] If school districts fail to take any of these steps, they can be found liable for violating Title IX.[172]

Since all school districts are required under the statute to have a Title IX coordinator, students with a complaint of sexual harassment should contact that person initially.[173] Not surprisingly, most school children have not yet been educated in the ways of bureaucracy and automatically assume that the appropriate person to tell of persistent sexual harassment is their school guidance counselor.[174]

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assistance is extended...." 34 C.F.R. § 100.13(i).

169. LAYMAN, *supra* note 4, at 81.

170. *Id.*

171. *Id.*

172. *Id.*

173. The regulations specify that:

> Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any action which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

34 C.F.R. § 106.8(a) (1996).

174. This is presuming that the child actually decides to notify school authorities of the harassment. *Hostile Hallways* indicated that most children do not complain to authorities. HOSTILE HALLWAYS, *supra* note 5, at 14, 24. Twenty-three percent of sexually harassed students have told no one; only seven percent of students say:

> they have told a teacher about the experience, with girls twice as likely as boys to have done this. Just under 1 in 4 (23%) have reported the incidents to parents or other family members....
>
> By far, most reporting takes place on a peer-to-peer basis: 63% of sexually harassed students have told a friend.

Id. at 14. One sixteen-year-old girl cited by the AAUW survey said, "I was upset the administration didn't respond immediately after I complained. I was told to ignore the harassers." *Id.* This response has been validated by other sources:

> While teachers and administrators look the other way, sexually denigrating comments, pinching, touching, and propositioning happen daily.... [S]ome girls are so intimidated they suffer in silence. Others fight back only to find this heightens the harassment. Many girls don't even realize they have a right to protest. And when they do come forward, bringing school sexual harassment into the open, it is often dealt with quickly and nervously; it is swept under the rug, turned aside, or even turned against the girl who had the courage to complain.

MYRA & DAVID SADKER, *supra* note 27, at 9.

> When students, teacher, and school administrators aren't familiar with the term "sexual harassment" or if they don't recognize the range of harassing [behavior], the taunting, teasing and tormenting of girls in

In theory, this administrator should know of the Title IX duty to forward the complaint to the Title IX Coordinator for his or her school district. Unfortunately for Jane Doe, her guidance counselor allegedly did not tell either Jane or her parents about the existence of a Title IX Coordinator, or even the existence of Title IX itself, nor did he forward Jane's complaints to the Coordinator. He "didn't feel it was important."[175]

An individual making a sexual harassment claim, or any other kind of sex discrimination claim, may file a complaint according to the school's internal grievance procedure and/or with the OCR[176] but is not required to exhaust any internal grievance procedure before filing with the OCR.[177] Once a complainant files with OCR, it has ninety days to investigate the complaint and another ninety days to negotiate a voluntary compliance agreement.[178] If *voluntary* compliance cannot be obtained, OCR will then *require* compliance.[179] This will generally occur through administrative proceedings within the DOE.[180] If OCR finds that discrimination has occurred and no agreement can be reached, it may begin proceedings to terminate the federal funds allocated to that school.[181] OCR may also refer the case to the Department of Justice for possible initiation of legal action against the district.[182]

C. Finding a Remedy Under Title IX

Under the regulations and the statute, there are no specific remedies for the complainant.[183] This is where the *Franklin* decision comes into play. According to the Supreme Court in *Cannon v. University of Chicago,*[184] when a private civil suit is brought against the school for violations of Title IX, there is an implied right of action for enforcing Title IX.[185] Thirteen years later, the Supreme Court in *Franklin*[186] unanimously ruled that monetary damages are available for a private

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> schools will continue.... [Students report] about the ways their school officials have responded to sexually harassing [behavior]. Their comments fall into three categories: (1) tolerance, (2) ineffective responses and (3) effective responses.

LARKIN, *supra* note 70, at 123.

175. *Petaluma II*, 54 F.3d 1447, 1456 (9th Cir. 1995).

176. The regulations provide for certain time restrictions on filing. *See* 34 C.F.R. § 100.7(b) (1996) (providing that the claim must be filed within 180 days from the date of the alleged discrimination, unless extended by the responsible Department of Education official).

177. *Id.*

178. 34 C.F.R. § 100.7(d)(1) (1996) ("the matter will be resolved by informal means whenever possible"). *But see* LAYMAN, *supra* note 4, at 83 ("In practice, investigations often take longer [than ninety days].").

179. *See* 34 C.F.R. § 100.8 (1996).

180. The proceedings involve an administrative hearing, a review by the Department's Civil Rights Reviewing Authority, and a final review by the Secretary of Education. *Id.*

181. 34 C.F.R. § 100.8(a)–(c).

182. 34 C.F.R. § 100.8(a).

183. 20 U.S.C. §§ 1681–86 (1988); 34 C.F.R. § 106.1–.71 (1996).

184. 441 U.S. 677 (1979).

185. *Id.* at 709.

186. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992).

action brought to enforce Title IX.[187] The Court determined that in enacting Title IX, unless Congress has expressly provided otherwise (which it had not), there is a presumption in favor of the availability of all appropriate (and traditional) remedies.[188] In deciding *Franklin*, the Court gave Title IX the teeth it needed to become an effective remedy for plaintiffs and an effective deterrent to future harassment in schools.[189]

III. COURTS SHOULD ANALOGIZE WORKPLACE SEXUAL HARASSMENT TO CLASSROOM SEXUAL HARASSMENT

Within Title VII jurisprudence, there are well-established elements to determine employer liability for hostile environment sexual harassment. Because workplace sexual harassment and school sexual harassment are analogous, there is no reason for the essential elements of Title VII not to apply in the school context.

A. A Title VII Hostile Environment Sexual Harassment Claim

It is worth mentioning again how a Title VII sexual harassment claim is established.[190] A sexually discriminatory hostile environment is created if the complainant was subjected to "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[191] Graffiti or openly displayed sexually suggestive pictures are included,[192] as well as practical or tasteless jokes directed at one sex, even though the conduct is not sexual in nature.[193] According to *Meritor*, the actions and environment created must be "unwelcome."[194] If a plaintiff participates in creating a hostile atmosphere, there is no Title VII violation.[195] However, tolerating the behavior does not establish that the conduct was welcome.[196]

The harassing behavior must also reach the level of unreasonably interfering

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187. *Id.* at 72.

188. *Id.* at 66.

189. *See* Tamar Lewin, *Students Seeking Damages for Sex Bias*, N.Y. TIMES, July 15, 1994, at B7.

> [L]awyers quickly noticed the financial potential of Title IX lawsuits once the High Court rejected the Bush Administration's argument that the law provided only for awards of back pay or injunctions ending the discriminatory behavior—remedies that were all but useless to students, who do not get paid and often have left the school by the time a court order is issued.

Id. See also Sherer, *supra* note 160, at 2151 n.176.

190. *See supra* notes 76–88 and accompanying text.

191. 29 C.F.R. § 1604.11(a) (1996).

192. Robinson v. Jacksonville Shipyard, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

193. Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988).

194. Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986).

195. Jones v. Flagship In'l, 793 F.2d 714 (5th Cir. 1986) (where EEOC officer encouraged others to file suit against her employer for sexual harassment, her behavior was found to contribute to a hostile work environment and justify her dismissal).

196. *Meritor*, 477 U.S. at 68.

with the victim's work or of creating an intimidating, hostile, or offensive environment.[197] Isolated suggestions of sexual activity, the "normal" use of obscenity, or a single unwelcome touching does not rise to the level of interfering with the work environment.[198]

Under Title VII's sexual harassment analysis, employers are not strictly liable; entity liability is based on rules of agency.[199] Those rules establish that harassment is imputed to the employer if the employer does not have a clear policy prohibiting sexual harassment and instituting reasonable grievance procedures.[200] This can best be described as a vertical construction. If a supervisor or coworker sexually harasses another employee and the entity-employer knew or should have known about it and did not take actions to stop it, the vertical relationship is established. The entity-employer is liable for the conduct because the intent of the harasser is imputed to the employer-entity. If policies and procedures prohibiting sexual harassment exist, the employer cannot be liable for harassment by coworkers of which it was unaware.[201] Importantly, to avoid liability, the employer who knew or should have known about the harassment, must take prompt effective remedial action or it will otherwise be found liable.[202]

B. How Title IX and Title VII Are Similar: Making Out a Prima Facie Case and Establishing Institutional Liability Under Title IX

Courts seem to have less difficulty reaching the conclusion that peer sexual harassment can be unwelcome sexual conduct or behavior that unreasonably interferes or alters the school environment. Following these Title VII standards, the lower courts across the nation have developed a virtually identical two-prong analysis for making out a prima facie case under Title IX.[203] In *Patricia H. v. Berkeley Unified School District,*[204] the Northern District of California applied Title VII standards and found that "[l]iability of the [institutional] defendants is conditioned on both a finding of hostile environment and their knowing failure to act."[205] The Eleventh Circuit in *Davis* applied this same two-prong formula as described above.[206] However, the *Davis* court, like the First Circuit in *Brown v. Hot,*

197. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); *Meritor*, 477 U.S. at 67; Ellison v. Brady, 924 F.2d 872, 876–77 (9th Cir. 1991).

198. Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986).

199. *Meritor*, 477 U.S. at 72–73.

200. *Id.*

201. *Id.*

202. *Id.*

203. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), *vacated, reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y 1996); Bosley v. Kearney R–1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297 (N.D. Cal. 1993); *cf.* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74–75 (1992) (citing *Meritor*, 477 U.S. at 57, and incorporating Title VII standards for determining relief). *See also* Murray v. New York Univ., 57 F.3d 243, 249 (2d Cir. 1995) (applying Title VII standards); *but see* Seamons v. Snow, 864 F. Supp. 1111, 1118 (D. Utah 1994); *Petaluma I*, 830 F. Supp. 1560 (N.D. Cal. 1993) (rejecting Title VII standards).

204. 830 F. Supp. 1288 (N.D. Cal. 1993).

205. *Id.* at 1297.

206. *See infra* note 273–93 and accompanying text.

Sexy & Safer Productions, Inc.,[207] elaborated on the two-prong formula by further breaking down the elements of a Title IX hostile environment case.[208]

1. The First Prong

The first four elements that a plaintiff must prove to succeed in a hostile environment peer sexual harassment case as identified by *Davis* are: (1) she is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; and (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment. The first four elements constitute the first prong of the two-prong analysis and the prima facie case for hostile environment sexual harassment. These elements were established under *Meritor*[209] and reaffirmed under *Harris*.[210] The Office of Civil Rights has also determined the same elements are applicable to hostile environment peer sexual harassment.[211]

2. The Second Prong

The fifth element of a hostile environment sexual harassment claim is that some basis for institutional liability must been established.[212] This element is perhaps most fundamental to a cognizable hostile environment sexual harassment claim. In bringing a peer hostile environment action against a school district or institution that receives federal funds, plaintiffs are not seeking redress because of a "direct act of a school official demanding sexual favors, but rather the officials' failure to take action to stop the offensive acts of those over whom the officials exercised control."[213] Title VII similarly requires that employers take steps to assure that their employees' work environment is free from sexual harassment "regardless of whether that harassment is caused by the sexual demands of a supervisor or by the sexually hostile environment created by supervisors or co-workers."[214]

This concept of entity liability under Title VII, based upon the employer's failure to take action to remedy a hostile environment created by coworkers, is not unique to the Eleventh Circuit; it is the law.[215] The agency principle, imported to

207. 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996).

208. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194, *vacated, reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

209. Meritor Savings Bank v. Vinson, 477 U.S. 57, 66–73 (1986).

210. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993).

211. PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 12041–42.

212. *Id.*

213. *Davis*, 74 F.3d at 1193; *see also* PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 12042.

214. *Id.* (citing Henson v. Dundee, 682 F.2d 897, 905 (11th Cir. 1982)).

215. For example, it has also been recognized in the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir.), *cert. denied*, 116 S. Ct. 473 (1995); Carr v. Allison Gas Turbine Div. Gen. Motors, 32 F.3d 1007, 1009 (7th Cir. 1994); Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); Nichols v. Frank, 42 F.3d 503, 508 (9th Cir. 1994); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 182 (6th Cir. 1992); Smith v. Bath Iron Works, 943 F.2d 164, 165–66 (1st Cir. 1991); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1345–46 (10th Cir. 1990); Levendos v. Stern

courts from *Meritor*,[216] allows a finding that an institution is liable if (1) there is a hostile environment created by sexually harassing conduct; (2) the institution "knew or should have known" about the harassment; and (3) it "failed to take prompt and effective remedial action to stop it."[217] This principle would apply to determine institutional liability for hostile environment sexual harassment whether the prohibited conduct is perpetrated by agents (that is, supervisors, teachers, administrators) or non-agents (that is, coworkers, peers, and third parties.)[218]

The Northern District in *Patricia H.* followed *Franklin*, and it, too, applied agency principles in determining liability based on the school's failure to take appropriate and effective action.[219] Moreover, the *Davis* court agreed that

> when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, 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, 20 U.S.C. § 1681(a). Just as a working woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," 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.[220]

Entertainment, Inc., 909 F.2d 747, 749 (3d Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015–16 (8th Cir. 1988).

216. Meritor Savings Bank v. Vinson, 477 U.S. 57, 66–67 (1986).

217. RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958). *Accord* Fuller v. City of Oakland, 47 F.3d 1522, 1528–29 (9th Cir. 1995); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803–04 (6th Cir. 1994); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995); Intlekofer v. Turnage, 973 F.2d 773, 779–80 (9th Cir. 1992); Ellison v. Brady 924 F.2d 872, 881–83 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990); Baker v. Wegerhaeuser Co., 903 F.2d 1342, 1345–46 (10th Cir. 1990); Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840, 844 (2d Cir. 1990), *cert. denied* 499 U.S. 922 (1991); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989); Katz v. Dole, 709 F.2d 251, 254–56 (4th Cir. 1983).

218. Bosley v. Kearney R–1 Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995).

> To establish a basis for imputing conduct to an employer in Title VII cases where the claim involves peer-on-peer (non-supervisor) harassment or harassment by third parties, an employer may be held liable if it is established that the employer knew or should have known of the hostile environment and took no or insufficient remedial action.

219. Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297 (N.D. Cal. 1993) (citing Ellison v. Brady, 924 F.2d at 881).

> An employer is liable if it fails to take "immediate and appropriate" action "reasonably calculated" to remedy the harm complained of.... Just as the Gwinnett school district [in *Franklin*] could be liable after Franklin complained and received no help, and Ellison's employer could be liable for its subpar efforts on her behalf, the [institution] may be liable if it failed to take reasonable steps to aid [plaintiffs].

220. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996), *vacated, reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996) (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)).

Hence, if the four elements of a prima facie case are asserted and proven, and a plaintiff successfully proves the agency connection required by the second, court-mandated prong, a plaintiff should be able to recover damages under Title IX.[221]

C. Where Title IX and Title VI Depart from Title VII

What courts are struggling with is the differing intent standard as conceived under Titles IX and VI. Titles IX and VI prohibit entities that receive federal funds from discriminating on the basis of, in the former, sex, and in the latter, race, color, or national origin. Unlike Title VII cases where there is no government-employer contract agreement, under Spending Clause enacted statutes like Title IX and Title VI, recipients (1) enter into a contractual relationship with the federal government and (2) must know the terms of the contract.[222] Therefore, the argument goes, a recipient of federal funds who unintentionally discriminates on the basis of sex in Title XI cases "lacks notice that it will be held liable for a monetary award."[223] However, the Court explicitly rejected this reasoning in the hostile environment sexual harassment case, *Franklin*.[224] The court explained,

> The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.... Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.[225]

Here, the Court characterized hostile environment sexual harassment as intentional discrimination. Even if it can be argued that the Court's use of the words "intentional discrimination" was in reference to the harasser's employment relationship to the school, and *not* the nature of the claim as a hostile environment sexual harassment allegation as it appears to be, peer sexual harassment still implicates an intentional discrimination analysis under the theory of respondeat superior.

1. Different Constructions of Intent

Entity liability under Titles VI and IX turns on intent. Under Title VII, the animus or intent motivating the harasser is not at issue. The Court has determined that Titles VI and IX reach conduct that is described as intentional discrimination.[226] Lower courts are struggling with what interpretation of intent must therefore be proved under a Title IX peer sexual harassment claim. Intent can take two different forms. The first, a vertical intent model, is the construct necessary for a traditional analysis of sexual harassment. The second, a horizontal model, is the construct that has been distracting courts from the analysis of sexual harassment as a form of

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221. *Id.* at 1194–95.
222. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74 (1992).
223. *Id.* at 74 (citation omitted).
224. *Id.* at 74–75.
225. *Id.* (citations omitted).
226. *See id.*; Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 (1983).

intentional discrimination.

a. A vertical intent model is the most appropriate intent standard for Title IX cases.

The concept of vertical intent is not new to sexual harassment law. Under Title VII, entity liability can be established by plaintiffs alleging sexual harassment at work. Consider the typical sexual harassment hypothetical. Coworker *A* sexually harasses *B*, a colleague, on the job. *B*, the employee-victim, repeatedly alerts management to the problem, but management does not act to stop the harassment. In this workplace scenario, the entity is clearly implicated. First, *A*, the harasser, is an employee of the entity. Second, *B*, the victim, is as well. Third, the harassment took place within the entity's establishment and under its control. Fourth, the entity knew (or should have known) about the harassment because *B* alerted management. Fifth, the entity did not act to stop the harassment. Title VII does not examine the entity's animus towards the victim in its failure to protect her. Nor does it examine the harasser's animus towards the victim in his sexually harassing conduct towards her. The Title VII inquiry is directed at whether or not a hostile environment was created.

The Title IX and Title VI construct differs somewhat in process, but remains solidly grounded upon traditional sexual harassment law. Take the above hypothetical scenario, but change the fact pattern slightly. Student *A* sexually harasses *B*, another student at school. *B*, the student-victim, repeatedly alerts her teachers and/or counselors to the problem, but the administration does not act to stop the harassment. In this educational scenario, the entity is likewise clearly implicated. First, *A*, the harasser, is a student under the disciplinary control of the entity. Second, *B*, the victim is as well. Third, the harassment took place within the entity's establishment and under its control. Fourth, the entity knew (or should have known) about the harassment because *B* alerted the administration. Fifth, the entity did not act to stop the harassment.

Because Titles IX and VI reach intentional discrimination, the most reasonable construct of intent, within sexual harassment doctrine, must be applied. A vertical construction suggests that because the harasser is acting in a way that creates a hostile environment and because the entity failed to take protective measures to stop the harassment and failed to preserve a nonhostile environment, the harasser's intent can be imputed to the entity. The relevant cases rule out strict liability, which would suggest that merely because the harassment occurred, the entity is liable.[227] Not even a traditional Title VII analysis would support this construction.[228] The entity must have some sort of notice for liability to attach. Unless the entity knew or should have known about the sexual harassment, the intent of the harasser can not be imputed to the entity.[229] In both the employment and the educational hypotheticals above, the entity should be liable under sexual harassment law.

227. *See generally Franklin*, 503 U.S. at 60; *Guardians*, 463 U.S. at 582.
228. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
229. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

i. The *Guardians Ass'n v. Civil Service Commission of New York* construction of intent is consistent with a Title VII vertical intent model.

The extremely fragmented Supreme Court decision in the Title VI case *Guardians*[230] qualifiedly concluded that discriminatory intent is required under Title VI.[231] Five justices determined (albeit for different reasons) that Title VI incorporates a disparate impact standard.[232] However, the Court added that while Title VI requires intentional discrimination, agencies "charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination."[233] The Court also explained that if the agency charged with enforcement interpreted the statute as not requiring intent, "we should not reject [that interpretation] absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history."[234]

ii. Office for Civil Rights regulations relies on the Title VII standard of liability.

Because courts must look to the OCR, the agency charged with enforcement of Title IX, in reviewing peer sexual harassment claims, it is significant to note that the OCR's final regulations regarding peer sexual harassment explain unequivocally that a school district's failure to remedy peer sexual harassment of which it knew or should have known violates Title IX.[235] Furthermore, this Title VII standard was the standard used in evaluating Title IX peer sexual harassment claims even before the issuance of the final guidelines.[236] The statute itself and the legislative intent of Title IX likewise do not foreclose OCR's interpretation and use

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230. 463 U.S. 582 (1983) (race-based disparate impact claim targeting a facially neutral "last-hired first-fired" policy does not support money damages under Title VI).

231. *Id.*

232. *Id.* at 584 n.2 (citations omitted).

> Justice STEVENS, joined by Justice BRENNAN and Justice BLACKMUN, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid.... Justice MARSHALL would hold that, under Title VI itself, proof of disparate-impact discrimination is all that is necessary.... [Justice White] agree[s] with Justice MARSHALL that discriminatory animus is not an essential element of a violation of Title VI. [Justice White] also believe[s] that the regulations are valid, even assuming arguendo that Title VI, in and of itself, does not proscribe disparate-impact discrimination.

233. *Id.* at 592.

234. *Id.*

235. PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 12048.

236. *See e.g.*, Letter from John E. Palomino, Regional Civil Rights Director, Region IV, to Mel Solie, Deputy Superintendent, Santa Rosa School District 2 (July 24, 1992) [hereinafter Palomino Letter]; Letter from Kenneth A. Mines, Regional Civil Rights Director, Region V, to Dr. Gerald L. McCoy, Superintendent, Eden Prairie Schools, Dist. 272, at 2–4 (Apr. 27, 1993) [hereinafter Mines Letter] (both letters on file with author).

of the Title VII standard of liability.[237]

iii. The *Franklin* construction of intent is consistent with a Title VII vertical intent model.

Although the language of Title VII does not include the words "sexual harassment," the *Meritor* court determined that sexual harassment was discrimination on the basis of sex. Since the Title VII language has an outright prohibition of discrimination in the employment context on the basis of sex, sexual harassment has consistently been viewed as absolutely prohibited under its protective umbrella. In the Title IX case, *Franklin*, the Supreme Court noted that the plaintiff, at the district court level, argued that "the terms of outright prohibition of Title VII...apply by analogy to Title IX's antidiscrimination provision, and that the remedies available under the two statutes should also be the same."[238] The Court did not illuminate the matter or resolve the question in its decision. It stated: "Because Franklin does not pursue this contention here, we need not address whether it has merit."[239] The Court did not define which "it" it was leaving open. There are several possibilities. Was the "it" left open the question of whether Title IX, like Title VII, outrightly prohibits sexual harassment? Or was the "it" left open the question of whether Title IX provides the same legal remedies as Title VII? Or could it be some combination of the two? The Court said that it believed it was leaving "the question" open. Yet the Court then went on to apply, by analogy, the definition of sexual harassment as derived from Title VII case law.[240] Because of this confusing posture, it is arguable that the Court chose not to address the issue of parallel remedies under Title VII and Title IX, and *not* that it declined to rule on whether the outright prohibition language of Title VII was an applicable analogy. It is impossible to determine whether or not the *Franklin* Court meant to be ambiguous in its footnote on the question. On the one hand, the Court appeared to be stating that it was *maybe* not applying a Title VII analogy where it looked like it was. On the other hand, it then proceeded to rely on Title VII principles and case law in establishing Christine Franklin's right to damages under a Title IX sexual harassment claim.

Several courts have since understood *Franklin* to "authorize the application of Title VII standards to a student's Title IX sexual harassment claim against her

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237. *Guardians*, 463 U.S. at 620 (1983) (Marshall, J. dissenting); *see* 112 CONG. REC. 18715 (1966) (House of Representatives vote). A senator and a representative introduced identical amendments that would have prohibited only intentional discrimination under Title VI and would have required showing an "affirmative intent to exclude" under the definition of discrimination. *Id.* at 18701. "The Justice Department, which had helped draft the language of Title VII, participated heavily in preparing the regulations. Seven federal agencies and departments carrying out the mandate of Title VI soon promulated regulations that applied a disparate impact or 'effects' test. As a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of Title VI." *Guardians*, 463 U.S. at 618 (Marshall, J. dissenting) (citations omitted).

238. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65 n.4 (citing Franklin v. Gwinnett County Pub. Schs., 911 F.2d 617, 622 (5th Cir. 1981)).

239. *Id.*

240. *See supra* notes 98–106 and accompanying text.

school."[241] Regardless of whatever confusion *Franklin* may have created, it is important to recognize that the Title VII vertical model of intentional discrimination is not precluded by the analysis at all. In fact, based upon its construction of Title IX standards as derived from Title VI (and, thusly, Title VII as well), analytically, with a mere showing of proof of intentional discrimination, the two cases, *Franklin* and *Guardians* are on all fours with each other.

b. Horizontal intent has distracted courts and is an overly narrow construction that violates the spirit of sexual harassment law.

Horizontal intent is the type of entity liability where the actions of an entity itself are the harm. Clearly, this is a narrow interpretation of intent, but it has been applied in several Title IX sexual harassment cases, much to the horror of the Office of Civil Rights.[242] The Rowinsky sisters in Texas lost their case and never even got to a jury. The OCR responded by excoriating the *Rowinsky* court for its narrow interpretation.[243] In a mischaracterization of the Rowinsky girls' claim, the court said that the girls were inappropriately suing the school district.[244] It was other children who had been sexually harassing the sisters, not the school.[245] Another girl named Eve Bruneau, a fourteen-year-old in upstate New York, sued the South Kortright School District for failing to protect her from sexual harassment.[246] Unlike the Rowinsky sisters, Eve's case was heard before a federal jury in November of 1996.[247] In a familiar tune applying the narrowest construction of horizontal intent, the jury denied Eve recovery because her peers, not the school itself, had sexually harassed her.[248] On the other hand, they said they "sympathized with the girl."[249] Eve is appealing her case.[250] This narrow conception of intent, essentially a horizontal standard, is directly opposed to the spirit of the law and the development of sexual harassment doctrine.

i. Horizontal intent confuses courts.

One example of a court struggling with the proper standard of intent came from the Northern District of California in *Petaluma*. The original judge in *Petaluma* imported an additional showing of discrimination beyond that which is required under the traditional hostile environment sexual harassment standards.[251] The *Petaluma I* case "derived" an extra showing of intent (beyond an initial

241. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1191, *vacated, reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

242. PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 12048.

243. *Id.*

244. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1012 (5th Cir.), *cert. denied*, 117 S. Ct. (1996).

245. *Id.*

246. Bruneau v. South Kortright Central Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); *see Dateline NBC*, *supra* note 23.

247. *Dateline NBC*: *Dateline Follow-Up* (NBC television broadcast, Dec. 8, 1996).

248. *Id.* (explaining that jury rejected her claim that she had suffered sexual harassment).

249. *Student Briefing Page on the News*, NEWSDAY, Dec. 5, 1996, at A26.

250. *Id.*

251. *Petaluma I*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).

showing of intentional discrimination), based upon what appeared to be a confused reading of the Supreme Court's rulings in *Guardians*[252] and *Franklin*.[253] On a motion for reconsideration of the legal standard, the judge in *Petaluma III* corrected the misconstruction of the judge in *Petaluma II*.[254] In granting the plaintiff the correct legal standard—the knew or should have known standard—the court spoke of *Franklin's* "lack of clarity" and the "conflicting clues" of the intent standard in its reliance on *Meritor* and *Guardians*.[255]

> [I]t is not clear how the Court meant the "intentional discrimination" standard it set in *Franklin* to relate to the standard for liability for hostile work environment sexual harassment under Title VII. The Court gave conflicting signals on this point.... To further complicate matters.... [y]et another layer of uncertainty is imposed by the [Title VI] context in which the *Franklin* Court raised the concept of intentional discrimination.[256]

In *Guardians,* the Court required proof of intentional discrimination in a Title VI case.[257] The *Guardians* Court discussed intentional discrimination to note the legal distinction between disparate treatment (treating an individual differently based upon his or her sex) and disparate impact discrimination (treating people in a way that has a greater negative impact on one sex than it does on the other).[258]

As the *Petaluma III* court stated, "a majority of the *Guardians* Court impliedly defined 'intentional discrimination' as discrimination other than disparate impact discrimination."[259] However, what is not clear, as the court further explained, was "whether the *Franklin* Court intended the phrase 'intentional discrimination' to have the same meaning as that same phrase in the *Guardians* Court's intentional discrimination/disparate impact dichotomy."[260]

ii. Horizontal intent unacceptably departs from traditional sexual harassment vertical intent standards.

The court in *Petaluma III* synthesized, compared, and analyzed additional cases that had, in the interim between *Petaluma I* and *Petaluma III*, addressed peer sexual harassment under Title IX and the appropriate standard of intent.[261] The *Petaluma III* court reasoned that:

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252. 463 U.S. 582 (1983).

253. 503 U.S. 60 (1992).

254. *Petaluma III*, 949 F. Supp. 1415, 1418–19 (N.D. Cal. 1996).

255. *Id.* at 1419.

256. *Id.* at 1418.

257. *Guardians*, 463 U.S. at 602–03 (finding that Title VI does not support a monetary damages remedy for Title VI violations not involving intentional discrimination).

258. *Id.* at 589–93.

259. *Petaluma III*, 949 F. Supp. at 1419.

260. *Id. See* Robinson v. Jacksonville Shipyard, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (finding employer liable for hostile environment sexual harassment created by coworkers of which it knew or should have known because it was discrimination on the basis of sex).

261. *Petaluma III*, 949 F. Supp. at 1419–21.

> This Court agrees with the...authority that Title VII is the most useful and appropriate analogue in Title IX cases. The Court further agrees with the analysis of the *Davis* court that sound public policy supports applying Title VII standards to student actions as well as employee actions under Title IX, without weakening the standards as applied to the students. In addition, this Court discerns in Title IX no intent to provide a lesser degree of protection to students than to employees.[262]

With the benefit of hindsight, it now appears that the *Davis* approach most closely carries out the *Franklin* holding. Although the Eleventh Circuit in *Davis* adhered to the traditional Title VII prima facie elements, the dissent approved of *Petaluma*'s assessment of the doubled intent standard.[263]

Nonetheless, the *Petaluma I* court diverged from traditional sexual harassment case law in finding that there is some additional intent requirement beyond the definitional prima facie case intent requirement. Further, *Petaluma I* found that a school's failure to take appropriate action in and of itself would be insufficient to establish a school's liability for sexual harassment because of the lack of additional intent.[264] The court wrestled with the concept of whose intent mattered. On the one hand, the defendant entity needs to have the requisite intent, but the entity did not harass the plaintiff. On the other hand, the party that did harass the plaintiff and might have had the requisite intent is not a proper Title IX defendant. However, under the traditional Title VII knew or should have known standard of liability, which the *Petaluma III* court deemed appropriate, rather than the double-intent standard, the entity could be found liable under a theory of respondeat superior.[265]

c. Other courts weigh in

In *Franklin*, the Court recognized that a student should have the same protection in school to be free from sexual harassment that an employee has in the workplace.[266] Some courts have applied this logic while others have not.

i. The Second, Fourth, and Eleventh Circuit Courts

Following *Franklin*, the Second Circuit in *Murray v. New York University College of Dentistry*[267] looked to Title VII standards in addressing a student's Title IX claim that she was subjected to hostile environment sexual harassment created by a patient at her dental school.[268] Although the district court dismissed her

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262. *Id.* at 1421–22.

263. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1196 n.1 (Birch, J., concurring in part and dissenting in part).

264. *Petaluma I*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).

265. *Petaluma III*, 949 F. Supp. at 1421. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958).

266. Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60, 74–75 (1992); *cf.* Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 149 (5th Cir. 1992) ("[T]here is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter....").

267. 57 F.3d 243 (2d Cir. 1995).

268. *Id.* at 248.

complaint after determining that the facts as she alleged them were insufficient to show that the school knew that the plaintiff was subjected to a sexually hostile environment,[269] the Second Circuit looked to *Franklin* to establish the appropriate standard of review.[270] The court stated:

> [t]he [*Franklin*] Court's citation of *Meritor...*, a Title VII case, in support of *Franklin's* central holding indicates 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.[271]

Ultimately, upon applying Title VII standards, the Second Circuit agreed with the district court that the facts alleged were insufficient to show that the college knew of the hostile environment.[272]

The Second Circuit does not stand alone in drawing a Title VII-Title IX parallel of sexual harassment standards. In 1994, the Fourth Circuit found that "Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."[273] Even more recently, the Eleventh Circuit issued a ruling at the eleventh hour in *Davis v. Monroe Board of Education*.[274] Two days prior to the oral arguments being held before the Northern District of California court in *Petaluma*, the Eleventh Circuit ruled that it "likewise find[s] it appropriate to apply Title VII principles to the [peer sexual harassment] question before [it]."[275] In addition to looking for support in *Franklin*, Title IX's legislative history, and the "Supreme Court's mandate that [it] read Title IX broadly,"[276] the Eleventh Circuit looked to OCR findings[277] and additional case law.[278]

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269. *Id.* at 247–48.

270. *Id.* at 249.

271. *Id.*

272. *Id.* at 249–51.

273. Preston v. Virginia *ex rel.* New River Community College, 31 F.3d 203, 207 (4th Cir. 1994).

274. 74 F.3d 1186 (11th Cir. 1996), *vacated, reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

275. *Id.* at 1192.

276. *Id.*

277. *Id. See infra* notes 279–93 and accompanying text.

278. *Davis*, 74 F.3d at 1190. The court acknowledged that "courts have regularly applied Title VII principles." The *Davis* court cited, inter alia, Lipsett v. University of Puerto Rico, 864 F.2d 881, 866 (1st Cir. 1988) (plaintiff was a female medical student in residency and, therefore, also an employee of the University). *Davis*, 74 F.3d at 1190. The *Lipsett* court determined that "Title VII sexual harassment principles applied to this 'mixed employment-training' context." *Id.* (quoting *Lipsett*, 864 F.2d at 897). "The Second [sic] Circuit relied on Title IX's legislative history, 'which strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII.'" *Id.* The *Davis* court further relied upon the following cases that apply Title VII principles to Title IX cases where teachers and other employees have brought sexual harassment claims: *Preston*, 31 F.3d at 207; Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987). *Davis*, 74 F.3d at 1190.

In assessing student-alleged cases of sexual harassment that applied Title VII principles to Title IX claims, the *Davis* court relied on Alexander v. Yale Univ., 458 F.

In *Davis*, the Eleventh Circuit, like the Ninth Circuit in *Petaluma*, utilized findings from the OCR to buoy its holding that peer sexual harassment violates Title IX.[279] LaShonda Davis was a fifth-grader who was subjected to repeated aggressive sexual harassment by a fellow fifth-grader.[280] Over a six month period, he fondled her breasts and attempted to grope her vaginal area.[281] The boy told her, "I want to get in bed with you," and "I want to feel your boobs."[282] The boy put a doorstop in his pants and rubbed up against LaShonda in the school hallway in a "sexually suggestive manner."[283] His "actions increased in severity until he finally was charged with and pled guilty to sexual battery."[284] The school principal and teachers who heard LaShonda's complaints[285] never disciplined the boy, and, more strikingly, inquired as to why LaShonda was the only girl complaining.[286] Even LaShonda's meager request to be allowed to move to a different assigned seat away from her harasser was denied until she had complained for over three months.[287]

The Davis court examined numerous OCR documents in order to establish appropriate legal standards for peer sexual harassment.[288] A letter of finding to the Santa Rosa City School District stated that a student experiences sexual harassment when "unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct...has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment."[289] The *Davis* court was persuaded that "[w]hen individuals who are

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Supp. 1, 4 (D. Conn. 1977).

> [It is] perfectly reasonable to maintain that academic achievement 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.

Davis, 74 F.3d at 1191 (citing *Alexander*, 458 F. Supp. at 4).

Furthermore, the *Davis* court relied upon Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360 (E.D. Pa. 1985), a case where hostile environment created by a teacher sexually harassing a student. "Though the sexual harassment 'doctrine' has generally developed in the context of Title VII, these [Title VII] guidelines seem equally applicable to Title IX." *Davis*, 74 F.3d at 1191 (citing *Moire*, 613 F. Supp. at 1366 n.2).

279. The *Davis* court noted that:

> OCR Letters of Findings are entitled to deference "as they express the opinion of an agency charged with implementing Title IX and its regulations."... As the Supreme Court has stated, "this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration."

Davis, 74 F.3d at 1192 n.4 (citing *Petaluma I*, 830 F. Supp. 1560, 1573 (N.D. Cal. 1993); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982)).

280. *Id.* at 1188–89.

281. *Id.*

282. *Id.* at 1189.

283. *Id.*

284. *Id.*

285. LaShonda complained to school authorities on all but one occasion. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 1192.

289. *Id.* (citing Palomino Letter, *supra* note 236, at 2).

participating in a program of activity operated by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others."[290] Ultimately, the *Davis* court agreed with OCR's findings that "[i]f the harassment is carried out by non-agent students, the institution may, nevertheless, be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."[291] From these conclusions, the *Davis* court found that OCR "informally determine[d] that Title IX prohibits peer sexual harassment in the schools, [and that] the OCR has relied upon Title VII hostile environment principles."[292] OCR's formal draft guidance on peer sexual harassment indicates that the Eleventh Circuit's characterization of OCR's internal procedures and its reliance upon Title VII hostile environment standards in investigating peer sexual harassment claims is accurate.[293]

ii. District Courts

Likewise, the District Court for the Western District of Missouri relied on *Franklin* in an analogous peer sexual harassment case. In *Bosley v. Kearney R-1 School District*,[294] the court found that

> [b]y saying that *Meritor*, involving a claim under Title VII, gave notice to the defendant school district in *Franklin*, and by saying that Congress' purpose in enacting Title IX was to prevent federal monies from being used to support intentional discrimination declared unlawful in other statutes, *Franklin* supports the conclusion that Title VII law provides standards for enforcing the anti-discrimination provisions of Title IX.[295]

The court in *Bosley* went on to assert that "[t]he Supreme Court has also stated that lower courts should 'accord [Title IX] a sweep as broad as its language.'"[296] Moreover, in *Petaluma*, the District Court for the Northern District of California held that Title IX proscribes the same type of hostile environment sexual harassment as that prohibited by Title VII.[297] This case also concluded that denying recovery to a student sexually harassed by her peers under the hostile environment theory violates Title IX and "would violate the Supreme Court's command [under *North Haven Board of Education*[298]] to give Title IX a sweep as broad as its language."[299] Prior to the *Petaluma* case, the Northern District of California had already found that Title VII was the "most appropriate analogue" for Title IX's

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290. *Id.*

291. *Id.* (citing Palomino Letter, *supra* note 236, at 2; Mines Letter, *supra* note 236, at 2–4).

292. *Id.*

293. "OCR nationwide practice in this area is consistent with United States Supreme Court precedent and well established legal principles that have developed under Title VII." DRAFT PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 91, at 1.

294. Bosley v. Kearney R–1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995).

295. *Id.* at 1022.

296. *Id.* (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).

297. *Petaluma I*, 830 F. Supp. 1560, 1571–75 (N.D. Cal. 1993).

298. 456 U.S. 512 (1982).

299. *Id.* at 1575.

substantive sexual harassment standards because it "prohibits identical conduct."[300]

In the Eastern District of Pennsylvania, the court in *Collier v. William Penn School District*[301] made the point that case law, with the exception of *Rowinsky*,[302] supported a finding of school district liability for peer sexual harassment under Title IX using the Title VII standard of liability.[303] It disagreed with *Rowinsky* and stated that

> The Fifth Circuit failed to consider the role the omissions of the school district may have played. In our view, the inquiry should focus on whether the school district, as a recipient of federal funds, failed, after notice, to prevent or curtail the sexual harassment of students within its charge.[304]

2. Children Deserve More Protection Than Adults

In its carefully reasoned opinion, the *Davis* court ruled that it did see a distinction between the school environment and the workplace.[305] Although some have argued that the *Davis* court was hardly circumspect in its ruling,[306] it was not without authority when it stated "where there are distinctions between the school environment and the workplace, they 'serve only to emphasize the need for zealous protection against sex discrimination in the schools.'"[307] The *Davis* court elaborated:

> The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom 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. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.[308]

The court further found that "'[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational

300. Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (citing Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987)).

301. 1997 WL 89120 (E.D. Pa. Feb. 28, 1997).

302. 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

303. 1997 WL 89120, at *2–*3.

304. *Id.* at *2.

305. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193, *vacated, reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

306. *Id.* at 1196 (Birch, J., concurring in part and dissenting in part) ("[T]he majority makes an unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student.").

307. *Id.* at 1193 (citing Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292–93 (N.D. Cal. 1993)).

308. *Id.* This same reasoning can also be found in Collier v. William Penn Sch. Dist., 1997 WL 89120 at *4 (E.D. Pa. Feb. 28, 1997).

benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.'"[309]

In concluding its Title VII-Title IX analogy, the Eleventh Circuit found that "as Title VII encompasses a claim for damages due to a sexually hostile working environment created by coworkers 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."[310] LaShonda Davis can no longer rest easy, however. On August 1, 1996, the Eleventh Circuit vacated the earlier, favorable decision and ordered that the case be heard en banc.[311]

CONCLUSION

In contemplating the thought of youngsters suing schools for being sexually harassed by their school-aged peers, many shudder to think of the potential ramifications. Indeed, late night television programs like "The Tonight Show" and "Saturday Night Live" have mocked the news reports of a first-grader in North Carolina and a second-grader in New York who were "suspended" for a single heinous act—kissing a little girl on the cheek.[312] In contemplating a legal remedy against the school for the boys' misbehavior, most of us would, likewise, shudder at the thought. Little Linda Brown faced similar criticism when, in 1954, she litigated her way into the neighborhood schools in Topeka, Kansas.

The objective of finding school districts liable under Title IX is not to punish a school district for a child's behavior, but to punish the school district for its own failure to stop persistent peer sexual harassment. Fortunately, because of Title IX's statutory construction, implementing regulations, the final OCR guidelines, and case law, a cause of action would not arise for a single stolen childhood kiss. If stray stolen kisses from six-year-olds were all that children were complaining about, this issue would not be as pressing a concern as it is today. Unfortunately, students' sexual harassment of their peers has taken on a far more threatening and destructive edge.

Once conduct that can be identified as sexual harassment occurs, action must be taken. The best way for a school representative to determine whether sexual harassment has occurred is to witness the behavior. Failing that, he or she must rely on the reports of the students involved, or those of bystanders. As with any type of suspected childhood abuse, it is better to err on the side of caution by identifying the conduct as sexual harassment. And in the situation where a student does manage to overcome her fear and anxiety of "finking" or "tattling" to her teacher, guidance counselor, or principal, her complaints should not be dismissed or, at best, meagerly addressed. The school representative has an obligation to examine and address such complaints. Furthermore, the child or children responsible must be disciplined *appropriately*, not disciplined *insufficiently*.

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309. *Davis*, 74 F.3d at 1193 (quoting *Patricia H.*, 830 F. Supp. at 1293).
310. *Id.* (citations omitted).
311. Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996).
312. *See supra* notes 71–72; Goodman, *supra* note 72, at D7.

School districts are potentially liable because they ignore or otherwise scoff at their obligation towards students facing sexual harassment. While a trauma-free schoolgoing experience and adolescence could produce generations of well-balanced, thoughtful, respectful adults, such a condition exists only in the realm of fantasy. On the other hand, school districts and their agents have a responsibility to avoid making a bad situation worse. Factually, their non-interventionist laissez faire treatment of sexual harassment can only serve to make it easier for harassers to take aim at their peer victims. Moreover, such an ineffective approach harms everyone involved. The district itself opens itself up to the potential loss of federal funds under Title IX or other disciplinary action by OCR; the harasser never learns to respect or treat others with dignity; and the victim continues to suffer through horrible indignities and assaults. A Title IX cause of action is one way to ensure school district accountability and is one avenue of potential recovery (in a very meager arsenal) that could assist in making wronged plaintiffs whole again.

Plaintiffs clearly have a substantial burden to overcome in bringing such a federal claim. The time-honored "tradition" of workplace hostile environment sexual harassment has resulted in litigation bearing fruit. Title VII litigation has already established what sexual harassment is, who might be capable of doing it, who needs to prove what, and what supervisors need to know for liability to be found. Through Title VI, Title IX became the amendment to bridge the gaps left by Title VII of the Civil Rights Act of 1964. It is no wonder, nor is it accidental, that what little Title IX sexual harassment jurisprudence there is has evolved so rapidly. By borrowing and adapting most, if not all, facets of Title VII sexual harassment jurisprudence, courts examining Title IX sexual harassment cases have not been left twisting in the legal wind.

In interpreting the wave of new peer sexual harassment claims arising under Title IX, courts are beginning to figure out that there is no need to reinvent the procedural gauntlet. The Supreme Court and lower courts are recognizing that the law should treat schoolgirls like their female workplace counterparts. They neither should be primarily abused in an environment that tolerates and condones their marginaliztion. And neither should they be secondarily abused by a system that creates impossible legal and formalistic hurdles where there are none mandated by courts. Once it can be shown that (1) a hostile environment exists in the school's programs or activities, (2) the school knew or should have known of the harassment, and (3) the school fails to take immediate and appropriate corrective action, a school should be found liable under Title IX if its students sexually harass other students."[313]

Eventually, the light bulb will go on and courts will see a Title IX peer sexual harassment case and think "been there, done that, know the Title VII footnotes by heart." The problem with acknowledging that some children suffer so horrendously in schools that they can effectively assert a "grown-up Title VII-like cause of action" is that we are forced to confront the terrible reality that our children have learned well from us—the lessons of disrespect, fear, and sexual power and politics.

313. PEER SEXUAL HARASSMENT GUIDANCE, *supra* note 92, at 12039.