# STUDENT-TO-STUDENT SEXUAL HARASSMENT UNDER TITLE IX: THE LEGAL AND PRACTICAL ISSUES

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## I. INTRODUCTION

While student-to-student "sexual harassment" has no doubt been occurring on school playgrounds and buses for as long as anyone can remember, it was not a cognizable cause of action in courts and administrative agencies until relatively recently. State legislative activity, such as in Minnesota in the late 1980s,[1] gave rise to an avenue of redress for students alleging physical or emotional damages stemming from their peers' misbehavior.[2] The Office for Civil Rights (OCR) within the United States Department of Education also began to interpret Title IX of the Education Amendments of 1972[3] and its own regulations[4] to prohibit student-to-student sexual harassment in schools that receive federal funds.[5]

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1. *See* 1989 Minn. Laws ch. 329, art. 8, § 15(2) (codified as amended at MINN. STAT. ANN. § 127.46 (West 1994)) (requiring that public schools ban student-to-student sexual harassment by policy, adopt a complaint or grievance procedure, and investigate and discipline students responsible for such misconduct).

2. *See* MINN. STAT. ANN. § 127.46 (West 1994).

3. 20 U.S.C. §§ 1681-1688 (1994).

4. 34 C.F.R. § 106.31-.42 (1997).

5. *See* Letter from Kenneth A. Mines, Region VII Director of the Office for Civil Rights, to Gerald L. McCoy, Superintendent of Eden Prairie (Minn.) Schools (Apr. 27, 1993) (on file with author) [hereinafter Region VII Letter]; *see also* Letter from Norma V. Cantú, Assistant Secretary for Civil Rights, the Office for Civil Rights, to Colleague (Aug. 14, 1996) (on file with author) [hereinafter Colleague Letter].

High profile cases in Minnesota,[6] Iowa,[7] and elsewhere have brought media attention to the issue of student-to-student sexual harassment.[8] For example, one story involving the suspension of a second grade boy for *sexually harassing* a female classmate, by giving her an unwelcome kiss on the cheek, made national headlines and was featured prominently in mainstream newscasts in the spring of 1997.[9] Cases have arisen in high schools,[10] middle schools,[11] and elementary schools.[12] The sexual harassment has been male-to-female,[13] female-to-female,[14] and male-to-male.[15] It has

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6. *See, e.g.*, Letter Ruling, Ref. No. ED341 from Steven P. Lapinsky, Director, Enforcement Div., Minn. Dep't of Human Rights (on file with author). In September of 1989, Katherine Lyle's mother filed a complaint with the Minnesota Department of Human Rights against Independent School District (ISD) #709 in Duluth claiming that her daughter was the subject of sexually offensive graffiti in bathroom stalls. *Id.* at 1. The Minnesota Department of Human Rights issued a probable cause finding, which led to a $15,000 settlement from ISD #709 to Carol and Katherine Lyle—without an admission of liability on the school district's part. *See* Settlement Agreement, File No. ED341-G555-6N (Minn. Dep't of Human Rights Sept. 23, 1991) (on file with author). In another case, Jill Olson filed a charge of discrimination claiming she was subjected to ongoing discriminatory treatment. Letter Ruling, Ref. No. ED360 from Gary Gorman, Human Rights Enforcement Supervisor, Minn. Dep't of Human Rights (on file with author). The Minnesota Department of Human Rights issued a Finding of Probable Cause, which eventually led to a $40,000 settlement from ISD #112. *See* Settlement Agreement, File No. ED360-GSS-RP-5 (Minn. Dep't of Human Rights Mar. 26, 1993) (on file with author).

7. *See, e.g.*, Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1415-16 (N.D. Iowa 1996) (involving a student who sued a school district seeking an award of monetary damages under Title IX for the district's failure to prevent peer-to-peer sexual harassment); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1196 (N.D. Iowa 1996) (involving a former high school student and her parents suing the school district, superintendent, and principal under Title IX, § 1983, and state law for failing to prevent sexual harassment of the student by other students at the high school); Wolfs v. North Fayette Community Sch. Dist., No. C94-2057 (N.D. Iowa) (settled prior to trial).

8. Shelley Donald Coolidge, *In Halls of Learning, Students Get Lessons in Sexual Harassment*, CHRISTIAN SCI. MONITOR, Sept. 18, 1996, at 1; Ken Fuson, *Teens Suing 3 Schools over Harassment*, DES MOINES REG., Aug. 5, 1994, at 1A; Tamar Lewin, *Sexual Harassment by Kids Confusing Issue for Schools*, DENV. POST, Oct. 6, 1996, at 8A.

9. *See* Lewin, *supra* note 8, at 8A.

10. *See, e.g.*, Mennone v. Gordon, 889 F. Supp. 53, 54 (D. Conn. 1995).

11. *See, e.g.*, Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 166 (N.D.N.Y. 1996).

12. *See, e.g.*, Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1015 (W.D. Mo. 1995).

13. *See, e.g.*, Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 364 (M.D. Ga. 1994), *aff'd in part and rev'd in part sub nom.* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

been both heterosexual[16] and homosexual[17] in nature. The actions range from name-calling and graffiti[18] to criminal sexual battery by children as young as eleven years old.[19] Accordingly, the federal courts have, for the past several years, experienced a significant increase in litigation in the area of student-to-student sexual harassment, particularly under Title IX. The primary theory of these suits is not that the students are seeking redress from their schools for what their peers are saying and doing to them, but rather the students are attempting to hold the schools legally accountable for failing to protect them initially or failing to stop the harassment once it began.

This Article surveys the variety of approaches taken by courts in the absence of guidance from the United States Supreme Court. This Article offers some practical considerations and concludes with a recommendation for a judicial standard to be applied in student-to-student sexual harassment claims filed under Title IX of the Education Amendments of 1972.

## II. THE PROBLEM

Title IX of the Education Amendments of 1972 succinctly provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[20] In other words, this provision prohibits sex discrimination under[21] any school or academic institution that receives federal funding.[22]

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14. *See, e.g.*, Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1564 (N.D. Cal. 1993), *rev'd*, 54 F.3d 1447 (9th Cir. 1995).

15. *See, e.g.*, Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996).

16. *See, e.g.*, Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1211 (E.D. Pa. 1997).

17. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).

18. *See, e.g.*, Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1197 (N.D. Iowa 1996) (involving a female student who was subjected to name-calling of a vulgar and sexual nature, and had sexual obscenities and threats written on her books, folders, and locker, as well as the school's bathroom walls by other students).

19. *See, e.g.*, Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 364-65 (M.D. Ga. 1994) (involving an eleven-year-old boy who harassed a fifth grade girl for five months by the use of vulgar language and repeated attempts to touch her breasts and vaginal area), *aff'd in part and rev'd in part sub nom.* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

20. 20 U.S.C. § 1681(a) (1994).

21. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 (5th Cir.) (defining "under" as either "in" or "by"), *cert. denied*, 117 S. Ct. 165 (1996).

22. This Article is limited in scope to sexual harassment cases arising in public elementary and secondary schools, although Title IX clearly applies to postsecondary academic institutions receiving federal funds. For a discussion of sexual harassment in higher education,

It is now generally accepted that sexual harassment is a form of sex discrimination[23] and that there are two types of sexual harassment: quid pro quo sexual harassment, which exists where a supervisor or other person in a position of power over another uses a threat of detrimental treatment or promise of beneficial treatment toward the other as a tool to exact sexual favors,[24] and "hostile environment" sexual harassment, which exists when sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive environment."[25]

In an educational setting, there are at least five possible configurations for actionable sexual harassment: (1) employee-to-employee quid pro quo in violation of Title VII;[26] (2) employee-to-employee hostile environment, also in violation of Title VII;[27] (3) employee-to-student quid pro quo, in violation of Title IX;[28] (4) employee-to-student hostile environment, in violation of Title IX;[29] and (5) student-to-student hostile environment, which may or may not violate Title IX, as this Article addresses. While it is theoretically possible for a student that has some type of "supervisory" or otherwise superior position over others in a school to harass another student sexually in a "quid pro quo" fashion, that case has yet to emerge in the legal arena. Some would suggest that it is also possible for a student to sexually harass a school employee.[30] If, however, one accepts the premise that the ability to cause emotional damage to the "victim" of sexual harassment is rooted in the power that the harasser possesses, it is highly unlikely that a student possesses that power over a staff person, whether a teacher, cook, or maintenance worker.

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see Margaret D. Smith, *Must Higher Education Be a Hands-On Experience? Sexual Harassament by Professors*, 28 EDUC. L. REP. 693 (1986).

23. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

24. *See, e.g.*, Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1564 (11th Cir. 1987) (holding that a manager's authority to alter a subordinate employee's employment status, combined with his threat of firing the employee if she failed to comply with the manager's sexual advances, constituted quid pro quo harassment).

25. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1997).

26. *See generally* 42 U.S.C. § 2000e (1994). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. *Id.* § 2000e-2(b).

27. *See, e.g.*, Noble v. Monsanto Co., 973 F. Supp. 849, 854 (S.D. Iowa 1997) (dealing with an employee who claimed that fellow employee's alleged sexual harassment created a hostile work environment).

28. *See, e.g.*, Stilley v. University of Pittsburgh, 968 F. Supp. 252, 263 (W.D. Pa. 1996) (recognizing a quid pro quo claim in employee-to-student sexual harassment).

29. *See, e.g.*, Kinmon v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467-68 (8th Cir. 1996) (setting forth the elements required to prove hostile environment harassment in the educational context).

30. *See* Howard v. Board of Educ., 876 F. Supp. 959, 964 (N.D. Ill. 1995) (dealing with a band teacher who filed a sexual discrimination suit against her former employer alleging, in part, that male students had contributed to a hostile employment environment by making offensive comments to her).

Although the express statutory remedy for a violation of Title IX is ultimately the loss of federal funding,[31] in 1979 the United States Supreme Court in *Cannon v. University of Chicago*[32] held that this law carried an implied private right cause of action, allowing individuals to sue federally funded academic institutions directly for gender discrimination.[33] The Court determined that Congress, in patterning the 1972 language of Title IX after Title VI,[34] must have intended Title IX to be interpreted consistently with Title VI.[35] The Court assumed that Congress was aware at the time of the holding that Title VI created an implied right of action.[36] Therefore, Congress's use of the same language in Title IX would mean that Congress intended that individuals would also be able to sue for violations of Title IX.[37] The plurality in *Cannon* also was apparently heavily influenced in its decision by the subsequent enactment of the Civil Rights Attorneys Fees Act of 1976,[38] which explicitly made attorneys fees available to prevailing parties in litigation involving Title IX, as well as other civil rights statutes.[39] Whether Congress was or was not conscious of creating a private right of action in enacting Title IX in 1972, it is likely too late to question the wisdom of the Court's decision in *Cannon* from 1979.

The next significant half-step in the creation of the student-to-student sexual harassment cause of action under Title IX came when the United States Supreme Court determined in 1992 that in addition to implying a private right of action, Title IX also implies a damages remedy.[40] *Franklin v. Gwinnett County Public Schools*[41] was a limited decision that has had broad application. *Franklin* was an appeal from the Eleventh Circuit's affirmance of a granted motion to dismiss a high school student's Title IX suit for monetary damages caused by the sexual abuse or harassment by a teacher-coach.[42] The Supreme Court reversed[43] the decision of the Eleventh Circuit, holding that money damages are available under Title IX.[44] The Court reached its decision by combining the presumption of "the availability of all

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31. *See* 20 U.S.C. § 1682 (1994).

32. Cannon v. University of Chicago, 441 U.S. 677 (1979).

33. *Id.* at 717.

34. 42 U.S.C. § 2000d (prohibiting discrimination under federally funded programs on the basis of race, color, or national origin).

35. Cannon v. University of Chicago, 441 U.S. at 695-96.

36. *Id.* at 696 (citing Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967)).

37. *Id.* at 702-03.

38. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b).

39. Cannon v. University of Chicago, 441 U.S. at 685-86 n.6.

40. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75-76 (1992).

41. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

42. *Id.* at 64.

43. *Id.* at 76.

44. *Id.* at 64, 76.

appropriate remedies unless Congress has expressly indicated otherwise"[45] with its examination of the text and history of the statute.[46]

Having concluded that Congress did not intend to foreclose a damages remedy under Title IX,[47] the Court went on to discuss the limitations on remedies when a statute is enacted pursuant to Congress's power under the Spending Clause of the Constitution.[48] Relying on its holding in *Pennhurst State School & Hospital v. Halderman*[49] the Court stated that "remedies [are] limited under . . . Spending Clause statutes when the alleged violation [is] *unintentional*,"[50] because then the federal funds recipient lacks notice of what conduct will cause it to lose the funds.[51] The Court then stated what has formed the cornerstone of the dissension among district and circuit courts, academics, and practitioners:

> This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett Public County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[52]

The Court was quoting from *Meritor Savings Bank v. Vinson*,[53] its 1986 case recognizing the hostile environment form of sexual harassment in the workplace as a violation of Title VII.[54] In *Franklin*, Justice White, writing for the majority, added to the above-quoted phrase in stating, "We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[55] One message read into this dictum by many inferior courts was that a school employee's acts of harassment of students can be imputed to the school district for purposes of holding the institution liable for damages under Title IX.[56] This implicates an agency relationship, or a respondeat superior theory of recovery—that is Title

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45. *Id.* at 66 (citing Davis v. Passman, 442 U.S. 228, 246-47 (1979)).
46. *Id.* at 71-73.
47. *Id.* at 73.
48. *Id.* at 74-75; *see* U.S. CONST. art. I, § 8.
49. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).
50. Franklin v. Gwinnett County Pub. Sch., 503 U.S. at 74.
51. *Id.* at 74-75.
52. *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)) (alteration in original).
53. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
54. *Id.* at 64 (citing 42 U.S.C. § 2000e).
55. Franklin v. Gwinnett County Pub. Sch., 503 U.S. at 75.
56. *Id.*

VII analysis.[57] The reference to *Meritor Savings Bank* in *Franklin* is often cited as an additional rationale for applying a Title VII analysis to some Title IX cases.[58]

Given the fact that the holding in *Franklin* was limited to the issue of the availability of damages under Title IX for employee-to-student harassment, the Supreme Court has not spoken directly to the standard to be applied in student-to-student cases. Accordingly, a number of courts have struggled in interpreting the Court's message in *Franklin*, and have disagreed on two issues: whether the Court's short discussion of intent—as necessary for damages recovery under Title IX—means that a plaintiff in a student-to-student case must also allege and prove intentional acts by officials of the institution that themselves constitute sex discrimination, or whether—as the *Franklin* Court suggested by alluding to the employee's actions as imputable to the employer or institution—a respondeat superior negligence standard is the appropriate measure of liability. Some courts have assumed, on the basis of the *Franklin* dictum, that a teacher is an agent of the school district or academic institution.[59] Other courts have engaged in a deeper analysis of which "school officials" have to engage in discriminatory acts to hold the educational entity legally liable under Title IX.[60] Other courts have held that in the context of employee-to-student harassment, the school, as employer, is not liable because the harassment of a student was outside the scope of employment of the harasser.[61] When an employee, such as a teacher or coach, is the harasser of a student, a major legal issue has been whether actual knowledge ("knew") is required on the part of the employer or institution, or whether constructive knowledge ("should have known") is sufficient.[62] If the

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57. Under Title VII, an employer can be held liable under an agency or respondeat superior theory for the acts of its agents or employees. Meritor Sav. Bank v. Vinson, 477 U.S. at 72.

58. *See, e.g.*, Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995).

59. *See, e.g.*, Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 952 (W.D. Tex. 1994) (discussing the impact of the *Franklin* case on Title IX cases), *rev'd on other grounds*, 101 F.3d 393 (5th Cir. 1996).

60. *See, e.g.*, Floyd v. Waiters, 133 F.3d 786, 793 (11th Cir. 1998) (holding that the school district was not liable under Title IX for sexual harassment by a school security guard because there was no evidence that the school district superintendent or school board members were aware of the security guard's misconduct); Doe v. University of Illinois, No. 96-3511, 1998 WL 88341, at *8 (7th Cir. Mar. 3, 1998) (stating that school officials must have actual knowledge of the harassment to be held liable).

61. *See, e.g.*, Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 730 (3d Cir. 1988) (discussing when an employer is liable for the actions of its employees); John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 959 (Cal. 1989) (Eagleson, J., concurring in part and dissenting in part) (discussing the relationship between vicarious liability and what the employer knew).

62. *See, e.g.*, Doe v. University of Illinois, 1998 WL 88341, at *8 (stating that the school officials must have actual knowledge); S.B.L. v. Evans, 80 F.3d 307, 309, 312 (8th

"should have known" standard is applied, the question then becomes which school employees should have known.[63]

All of the disagreement in the employee-to-student arena is, nevertheless, merely a prelude to the next half-step in this legal morass—what is the appropriate standard to be applied when a student sues her school under Title IX for being subjected to hostile environment sexual harassment by her peers rather than by a school employee or agent? The United States Supreme Court has thus far denied certiorari on all student-to-student sexual harassment cases[64] leaving the circuit and district courts to struggle with the issues inherent in this novel legal mutation. One district court even called upon Congress to "step in and simply tell us whether it intended to make school districts responsible for the payment of damages to students under these circumstances."[65] So far, Congress has either ignored or declined the offer. An examination of the two recent federal district court cases in Iowa illustrates the multiple and challenging legal issues inherent in the student-to-student sexual harassment cases under Title IX.

In *Burrow v. Postville Community School District*,[66] Lisa Burrow, a high school student, sued her principal, superintendent, and school district under Title IX, § 1983,[67] and state tort law for alleged sexual harassment directed at her by her peers.[68] Prior to initiating her suit in federal court, Burrow filed a complaint with the United States Department of Education (USDE), and the Office of Civil Rights (OCR), the agency charged with investigating violations of Title IX.[69] In her OCR complaint and suit, Burrow asserted that the harassment against her began following a party held at her home in her parents' absence where $1500 in damage to the house had been caused.[70] She gave her parents the names of teens who had attended the party and were responsible for the damage.[71] Thereafter, fellow students, males and females, launched "a host of verbal and physical assaults against [Burrow]."[72]

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Cir. 1996) (discussing the different ways in which the courts have treated constructive knowledge).

63. *See, e.g.*, Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. at 953 (discussing the use of "knew or should have known" standard).

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

65. Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1414 (N.D. Iowa 1996).

66. Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996).

67. 42 U.S.C. § 1983 (1994).

68. Burrow v. Postville Community Sch. Dist., 929 F. Supp. at 1196-97.

69. Letter from Charles Nowell, Regional Director for the United States Department of Education, Office for Civil Rights, to John Selk, Superintendent, Postville Community Sch. Dist. (Oct. 20, 1993) (on file with author) [hereinafter Letter of Findings].

70. Burrow v. Postville Community Sch. Dist., 929 F. Supp. at 1196; *see also* Letter of Findings, *supra* note 69, at 3.

71. Burrow v. Postville Community Sch. Dist., 929 F. Supp. at 1196.

72. *Id.* at 1196-97.

The OCR investigated and concluded that of all the incidents about which Burrow complained, only three were both substantiated and involved conduct that constituted sexual harassment under the OCR's definition.[73] These three incidents were: (1) a letter about her on display in study hall; (2) a derogatory name written over Burrow's name on her paper also on display in the study hall; and (3) a sexually derogatory name written on her books and locker.[74] Ultimately, the OCR concluded that the school district was not in violation of the discrimination prohibitions under Title IX because the school district had taken reasonable steps to try to deal with what was happening to Burrow.[75]

Undaunted, Burrow brought suit. The defendants filed a motion for summary judgment on all claims, which the district court granted in part.[76] Chief Judge Melloy held that Burrow's parents lacked standing to sue under Title IX and § 1983 and that the individual defendants were not subject to suit under Title IX; thus the court dismissed those parties.[77] Relying on precedent from the Eighth Circuit, the court also held that the state's compulsory attendance law does not create a "special [custodial] relationship" sufficient to justify invoking the exception to the rule announced in *DeShaney v. Winnebago County Department of Social Services*[78]—a United States Supreme Court decision severely limiting governmental liability under § 1983 for an alleged Fourteenth Amendment violation for failure to protect a citizen from the actions of a third party.[79] Finally, the district court in *Burrow* also held that insufficient evidence existed, even when viewed in the light most favorable to Burrow, to support a cause of action under the state tort claims of intentional

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73. Letter of Findings, *supra* note 69, at 2.

> OCR defines sexual harassment as 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 aid, treatment, or services, or conditions the provision of aid, benefits, services, or treatment protected under Title IX. Regarding sexual harassment by students, a recipient will be held responsible for the harassment if it had knowledge of the harassment and failed to take reasonable action. OCR defines reasonable action as action that demonstrates such behavior is not permitted and that any subsequent similar behavior will not be condoned.

*Id.* It is significant that there are no citations to its regulations following the quoted passage for, at the time, OCR had not adopted any regulations as to student-to-student sexual harassment. Only recently—March 13, 1997—did the Department of Education, OCR, issue its "final policy guidance." *See* 62 Fed. Reg. 12,034 (1997).

74. Letter of Findings, *supra* note 69, at 4-5.

75. *Id.* at 8.

76. Burrow v. Postville Community Sch. Dist., 929 F. Supp. at 1196.

77. *Id.* at 1199. *But see* Mennone v. Gordon, 889 F. Supp. 53, 57-58 (D. Conn. 1995) (adopting the minority view that individual defendants are subject to suit under Title IX).

78. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

79. Burrow v. Postville Community Sch. Dist., 929 F. Supp. at 1196 (citing Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 734 (8th Cir. 1993)).

and negligent infliction of emotional distress.[80] The plaintiff's claim for punitive damages against the school district was also disallowed under Iowa law.[81]

The heart of Judge Melloy's ruling dealt with the appropriate standard to use in cases alleging Title IX violations for student-to-student sexual harassment. The plaintiff's counsel had asserted a negligence standard—that Burrow should have to prove only that the school district knew of and failed to remedy the peer harassment in order to prevail.[82] The defendants, on the other hand, argued that in order to violate Title IX, the school district had to intend to discriminate against Burrow.[83] The court detailed its review of then-existing case law, noting the wide divergence of opinions regarding the appropriate standard, and settled on a modification of a five-element test articulated by the Eleventh Circuit.[84] The original test set out in *Davis v. Monroe Board of Education* (*Davis I*)[85] required plaintiffs to prove:

> (1) that [the plaintiff] is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.[86]

The *Burrow* court modified the fifth element and created a sort of hybrid between the negligence standard and the intentional tort standard: "that the educational institution knew of the harassment and intentionally failed to take proper remedial measures because of the plaintiff's sex."[87] Obviously, the jury never got to the fifth element, having disposed of the case on the third element—the harassment was based on sex.[88]

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80. *Id.* at 1210.

81. *Id.* at 1211 (citing IOWA CODE § 670.4(5)). What remained after the court granted motions to dismiss was the plaintiff's cause of action against the school district for violations of Title IX. *Id.* A jury returned a verdict for the school district, finding that Burrow had been "subject to offensive sexual language and conduct at school," but that the harassment was not based on her sex. Special Verdict Form, Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996) (No. C94-1031).

82. Burrow v. Postville Community Sch. Dist., 929 F. Supp. at 1199.

83. *Id.* at 1199-200.

84. *Id.* at 1204-05 (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194-95 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843)).

85. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

86. *Id.* at 1194.

87. Burrow v. Postville Community Sch. Dist., 929 F. Supp. at 1205-06.

88. *See supra* note 81 and accompanying text.

Approximately two months after the ruling on the defendants' motion for summary judgment in *Burrow*, Chief Magistrate Judge John Jarvey, also sitting in the Northern District of Iowa, was called upon to rule on a similar motion in a similar case. In *Wright v. Mason City Community School District*,[89] pretrial summary judgment motions had resulted in dismissal of "[a]ll claims against the individual defendants"[90] either voluntarily by the plaintiff or "by the court because of qualified immunity."[91] The balance of the pleaded case proceeded to trial, and a jury verdict was rendered for the plaintiff against the Mason City Community School District for $5,200 "for future medical expenses."[92] The defendant school district filed a posttrial motion for judgment as a matter of law on the issue of its liability for student-to-student sexual harassment under Title IX.[93] The gist of the school district's argument was that the plaintiff failed to prove intentional discrimination against her on the basis of sex.[94] The district court agreed, granting the motion, setting aside the verdict, and dismissing the action.[95]

Judge Jarvey reviewed the statutory language of Title IX, the *Cannon-Franklin* legacy,[96] and recognized the "conflicting opinions in the appellate courts" and district courts regarding the standard of proof necessary for student-to-student cases.[97] Judge Jarvey settled on Judge Melloy's "modified *Davis I*" test announced in *Burrow*.[98] Judge Jarvey applied the facts from trial to conclude that the plaintiff had failed to prove that the Mason City schools had intended to discriminate against her on the basis of sex when they failed to stop the harassment by her peers.[99] The court wrote that the conduct of the school officials "was only negligence at best."[100] "The court saw no evidence . . . that went past negligence into reckless or intentional discrimination."[101]

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89. Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996).

90. *Id.* at 1414. As in most cases, the plaintiff had initially named as individual defendants the superintendent of schools and the high school principal, as well as the school district. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1420.

96. *Id.* at 1415-16.

97. *Id.* at 1416-19.

98. *Id.* at 1419-20 (citing Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996)).

99. *Id.* at 1420.

100. *Id.*

101. *Id.*

## III. THE SEARCH FOR AN APPROPRIATE STANDARD

To date, there have basically been two approaches by the judiciary to the complex issue of student-to-student hostile environment sexual harassment—applying a negligence analysis using respondeat superior principles, as in Title VII cases[102] and a *Franklin*-inspired intentional tort theory.[103] As noted previously, courts have sometimes combined the two to create a hybrid that mingles concepts of negligence with those of intentional torts.[104] While this standard may be a blessing to schools in Iowa fearing for their funding under Title IX, the standard announced in the cases in the Northern District of Iowa appears to be inconsistent with the jurisprudence of both negligence and intentional torts.[105]

### A. *A Temporary Split in the Circuits*

In the beginning, there was *Davis I*.[106] The Eleventh Circuit was the first federal appellate court to rule on the viability of a cause of action under Title IX for student-to-student sexual harassment. The case was on appeal from the

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102. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193-94 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

103. *See, e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

104. *See supra* notes 84-85 and accompanying text. It seems clear that the *Davis I* fifth element modification used by the court in *Burrow*, and thereafter adopted by the court in *Wright*, is an attempt to inject *Franklin*-required intent into an analysis otherwise based on negligence. The hybrid standard "knew and intentionally failed" to react properly provides that the intentional failure was due to the plaintiff's gender. Thus, we have a requirement of "intent to discriminate on the basis of sex" which should satisfy the United States Supreme Court's pronouncement in *Franklin v. Gwinnett County Public Schools*, that one must be on notice that the harassment was occurring and that the schools have a duty to prevent or stop it. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 (1992).

105. *See* RESTATEMENT (SECOND) OF TORTS § 282 (1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonsable risk of harm. It does not include conduct recklessly disregardful of an interest of others."). The comment to the Restatement states:

> Negligence contrasted with intended harm. The definition of negligence given in this Section includes only such conduct as creates liability for the reason that involves a risk and not a certainty of invading the interest of another. It therefore excludes conduct which creates liability because of the actor's intention to invade a legally protected interest of the person injured or of a third person . . . .

*Id.* § 282 cmt. d.

106. This Article delineates between the Eleventh Circuit's initial ruling and the en banc ruling. The initial ruling is referred to as *Davis I*. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

defendant's granted motion to dismiss; the district court held that the claim against the Board of Education for violating Title IX had no basis in law.[107] The district court stated that "the sexually harassing behavior of a fellow fifth grader is not a part of a school program or activity."[108] "Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment."[109] The district court acknowledged the opinion of the Northern District of California in *Doe v. Petaluma City School District*[110]—the only reported student-to-student sexual harassment/Title IX case on record at that time—but disagreed with the holding.[111] On appeal, the Eleventh Circuit initially reversed the district court's granting of the school district's motion to dismiss,[112] but later granted rehearing and subsequently reversed itself, reinstating the dismissal.[113] From early 1996, the time of *Davis I*, to August of 1997 when *Davis II*[114] came down, schools receiving federal funds within the Eleventh Circuit believed that Title IX provided both a substantive and procedural remedy for student-to-student sexual harassment and that Title VII analysis would be applied to Title IX student-to-student cases.[115]

The Eleventh Circuit in *Davis I* fell into the same trap that ensnared many judges thereafter—the assumption or supposition that when the United States Supreme Court cited to and quoted from *Meritor Savings Bank* in reinstating the cause of action in *Franklin*, the same Title VII analysis that they suggested should be applied in employee-to-student cases should also be used for student-to-student cases. This wholesale transference, however, ignores the fact that Title VII, prohibiting discrimination in employment, is based on

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107. Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994), *aff'd in part and rev'd in part sub nom.* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

108. *Id.* "The harassment consisted of repeated attempts by [a fifth-grade boy] to touch [the plaintiff's] breasts and vaginal area, and use of vulgar language towards [the plaintiff]." *Id.* at 364.

109. *Id.* at 367.

110. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd*, 54 F.3d 1447 (9th Cir. 1995).

111. Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. at 367. In *Doe*, the district court held that a Title IX claim may be based on the school's inaction when faced with student-to-student harassment where the inaction was to intentionally discriminate on the basis of sex. Doe v. Petaluma City Sch. Dist., 830 F. Supp. at 1563.

112. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir.), *reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *vacated*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

113. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

114. *Davis II* refers to the Eleventh Circuit's en banc ruling. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

115. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d at 1192.

agency principles[116] and that agency law does not generally consider third parties to be agents of the employer.[117] Students are not "agents" of the school district and holding the school officials or school district accountable for students' harassing behavior is legally inappropriate.

At approximately the same time *Davis I* was being litigated in California, a similar case was winding its way through the federal court system in Texas. *Rowinsky v. Bryan Independent School District*[118] involved two eighth grade sisters who were allegedly sexually harassed at a middle school and on the school bus by fellow students.[119] The case is factually interesting, as well as realistic, because it contains allegations of peer harassment that were unreported to school authorities; harassment that was reported to a teacher, counselor, or principal; incidents where punishment was administered to the offending students; and incidents where student behavior went unpunished.[120] This would have presented a difficult question for the fact-finder under a negligence standard—whether the school district's response to the repeated complaints was reasonable—but the granting of the defendants' motion to dismiss foreclosed that inquiry.[121]

On appeal, the Fifth Circuit concluded that Mrs. Rowinsky, the girls' mother, lacked standing to sue under Title IX,[122] and that the district court was correct in its ruling that absent "evidence that sexual harassment and misconduct was treated less severely [when complained of by] girls than . . . boys,"[123] a cause of action for peer harassment under Title IX will not lie.[124] The Fifth Circuit's adopted standard for peer sexual harassment was based on a requirement of proof of intentional sex discrimination by the recipient of funds, the school district: "[A] plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex."[125] This holding reflects both a literal and a *Franklin*-friendly interpretation of Title IX to the effect that the funds recipient must engage in intentional discrimination based upon gender in order to be liable in damages to a student.

In reaching its conclusion, the Fifth Circuit rejected the Eleventh Circuit's decision in *Davis I*.[126] In its analysis, the Fifth Circuit began by

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116. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

117. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

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

119. *Id.* at 1008-09.

120. *Id.*

121. *Id.* at 1016. *But see id.* at 1023 (Dennis, J., dissenting) ("[I]t is clear from . . . the facts adduced, viewed most favorably to [the Plaintiffs] . . . that the school board had actual knowledge . . . and that the school board failed to take appropriate corrective action.") The majority appropriately disavowed this statement. *Id.* at 1010 n.7.

122. *Id.* at 1009 n.4.

123. *Id.* at 1010.

124. *Id.* at 1016.

125. *Id.*

126. *Id.* at 1010 n.8.

attempting to determine whether the statute gives any guidance as to "'who' is prohibited from discriminating against students 'in' an educational program."[127] Finding that the statutory language could fairly be interpreted to impose liability on the funds recipient for the acts of a third party, the court nevertheless, concluded that Title IX, as interpreted by the United States Supreme Court in *Cannon*, "impose[s] liability only for the acts of grant recipients."[128] Given that in *Franklin*, the Supreme Court held that intentional acts of the funds recipient were necessary to sustain a cause of action for damages for employee-to-student sexual harassment under Title IX,[129] the *Rowinsky* court likewise held that evidence of the school district's intent to discriminate on the basis of sex is necessary to support a cause of action for student-to-student sexual harassment under Title IX.[130] A negligence standard would not suffice to hold the school district liable.[131]

The Ninth Circuit could have entered the fray before either the Eleventh or Fifth Circuits, but the pleadings of the case prevented that circuit court from confronting squarely the issue of whether Title IX imposes liability on a school district recipient for student-to-student sexual harassment, and if so, what standard applied. In *Doe v. Petaluma City School District*[132], the plaintiff, a junior high student, sued for the injuries she suffered when she was harassed for over a year by male and female classmates.[133] The plaintiff was in seventh grade when two boys first made a comment about her having "a hot dog in her pants."[134] Within a short period of time, the rumors were spreading around school that she kept a hot dog in her purse or her pants or had "had sex with" a hot dog.[135] Graffiti appeared to the same effect on bathroom walls at the school.[136] During this eighteen month period, the plaintiff, "Jane Doe," was reporting the incidents to her counselor, who made repeated but ineffective attempts to deal with the harassment. This counselor also made classically naive statements to "Doe" regarding sexual harassment: "boys will be boys,"[137] "girls could not sexually harass other girls,"[138] and that he could do nothing against the offending students because of their right to freedom of speech.[139] Ultimately, the plaintiff transferred from that school

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127. *Id.* at 1012.
128. *Id.*
129. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70 (1992).
130. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d at 1016.
131. *See id.*
132. Doe v. Petaluma City Sch. Dist., 54 F.3d 1447 (9th Cir. 1995).
133. *Id.* at 1449.
134. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1564 (N.D. Cal. 1993), 54 F.3d 1447 (9th Cir. 1995).
135. *Id.*
136. *Id.* at 1565.
137. *Id.*
138. *Id.* at 1564.
139. *Id.* at 1565.

to another, but the harassment followed her and she eventually had to enroll in a private girls' school.[140]

Doe initially sued both her former school district and her school guidance counselor under Title IX and 42 U.S.C. § 1983.[141] The district court partially granted the defendant's request for dismissal of her claims, but allowed the plaintiff to amend her complaint to limit the Title IX action to the school district and the § 1983 claim to the guidance counselor.[142] The district court then held that the school district could be liable for hostile environment sexual harassment under Title IX,[143] but that the counselor could not be sued as an individual under Title IX, although he was subject to suit under § 1983 for violating Title IX.[144] The district court refused to grant the guidance counselor immunity, and that was the issue that was appealed to the Ninth Circuit.[145]

The United States Supreme Court held, in *Harlow v. Fitzgerald*,[146] that to determine whether a public school official should be granted immunity from suit, courts are to apply an objective test.[147] A grant of good-faith immunity is inappropriate where the law alleged to have been violated by the school official engaging in a discretionary function was well established at the time of the incident giving rise to the cause of action.[148] Stated conversely, if the law regarding the cause of action was not well settled, the school official may be awarded immunity for his lack of awareness that his actions would violate the rights of an individual.[149]

The Ninth Circuit in *Doe* concluded that with respect to whether Title IX would support a cause of action for "failure to prevent" or reasonably address student-to-student sexual harassment, that law in 1990 to early 1992 was anything but clear.[150] "No case prior to February 1992[151] has been cited to us which demonstrates that Doe had a clearly established right to have [the guidance counselor] intervene on her behalf."[152] The court rejected an

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140. *Id.* at 1566.

141. *Id.*

142. Doe v. Petaluma City Sch. Dist., 54 F.3d at 1447, 1449 (9th Cir. 1995).

143. Doe v. Petaluma City Sch. Dist., 830 F. Supp. at 1563. The district court determined that the proper standard for a Title IX cause of action for student-to-student sexual harassment claims against a school district would be one based on intent rather than negligence. *Id.* at 1567 n.1, 1575-76.

144. *Id.* It is this type of inconsistency that is a challenge to counsel and the courts in these cases.

145. Doe v. Petaluma City Sch. Dist., 54 F.3d at 1449.

146. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

147. *Id.* at 818.

148. *Id.* at 818-19.

149. *Id.* at 818.

150. Doe v. Petaluma City Sch. Dist., 54 F.3d at 1451.

151. The plaintiff left the Petaluma City schools in early February 1992, presumably ending that district's responsibility to respond to her complaints of peer sexual harassment. *Id.* at 1449.

152. *Id.* at 1451.

early 1990s' opinion letter by the OCR[153] as insufficient evidence of "clearly established law" when the cause of action arose.[154] Thus, the Ninth Circuit reversed the trial court and granted immunity to the guidance counselor.[155] While expressing no opinion on the question whether "Title VII cases . . . could be used by analogy to provide the basis for creating a duty to act under Title IX" to prevent or stop student-to-student sexual harassment, the Ninth Circuit indicated that its approach might be "to consider the Supreme Court's recent *Franklin* decision."[156] Thus, another court appeared to have no qualms about applying the half-step-removed teacher-to-student precedent of *Franklin* to a case involving student-to-student sexual harassment.

The Tenth Circuit also heard a student-to-student case during this time period. *Seamons v. Snow*[157] was appealed from a district court's grant of a dismissal for failure to state a cause of action.[158] Seamons appears to be the first male plaintiff to sue for sexual harassment under Title IX. After football practice at Sky View High School in Cache County, Utah, the plaintiff was grabbed out of the shower by four teammates and taped naked to a towel rack.[159] His date from the homecoming dance of a few weeks earlier was then escorted into the locker room by a fifth teammate.[160] The plaintiff complained to his principal the next day, who had several conversations with the football coach.[161] The coach then allegedly kicked the plaintiff off the team when he refused to apologize to his teammates for going to the administration about the incident.[162] The five players who had participated in the locker room incident were allowed to play in the next football game, receiving no punishment.[163] After learning of this, the superintendent canceled the last game, a playoff game, and the plaintiff was blamed by students for being the cause of the team's exclusion from the state championship series.[164] The plaintiff transferred schools, moving in with an aunt and uncle in another county,[165] and he and his parents sued under Title IX, § 1983, and § 1985.[166]

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153. The letter basically stated that the school district had a duty to prevent student-to-student sexual harassment. *Id.* at 1452.

154. *Id.*

155. *Id.*

156. *Id.*

157. Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996).

158. *Id.* at 1229-30.

159. Seamons v. Snow, 864 F. Supp. 1111, 1115 (D. Utah 1994), *rev'd in part*, 84 F.3d 1226 (10th Cir. 1996).

160. *Id.*

161. *Id.*

162. *Id.* at 1121.

163. Seamons v. Snow, 84 F.3d at 1230.

164. *Id.*

165. Seamons v. Snow, 864 F. Supp. at 1115.

166. *Id.* The § 1983 claims were premised on alleged constitutional violations of the plaintiff's rights to procedural and substantive due process, denial of freedom of association, "familial association," speech, equal protection, and "equal education." *Id.* The original

Counsel for the plaintiffs neither alleged nor argued "that the defendants should have protected Brian from the initial assault by members of the football team,"[167] so this was not a "duty to prevent" or "duty to protect" case. Rather, the plaintiffs sought to prove that the school district had created a hostile sexual environment in its response to the plaintiffs' initial complaints about the treatment he had received in the locker room.[168] The plaintiffs, however, was unsuccessful in the district court and on appeal.[169] Both courts found his pleadings and proof lacked evidence of discrimination based upon his gender.[170] That is to say, having offered that "such hazing has also occurred to women at Sky View High School and that it has similarly gone unaddressed by school officials," he failed to allege and prove that the "[d]efendants would have acted differently if a similar event had occurred in the women's athletic program."[171] Thus, the Tenth Circuit, as had the Fifth Circuit in *Rowinsky*, required proof of different treatment based on gender to sustain a cause of action under Title IX when the allegations against the school district and officials stem from their response, or lack thereof, to a peer sexual harassment situation.[172]

Another case of student-to-student sexual harassment was heard and decided by the Seventh Circuit in *Nabozny v. Podlesny*.[173] Rather than alleging a violation of Title IX, the plaintiff's counsel originally brought suit under 42 U.S.C. § 1983[174] and a Wisconsin state antidiscrimination in

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complaint also alleged a conspiracy to violate the plaintiff's constitutional rights under § 1985. *Id.*

167. Seamons v. Snow, 84 F.3d at 1230 n.4.

168. *Id.* at 1230.

169. Seamons v. Snow, 864 F. Supp. at 1119. The Tenth Circuit reversed the district court's dismissal based on a First Amendment freedom of speech claim. Seamons v. Snow, 84 F.3d at 1233.

170. Seamons v. Snow, 84 F.3d at 1233.

171. *Id.*

172. *Id.* While the district court in *Seamons* rejected the application of Title VII principles to a Title IX case as "inappropriate," the Tenth Circuit did not reach that issue, having determined that the plaintiff had failed to support his claim that the treatment he suffered *from the school officials he sued* was based on his gender. *Id.* at 1232-33.

> [A]lthough Title IX does protect against sexual harassment hostile educational environment, it is unclear what liability, if any, an individual or institutional defendant may have for creating a sexual harassment hostile environment when it was caused by such defendant's mere negligence or gross negligence and not as a result of any deliberate intention to discriminate on the basis of sex. Because we decide Brian's Title IX claim solely on the basis that he has failed to allege sexual discrimination, we decline to address the other challenges to his Title IX claim.

*Id.* at 1232 n.7 (citations omitted).

173. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

174. *Id.* at 449. The allegations underlying the § 1983 action were violations of the plaintiff's Fourteenth Amendment rights to equal protection and due process of law. *Id.*

education statute.[175] In language similar to Title IX, the Wisconsin statute prohibits discrimination in any educational program or activity on the basis of gender and sexual orientation, among other classifications.[176] The plaintiff was an avowedly gay male secondary student who was allegedly harassed to a shocking degree during junior high and high school.[177] He was spat upon, called "faggot," pushed and tripped, and urinated upon in the school restroom.[178] On one occasion, he was knocked to his hands and knees in a classroom and held down while a male classmate performed a "mock rape" of him and twenty of his fellow students watched, laughing.[179] He was kicked repeatedly in the abdomen, resulting in internal bleeding.[180] He was hospitalized for multiple suicide attempts between seventh and eleventh grade and diagnosed with post-traumatic stress disorder by the time he was sixteen.[181] He transferred from Ashland Junior High to a private school during eighth grade, but transferred back in ninth grade.[182] Ultimately, he dropped out of Ashland High School in eleventh grade, moving out of town.[183]

The district court granted summary judgment for the defendants on all claims, although the judge's decision was based, at least in part, on noncompliance by the plaintiff's counsel with local rules.[184] On appeal, the Seventh Circuit reviewed the facts de novo[185] and evaluated the plaintiff's case under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[186] The district court held that the equal protection claims should be dismissed on either of two alternative grounds—failure to allege or offer sufficient proof of different treatment based on gender, or that the

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175. *Id.* at 453.

176. *Id.* (citing WIS. STAT. § 118.13(1)). On appeal, however, "only Nabozny's constitutional claims [were] before [the] court." *Id.* at 449 n.1.

177. *Id.* at 451. Because there was no trial—the district court having granted the defendants' motion for summary judgment—the facts as laid out in the opinion were based on "the pleadings, depositions, answers to interrogatories, and admissions on file, [and] affidavits," and were, accordingly, recited as proffered by and in the light most favorable to the plaintiff. *Id.* at 450-51.

178. *Id.* at 451-52.

179. *Id.* at 451.

180. *Id.* at 452.

181. *Id.*

182. *Id.* The private school did not extend beyond the eighth grade. *Id.*

183. *Id.*

184. *Id.* at 449-50.

185. *Id.* at 451.

186. *Id.* at 453-60.

defendants were entitled to immunity.[187] The Seventh Circuit reversed, but only on the basis of equal protection.[188]

Applying a heightened scrutiny analysis as to the gender discrimination claim, the Seventh Circuit focused on the allegations and admissions related to the school district's past response to complaints of sexual abuse and harassment of female students at the hands of their peers, concluding that there was sufficient evidence or inferences of different treatment to get past a summary judgment motion.[189] The question of whether the individual defendants were entitled to qualified immunity turned on whether the law regarding "giv[ing] male and female students equivalent levels of protection" was sufficiently clear in 1988 when the plaintiff was in seventh grade.[190] The Seventh Circuit concluded that it was, despite the lack of case law on point.[191]

With respect to the sexual orientation claim, the Seventh Circuit also reversed the district court's decision, although the trial court had not directly addressed the orientation issue.[192] A two-step analysis was employed by Judge Eschbach.[193] First, has the nonmoving party offered sufficient evidence to survive a summary judgment motion, and if so, whether the defendants are entitled to immunity.[194] The Seventh Circuit answered both steps with a "yes."[195] Interestingly, although the Seventh Circuit used a heightened scrutiny analysis for the gender discrimination claim,[196] the sexual orientation cause of action[197] merited only a rational basis standard.[198] The

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187. *Id.* at 454. The Seventh Circuit held that the school district, as a municipal entity, was not entitled to qualified immunity. *Id.* (citing Owen v. City of Independence, 445 U.S. 622, 650-51 (1980)).

188. *Id.* at 460-61. The court held that the plaintiff failed to present enough evidence of a violation of due process, however; a "reasonable fact-finder could find that the . . . defendants . . . violated Nabozny's Fourteenth Amendment right to equal protection." *Id.* at 460.

189. *Id.* at 454-55.

190. *Id.* at 456.

191. *Id.* (citing McDonald v. Haskins, 966 F.2d 292, 293 (7th Cir. 1992)).

192. *Id.* at 456-58. "In the order the district court never specifically discussed Nabozny's sexual orientation claim. There is little doubt, however, that the district court intended for its order to dispose of Nabozny's suit in its entirety." *Id.* at 456-57.

193. *Id.* at 457.

194. *Id.*

195. *Id.* at 458.

196. *Id.* at 456 ("It is now well settled that to survive constitutional scrutiny, gender based discrimination must be substantially related to an important governmental objective."). The Seventh Circuit added in a footnote a recognition of a possibly higher standard to be applied in gender-based discrimination cases based upon the then-recently decided *United States v. Virginia*, 116 S. Ct. 2264 (1996), where the Supreme Court had phrased the level of scrutiny as requiring from the government "an exceedingly persuasive justification." Nabozny v. Podlesny, 92 F.3d at 456 n.6.

197. The United States Supreme Court decided that same-sex sexual harassment on the job can violate Title VII. Oncale v. Sundowner Offshore Servs., 118 S. Ct. 998, 1002-03 (1998). Presumably "gay bashing" is similarly actionable under Title IX. On this point I concur with the Department of Education (OCR) guidelines. *See* Sexual Harassment Guidance:

Seventh Circuit affirmed the district court's dismissal of the due process claim, citing the fact that a school district has no affirmative duty to protect students from other students because of the absence of a "special [custodial] relationship" between the student and the school district, the element necessary to merit a *DeShaney* exception.[199]

The Second Circuit is on record as applying Title VII principles to a Title IX claim of hostile environment sexual harassment, although the case arose in higher education and, frankly, is a quasi-Title IX/quasi-Title VII case. *Murray v. New York University College of Dentistry*[200] involved a Title IX complaint from a second-year dental student against her educational institution.[201] New York University was also her employer because she was paid as a dental intern.[202] The harassment in *Murray* was by a patient of the dental clinic.[203] In discussing the appropriate legal standard to use, the Seventh Circuit first made a distinction between Title IX suits brought by students and those brought by employees,[204] and concluded that it is quite appropriate to apply Title VII standards to those cases where the plaintiff is an employee of an educational institution.[205] In looking at whether to apply that same analysis to suits filed by students under Title IX, the Second Circuit went through the now typical analysis of *Franklin*,[206] finding that the Supreme Court had sent sufficient signals, by citing to the hostile environment case of *Meritor*, to indicate that Title VII should be used in a hostile environment sexual harassment case brought by a student plaintiff under Title IX.[207] Although in that portion of its analysis, the Second Circuit failed to note the distinction between a student being harassed by a teacher as in *Franklin* and a student being harassed by a nonemployee third party as in the case at bar, the *Murray* opinion reflects that the harasser's status as a third party did play a part in the court's analysis.[208]

If a plaintiff alleges quid pro quo sexual harassment by a supervisor that "wields the authority delegated to him by an employer," the Second Circuit

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Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).

198. Nabozny v. Podlesny, 92 F.3d at 458 (citing Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989)).

199. *Id.* at 458-61 (citing J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990)).

200. Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995).

201. *Id.* at 245.

202. *Id.* at 245-47; *see also* Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (recognizing that a medical student intern is both a student and an employee).

203. Murray v. New York Univ. College of Dentistry, 57 F.3d at 245.

204. *Id.* at 248-49.

205. *Id.*

206. *Id.* at 249 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 73 (1992)).

207. *Id.* at 248-49.

208. *Id.* at 250.

wrote, "the supervisor's conduct is deemed to be that of the employer, and the employer's liability for that conduct is absolute."[209] On the other hand,

> employer liability for a hostile environment created by coworkers, or by a low-level supervisor who does not rely on his supervisory authority in carrying out the harassment, attaches only when the employer has "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."[210]

Given that the harasser in *Murray* was neither a supervisor nor a coworker of the plaintiff, it is implicit in the opinion that there would be no imputation of his conduct to the employer; the employer could only be liable for its own torts, whether by action or inaction.[211]

In August of 1997, the Eleventh Circuit issued its decision on rehearing in *Davis II*.[212] The Eleventh Circuit completely repudiated its earlier decision and adopted the standard established by the Fifth Circuit in *Rowinsky*—Title IX imposes liability "only when the school board or one of its agents bears direct responsibility for discriminating on the basis of sex."[213] The Eleventh Circuit also rejected the application of Title VII standards and case law in Title IX student-to-student hostile environment sexual harassment cases.[214] The Eleventh Circuit cited three reasons for its conclusion that Title VII analysis is inapplicable to student-to-student cases: (1) the language is different, implying the absence of Congressional intent that the two statutes be interpreted consistently;[215] (2) Title IX was enacted under the Spending Clause, while Title VII was enacted under the Commerce Clause, and Title IX's reach is thus narrower;[216] and (3) Title VII analysis is based upon agency principles, and "[a]gency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board."[217]

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209. *Id.* at 249 (citing Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994)).

210. *Id.* (quoting Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 63 (2d Cir. 1992)). The court then went on to note that in deciding *Karibian* and *Kotcher*, the Second Circuit had not included the constructive notice language "should have known" in its announced standard. *Id.* at 249-50. The plaintiff in *Murray* asked the court to add the constructive knowledge language to its Title VII standard, extend that same standard to harassment created by a third party, and then import all of that onto a Title IX analysis. *Id.* at 250. The Second Circuit declined the invitation, finding it unnecessary given the facts of the case. *Id.*

211. *Id.* at 245, 249.

212. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

213. *Id.* at 1407 (Black, J., concurring).

214. *Id.* at 1400 n.13 ("We decline appellant's invitation to use Title VII standards of liability to resolve this Title IX case.").

215. *Id.* at 1400-01 & n.13.

216. *Id.* at 1400 (citing EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1279 n.10 (9th Cir. 1982)).

217. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 1 (1958)).

A three-judge panel of the Seventh Circuit recently decided *Doe v. University of Illinois*,[218] a Title IX case arising in a high school operated by the state university. The court spared readers the facts as alleged in the petition, except to state that the plaintiff complained of being "the victim of an ongoing campaign of verbal and physical sexual harassment perpetrated by a group of male students at the school."[219] Counsel for the University high school acknowledged during oral argument that the administration was aware of at least some of the instances and had taken disciplinary action against two male students.[220] On appeal from the district court's grant of summary judgment for the defendants,[221] the Seventh Circuit panel concluded that the plaintiff's complaint should not have been dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and reversed the trial court and remanded the case.[222] More important, however, the court established a fairly workable standard for liability under Title IX in student-to-student sexual harassment cases,[223] based upon a clear and well-articulated understanding of the nature of the problem of public school liability under Title IX for these types of cases.

The court first decided, for the purposes of ruling on the school's immunity defense, that the source of authority for Congress's enactment of Title IX was likely both the Spending Clause of the Constitution and section 5 of the Fourteenth Amendment.[224] Having concluded that Congress, in enacting Title IX, both indicated a clear intent to abrogate the states' immunity under the Eleventh Amendment and that Congress's authority was unquestioned,[225] the court moved on to discuss the Title IX issue itself.

Reviewing the *Cannon-Franklin* legacy, circuit court decisions in *Rowinsky* and *Davis II*,[226] and citing an occasional district court case, the Seventh Circuit quickly focused on the intent versus negligence standard and the fuzziness of many other jurisdictions' announced standards in this regard. The court concluded that proof of intent to discriminate is required to hold a

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218. Doe v. University of Illinois, No. 96-3511, 1998 WL 88341 (7th Cir. Mar. 3, 1998).

219. *Id.* at *1.

220. *Id.* at *17.

221. The trial court, however, did grant the plaintiff leave "to refile her claim against the University of Illinois for intentional sexual discrimination in violation of Title IX." *Id.* at *1.

222. *Id.* at *17. The Court also ruled on the defendant's Eleventh Amendment immunity defense, affirming the lower court's denial of the University's motion to reconsider. *Id.*

223. The majority opinion, authored by Circuit Judge Cummings, spawned two additional opinions. Judge Coffey concurred in the ultimate conclusion as to the inappropriateness of the granting of the defendants' motion to dismiss "but not the reasoning," and dissented from the standard of liability. *Id.* at *17 (Coffey, J., concurring in part and dissenting in part). Circuit Judge Evans wrote a separate, brief concurrence focusing on the announced standard and elaborating for the purpose of guiding the district court on remand. *Id.* at *27 (Evans, J., concurring).

224. *Id.* at *5.

225. *Id.* at *6-7.

226. *Id.* at *8-12.

recipient liable under Title IX. Ultimately, the majority held that "Title IX does make schools liable for failure to respond promptly and appropriately to known student-on-student sexual harassment."[227] The Seventh Circuit explained:

> [T]his Court does not imply that schools must be successful in completely eradicating sexual harassment from their campuses and programs. . . . Rather, officials must choose from a range of responses. As long as the response strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit.[228]

The court then proceeded to require that actual notice of the offensive behavior be given to the defendants.[229] The court rejected the "or should have known" negligence terminology. Further, the court offered resolution of a subissue when it clarified which defendants had to have actual notice. A "school district can be liable 'only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so.'"[230]

Circuit Judge Coffey, in an illuminating opinion concurring in part and dissenting in part, also focused on the intent versus negligence question.[231] Judge Coffey stressed:

> The issue is not whether a given school did enough to wipe out ongoing student-on-student sexual harassment—that is a negligence inquiry—rather, the proper question is whether the responsive action taken was of such a

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227. *Id.* at *16.

228. *Id.*

229. *Id.* at *16-17.

230. *Id.* at *16 (quoting Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997)).

231. *Id.* at *19 (Coffey, J., concurring in part and dissenting in part). Judge Coffey noted:

> [W]hile I agree with the general spirit of Title IX liability as set forth in the majority's "actual knowledge" test, I nevertheless have serious misgivings about other facets of the standard it proposes.
>
> . . . I fear that a casual reader of today's majority opinion might very well argue that negligence concepts have somehow crept into our Title IX jurisprudence.

*Id.*

> nature that it effectively evinced the school's intent to perpetuate a sexually-hostile environment.[232]

This opinion also reflected a key understanding of the nature of the school setting and the inherent difference between student discipline imposed to eliminate a school's liability under Title IX and employee discipline imposed to eliminate an employer's liability under Title VII.

> Schools do not have to eliminate sexual harassment by students upon other students. That would be an impossible task, for schools are full of all sorts of kids, and every school has its share of buffoons, yokels, and dunderheads of all stripes. And unlike harassers in the work place, students can't be fired. Schools are also full of kids with raging hormones who may be crude and insensitive when dealing with students of the opposite sex. . . . Considerable deference . . . must be given to schools in meeting these demands, and a wide range of reasonable responses should be permitted.[233]

Similarly, Chief Judge Posner of the Seventh Circuit, writing in a separate opinion dissenting from the denial of rehearing en banc, recognized some of the public policy issues underlying a well-intentioned but dangerous tendency of some courts to read Title IX too broadly. Judge Posner wrote:

> The potential liabilities of the nation's schools, already financially hard-pressed, are staggering, since insults, teasing, petty persecutions, grabbing, poking, sexual experimentation and other forms of what might actually or arguably constitute sexual harassment are an omnipresent feature of school life. Liability for failing to prevent [or] rectify sexual harassment of one student by another places a school on a razor's edge . . . .
>
> I tentatively favor the adoption of a standard of liability that would give schools substantial protection against being sued for failing to guess right about the proper management of sexual and related nastiness among their charges.[234]

Judge Posner went on to propose a "deliberate indifference" standard, which will be addressed in Part V of this Article.

The federal circuit courts of appeal decisions can now be seen as being fairly unified. The Fifth and Eleventh Circuits are in agreement that a cause of action will not lie under Title IX for student-to-student sexual harassment unless an agent of the school "directly" participates in the harassing

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232. *Id.* (footnote omitted).
233. *Id.* at *27.
234. *Id.* at *29 (Posner, C.J., dissenting).

behavior,[235] and that a negligence standard, borrowed from Title VII analysis, is inapplicable as well as inappropriate to Title IX student-to-student cases of sexual harassment.[236] The Seventh Circuit likewise rejected a strict liability standard, required intent, but allowed intent to be inferred from "failure to respond promptly and appropriately."[237] The Tenth, Second, and Ninth Circuits "have resolved complaints of student-student sexual harassment without deciding whether a cause of action exists under Title IX for this alleged harm."[238] Because *Nabozny* was brought under § 1983 and the Equal Protection and Due Process Clauses of the Fourteenth Amendment rather than Title IX, the Seventh Circuit has not been faced with the issue.[239]

### B. *District Court Analysis: All Over the Board*

*Oona R.-S. v. Santa Rosa City Schools*[240] was brought under Title IX and 42 U.S.C. § 1983.[241] The § 1983 action was based upon alleged deprivations of equal protection and due process of law as guaranteed by the Fourteenth Amendment, and the Title IX violation.[242] The complaint alleged that the plaintiff was subjected to sexual harassment—hostile environment—by a student teacher,[243] as well as by her peers;[244] so this case is a hybrid on its face. On the defendants' motions to dismiss the § 1983 claims,[245] the district court held that a Title IX violation may support a cause of action under § 1983;[246] that "intentional discrimination is an element of a claim that an individual official has violated a plaintiff student's rights under Title IX by engaging in *or allowing* sexual harassment of that student";[247] that sufficient

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235. *See, e.g.*, Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 657 (5th Cir. 1997).

236. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1400 n.13 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1008 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

237. Doe v. University of Illinois, No. 96-3511, 1998 WL 88341, at *16 (7th Cir. Mar. 3, 1998).

238. Davis v. Monroe County Bd. of Educ., 120 F.3d at 1395 (citing Seamons v. Snow, 84 F.3d 1226, 1232-33 (10th Cir. 1996); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250 (2d Cir. 1995); Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1994)).

239. *See* Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).

240. Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995).

241. *Id.* at 1458.

242. *Id.*

243. *Id.* at 1455.

244. *Id.* at 1456.

245. *Id.* at 1459. The individual defendants sought to be dismissed on three grounds: Title IX does not impose liability on individuals, the individual defendants were entitled to qualified immunity, and there was insufficient basis for liability. *Id.* at 1458.

246. *Id.* at 1462.

247. *Id.* at 1464 (emphasis added). In the footnote following the court's pronouncement, which included the phrase "or allowing sexual harassment," Chief Judge Henderson

allegations of the involvement of school officials in the harassment had been made with respect to some of the named individual defendants but not as to others;[248] and that "Title IX may be violated when female students are subjected to sexual harassment by their male peers at school and school officials discriminate against the female students on the basis of sex in encouraging or failing to appropriately respond to such harassment."[249] The court denied the defense of qualified immunity on its reading of Ninth Circuit precedent.[250] Once again, it appeared that a court was saying that it required intent to discriminate, but equating active deeds that clearly indicate intent—"encouraging"—with passive behavior—"allowing"—which is more akin to negligence.

In a student-to-student sexual harassment case out of Connecticut, a federal district court adopted the minority viewpoint in holding that individuals, in this case a teacher[251] and a superintendent,[252] can be held liable under Title IX.[253] The court wrote, after reciting the language of Title IX,[254] "This language does not restrict the potential class of defendants based on their nature or identity (i.e., individual, institution, etc.). It does, however, restrict them based on their function or role in a program or activity."[255] The court also held that the teacher was entitled to qualified immunity because his

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reviewed and distinguished cases where intent to discriminate was not required—"equitable funding in athletics" cases under Title IX—as if a school district's "allowing" sexual harassment to occur is an example of intentional discrimination rather than indicative of negligence, a failure to prevent the harassment. *See id.*

248. *Id.* at 1468. The court distinguished between culpable actions as actionable behavior and nonculpable supervisory behavior because "no section 1983 liability may attach under a theory of *respondeat superior*." *Id.* (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 663-64 n.7 (1978)).

249. *Id.* at 1469. The court described the potential manifestations of liability as "active encouragement of peer harassment, the toleration of the harassing behavior of male students, or failure to take adequate steps to deter or punish peer harassment." *Id.*

250. *Id.* ("'[Q]ualified immunity is not a defense in cases involving intentional racial or other similar discrimination.'") (quoting Gutierrez v. Municipal Court, 838 F.2d 1031, 1051 (9th Cir. 1988)).

251. Mennone v. Gordon, 889 F. Supp. 53, 54-55 (D. Conn. 1995). The teacher was alleged to have been present for and observed the harassment and to have failed to intercede. *Id.*

252. *Id.* The superintendent's motion to dismiss on the ground that the board, not he, was the real party in interest, was granted because the plaintiff did not allege any actions on the part of the superintendent that would indicate that he "was directly and personally responsible for" the harassment. *Id.* at 55.

253. *Id.* at 55-58.

254. *Id.* at 56. "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." 20 U.S.C. § 1681(a) (1994).

255. Mennone v. Gordon, 889 F. Supp. at 56. Individual defendants can be held liable under Title IX "as long as they exercise a sufficient level of control." *Id.*

"failure to protect" the plaintiff from the actions of the harassing student was not a clearly established duty at the time the cause of action arose, in the 1990-91 school year.[256] Finally, the court dismissed the § 1983 action, holding that the plaintiff's constitutional claims of due process and equal protection violations were subsumed by Title IX, as they were premised on the same behavior as the Title IX claim.[257]

In 1995, in the heart of America, another case of student-to-student sexual harassment came before a federal district court.[258] In *Bosley v. Kearney R-1 School District*, a mother and daughter brought an action under 42 U.S.C. § 1983, Title IX, and state tort law against the Kearney, Missouri school district for vague and unspecified incidents of alleged sexual harassment against the daughter.[259] The court, on the defendant's motion for summary judgment, held that the mother did not have standing to sue for a violation of Title IX,[260] that a substantive due process violation could not be proven because school districts do not have a "duty to protect students from unlawful conduct committed against them by other students."[261] The court dismissed the § 1983 count alleging that a due process violation[262] and an equal protection violation could not be proven because there was insufficient evidence "that defendant purposely treated [the daughter] differently than male students in the same or similar circumstances."[263] The daughter's alleged Title IX violation survived summary judgment.[264] The *Bosley* court held that intentional discrimination by the defendant is a requisite element of a claim for damages under Title IX, but it also held that Title VII is the most appropriate standard for analysis under Title IX.[265] The federal district court in Missouri, however, proceeded to alter one of the traditional Title VII elements by requiring the plaintiff to prove that the defendant "knew of the harassment and intentionally failed to take proper remedial action"[266]—arguably a higher standard than "knew or should have known . . . and failed to take proper remedial action."[267]

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256. *Id.* at 58. The school year in which the harassment took place was 1990-91. *Id.* at 54.

257. *Id.* at 58-60 ("'[W]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.'") (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981)).

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

259. *Id.* at 1012-13.

260. *Id.* at 1020.

261. *Id.* at 1019.

262. *Id.*

263. *Id.*

264. *Id.* at 1025.

265. *Id.* at 1020-22.

266. *Id.* at 1023.

267. *Id.* at 1022-23.

In *Doe v. Petaluma City School District*[268] the district court's initial decision granted the defendant school district's motion to dismiss and held that, in student-to-student sexual harassment cases brought under Title IX, the plaintiff must show intentional discrimination.[269] Thereafter, "the Court granted Plaintiff leave to move for reconsideration . . . in light of the developing case authority in this rapidly changing area of the law."[270] Ultimately, the court granted the plaintiff's motion for reconsideration.[271] On reconsideration, the court held that instead of proving intentional discrimination, the plaintiff could rely on Title VII negligence standards for hostile environment sexual harassment.[272] The court held that the applicable standard did not adapt or modify the elements required for workplace harassment suits to school-based, student-to-student suits in the traditional Title VII hostile environment standard.[273] As noted in the previous Part of this Article, on appeal the Ninth Circuit ruled only on the issue of immunity for the school guidance counselor who had so badly misadvised the plaintiff, reversing the original district court decision on that point.[274]

Chronologically, the next case also provided two opinions. In *Bruneau v. South Kortright Central School District*,[275] a sixth grader in New York, brought suit through her guardian against her school for failure—despite having actual knowledge of the harassment—to stop sexual harassment by her male classmates.[276] Initially, the district court granted the defendants' motion to dismiss the individual defendants from the Title IX claims, but refused to dismiss the Title IX claims against the district and board of education, denied the defendants' motion for summary judgment, and gave the plaintiff leave to amend her complaint against the district and board under § 1983.[277] In its ruling on the amended complaint, the issue was narrowed to the appropriate standard for assessing liability under Title IX.[278] The *Bruneau* court followed *Davis I* and adopted a modified Title VII standard, changing the fourth and fifth elements to reflect the difference between an employment environment and an educational environment:

> [A] Title IX Plaintiff must demonstrate that: (1) she is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive

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268. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd*, 54 F.3d 1447 (9th Cir. 1995).
269. *Id.* at 1576.
270. Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1417 (N.D. Cal. 1996).
271. *Id.* at 1416.
272. *Id.* at 1426.
273. *Id.* at 1426-27.
274. Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1450, 1452 (9th Cir. 1995).
275. Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996).
276. *Id.* at 166-67.
277. *Id.* at 166.
278. *Id.*

> educational environment; and (5) some basis for institutional liability has been established.[279]

In applying this analysis to the facts as alleged in the petition, the *Bruneau* court concluded (1) the plaintiff was a member of a protected group; (2) whether the conduct complained of by the plaintiff constituted sexual harassment is a question for the jury; (3) "after drawing all ambiguities and inferences in favor of the Plaintiff," a jury could find that but for the plaintiff's sex, she would not have been harassed; (4) there was enough evidence on both sides of the "pervasiveness or severity" issue to generate a legitimate jury question; and (5) the question of actual notice was also sufficiently in dispute factually to preclude the court's conclusion as a matter of law that one party or the other had carried the day.[280] Thus, the defendants' motion for summary judgment on the Title IX claim was denied.[281]

In *Collier v. William Penn School District*,[282] the district court in the Eastern District of Pennsylvania ruled, in a student-to-student case brought under Title IX, 42 U.S.C. § 1983, and state tort law, that Title VII is sufficiently analogous to Title IX to justify applying the same analysis in a claim for peer harassment, and denied the defendants' motion to dismiss.[283] The court stated:

> The plaintiff in the pending case states a cognizable Title IX claim. Her complaint alleges that [the school district] did nothing despite actual notice of pervasive and significant sexual harassment by several students, against her, over a prolonged period of time. . . .
>
> While we are permitting plaintiff's complaint to go forward, we caution that not every unwanted interaction of a physical or sexual nature between adolescents states a Title IX claim against a school district. While sexual overtures or contact between a teacher and a student is undeniably out of bounds, a similar relationship between adolescents does not necessarily constitute harassment. Even so, we are confident that wherever the line for school district liability for peer-peer harassment is drawn, the facts of plaintiff's complaint, if true, cross it.[284]

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279. *Id.* at 174. Later in the opinion, the court held that "an educational institution will not be held liable for alleged peer-on-peer sexual harassment unless the school provided no reasonable avenue of complaint or knew of the harassment but did nothing about it." *Id.* at 177.

280. *Id.* at 174-77.

281. *Id.* at 177.

282. Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E.D. Pa. 1997).

283. *Id.* at 1214.

284. *Id.* "The harassment included offensive language, sexual innuendo, sexual propositions, and threats of physical harm. . . . [A] male student . . . exposed his penis to plaintiff and grabbed her breast." *Id.* at 1211.

### C. *Office for Civil Rights Analysis*

The United States Department of Education's (USDE) regulations implementing Title IX are found at section 106.31 of the Code of Federal Regulations.[285] These regulations restate the law[286] and then delineate "specific prohibitions"[287] that the OCR then cites as support for its analysis.[288] The regulations themselves, however, do not include the term or any reference to "student-to-student" or "peer" sexual harassment, nor do they include the definition of sexual harassment that the OCR relies on in its investigations.[289]

The OCR's boilerplate language regarding its analysis of student-to-student sexual harassment cases under Title IX is as follows:

> OCR policy defines sexual harassment as verbal or physical conduct of a sexual nature, imposed on the basis of sex that denies, limits, provides different aid, benefits, services, or treatment protected under Title IX. Regarding student-on-student harassment, a district will be held responsible for the harassment if it had or should have had knowledge of the harassment and failed to take prompt, reasonable, and effective action to demonstrate that such behavior is not permitted and that any subsequent such behavior will not be condoned.
>
> In determining the District's compliance with the Title IX regulation, OCR determine[s] whether: (1) a female student . . . was subjected to harassment of a sexual nature by students at [the respondent's school]; (2) the District had or should have had knowledge of the harassment; and (3) the District, after becoming aware of students sexually harassing another student, took action sufficient to demonstrate that such behavior is not permitted and that any subsequent such behavior will not be condoned.[290]

Thus, the first step is to determine whether the activities complained of constitute harassment based on sex. If so, the next step is to determine whether the district had actual or constructive knowledge of the incidents, and if so, whether the discipline imposed on the offending student was sufficient in stopping the harassment by that individual in the future. Noticeably missing in the OCR's analysis in its investigation of the Mason City, Iowa School District is whether a hostile environment existed: Was the harassment so severe or pervasive as to impair the student's educational benefits?[291] In

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285. 34 C.F.R. § 106.31(a) (1996).

286. *Id.*

287. *Id.* § 106.31(b)(1)-(7).

288. *See* Region VII Letter, *supra* note 5, at 2.

289. Letter from Charles Nowell, Region VII Director of the Office for Civil Rights, to David F. Darnell, Superintendent of Mason City (Iowa) Community School District 2 (Mar. 28, 1994) (on file with author).

290. *Id.*

291. *See id.* at 1-13.

that investigation, of the eight instances alleged the OCR found that five could both be substantiated and constituted harassment of a sexual nature.[292] These five substantiated incidents occurred over a seventeen-month period, from September of 1992 to January of 1993.[293] At that time, the complainant withdrew from the Mason City schools.[294] There was no coherent or explicit finding that the five incidents, three of which were adequately addressed by the school district according to the OCR,[295] constituted a hostile environment.[296]

Clearly, the OCR employs a negligence standard and follows Title VII guidance in its analysis. Following the Fifth Circuit's decision in *Rowinsky*,[297] in which that court declined to follow the OCR's analysis—the USDE's Assistant Secretary for Civil Rights issued "Policy Guidance" on the subject of student-to-student sexual harassment.[298] In her cover letter accompanying the draft "Guidance," Assistant Secretary Norma Cantú wrote:

> Recently, OCR has received inquiries relating to our position regarding peer sexual harassment—harassment that occurs during school activities or on school grounds by one student against another.
>
> The central question posed is whether, in OCR's view, peer harassment that creates a hostile environment is covered by Title IX and, therefore, whether a school may be liable under Title IX if it fails to appropriately respond to instances of such harassment once it has notice of the actions by students giving rise to the harassment. The answer to that is yes. Since at least

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292. *Id.* at 11.

293. *Id.*

294. Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1420 (N.D. Iowa 1996).

295. *See supra* note 292 and accompanying text.

296. The omission of the determination of how many incidents or other relevant factors constitute a hostile environment may have been an oversight by the investigator in the Mason City case or may depend upon who investigates. For example, in the Eden Prairie, Minnesota investigation, the letter of findings at least outlines the criteria for a finding that a hostile environment exists:

> In determining whether sexual harassment exposes students because of their sex to a hostile environment, relevant circumstances include the age of the victim(s); the frequency, duration, repetition, location, severity, and scope of the act(s) of harassment; the nature and context of the incident(s); whether the conduct was verbal or physical; whether others joined in perpetuating the alleged harassment; whether the harassment was directed at more than one person; and whether the alleged incidents created an offensive, hostile or abusive atmosphere at the district or at specific schools or in other district settings, such as school buses.

Region VII Letter, *supra* note 5, at 2.

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

298. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).

> 1989, OCR has investigated claims of peer harassment filed pursuant to Title IX and, in appropriate cases, found schools liable if, once on notice, they failed to respond to instances in which students were harassing other students. 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.[299]

At this point, Assistant Secretary Cantú inserted a footnote which stated,

> Very recently, however, a divided panel of the Fifth Circuit has ruled that peer harassment is not, in and of itself, cognizable under Title IX. In so doing, the court rejected other federal opinions on the subject, misconstrued existing statements of OCR policy, and dismissed OCR's deliberate and settled practice.[300]

Assistant Secretary Cantú then cited *Rowinsky*.[301]

Notice of the final version of the OCR's Policy Guidance was published in March of 1997.[302] The Sexual Harassment Guidance states,

> [A] school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[303]

In the section of the guidelines devoted to a discussion of the *severe, persistent,* or *pervasive* element of sexual conduct, the OCR states that their investigators will employ both subjective and objective tests.[304] For these tests, they will consider at least eight separate factors:

> The degree to which the conduct affected one or more students' education. . . .
>
> The type, frequency, and duration of the conduct. . . .
>
> The identity of and relationship between the alleged harasser and the subject or subjects of the harassment. . . .
>
> The number of individuals involved. . . .
>
> The age and sex of the alleged harasser and the subject or subjects of the harassment. . . .

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299. *See* Colleague Letter, *supra* note 5, at 1.

300. *Id.*

301. *Id.*

302. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).

303. *Id.* at 12,039.

304. *Id.* at 12,041.

> The size of the school, location of the incidents, and context in which they occurred. . . .
>
> Other incidents at the school. . . .
>
> Incidents of gender-based, but non-sexual, harassment.[305]

But what should be made of the judicial pronouncement that "the mere existence of sexual harassment does not necessarily constitute sexual discrimination"?[306] This question was somehow lost in the shuffle.

Are the newly issued Sexual Harassment Guidance and recent letters of finding binding on schools subject to Title IX? If not, what weight should they be given by the courts? According to the Fifth Circuit, a degree of judicial deference normally should be paid to the OCR's adopted regulations.[307] Its "[p]olicy memorandum . . . represents a deliberate policy statement by the agency."[308] The letters of finding alone, however, "should be accorded little weight."[309] The *Rowinsky* court implied that the OCR had not then adopted regulations or issued guidance on student-to-student sexual harassment because the agency lacked jurisdiction over those cases under Title IX. The agency recognized that problem,[310] a position the OCR thoroughly disputed in the guidelines when they claimed jurisdiction over employee-to-student, student-to-student, and even third party-to-student sexual harassment.[311] Thus, the issue of whether the OCR's Sexual Harassment Guidance deserves *any* weight with respect to peer sexual harassment seems fair game for litigation. Even if that question is judicially resolved in the affirmative, the question still remains whether the courts must or even should apply the same factors as the OCR applies when it conducts investigations and issues findings of liability for federal funds. General principles of administrative law and jurisprudence would suggest that in the absence of binding precedent from

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305. *Id.* at 12,041-42. It should be noted that the explanation of "severe, persistent, or pervasive" would be applicable to employee-to-student cases, student-to-student, third party-to-employee, or third-party-to-student cases, as the guideline applies to all types of Title IX violations. *Id.* at 12,035.

306. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir.) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)), *cert. denied*, 117 S. Ct. 165 (1996).

307. *Id.* at 1015.

308. *Id.*

309. *Id.*

310. *Id.* at 1015 n.22.

311. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034 (1997) ("The Guidance provides educational institutions with information regarding the standards that are used by the [OCR], and that institutions should use, to investigate and resolve allegations of sexual harassment of students engaged in by school employees, *other students (peers), or third parties.*") (emphasis added).

above, a court is free to apply any criteria for determining a violation of Title IX, irrespective of the methods and factors used by the OCR.[312]

## IV. PRACTICAL CONSIDERATIONS

If one accepts the premise that the sole or primary motivation of the sexual harasser is to establish or exert power over the victim of the harassment,[313] it is awkward to cast children as young as six and seven into that model. If, on the other hand, one considers the probability that the child harasser is seeking attention, albeit inappropriately, from the victim or a wider audience of peers, or is acting out perverse perceptions of adult behavior—much in the same way that a misguided eight-year-old may smoke a cigarette to appear grown up—then the basic premise that "sexual harassment is about power" is contorted at best and may not be applicable at all where young children are concerned.

The Fifth Circuit noted in *Rowinsky* that the importation of "a theory of discrimination from the adult employment context into a situation involving children is highly problematic."[314] The *Rowinsky* court rejected the plaintiff's request to subject student-to-student harassment under Title IX to a Title VII sexual harassment analysis stating, "In an educational setting, the power relationship is the one between the educational institution and the student. In the context of two students, however, there is no power relationship, and a theory of respondeat superior has no precedential or logical support."[315] The court did not go far enough, however, in discussing why it is illogical or inappropriate to compare the behavior of children on the playground to the behavior of adults in a work setting.

Surely Title VII presupposes that adults in the workplace are capable of mature restraint, by requiring that "juvenile" behavior—sexual innuendo, propositions, vulgar language, and off-color jokes—be curtailed by the employer. Children in a school setting are by nature and definition "juvenile" in their behavior. This is not to say minor children are excused for this type of behavior. On the contrary, public schools are responsible for teaching the difference between inappropriate and model behavior. The question is, will the school district be held accountable under Title IX for a slow learner or a widespread epidemic of this juvenile behavior?

Take for example the situation that occurred in the Eden Prairie, Minnesota, public schools.[316] The complaint filed with the United States Department of Education, Office for Civil Rights, involved two six-year-old first grade girl

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312. *See* Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1039 (7th Cir. 1997) ("[W]e must approach this new and developing area of federal law with acute scrutiny.").

313. *See* Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996) (citing CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 220-21 (1979)).

314. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d at 1011 n.11.

315. *Id.* (citing Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 533-36 (1987)).

316. *See generally* Region VII Letter, *supra* note 5.

"victims" and two nine-year-old fourth grade boy "perpetrators."[317] The older boys' misconduct included foul language, profanity, "making lewd jokes about male anatomy, . . . tormenting the girls by pointing and shoving big rubber knives at them, [and] pretending to stab them" on the school bus.[318] The girls were "teased . . . about their sex organs"[319] and one of the boys had told one of the girls "in graphic slang terms to perform sex acts with her father."[320] Although school officials punished the offending students with detentions and suspensions, the OCR was critical of the district for, among other things, failing to "treat the complainant's correspondence as alleging a violation of the district's sexual harassment policy."[321] The elementary school principal and transportation director had instead generically characterized the boys' misconduct as "inappropriate language"[322] and disruptive behavior violating the student disciplinary code.[323] The settlement agreement between the OCR and the Eden Prairie Schools included an obligation that the latter "will make an express finding as to whether harassment occurred" in responding to future complaints of sexually inappropriate behavior.[324]

Thus, it matters a great deal to the United States Department of Education's Office for Civil Rights what such juvenile misbehavior is labeled. Their expectations of the school officials' treatment of these situations at school or on the school bus does not vary from the approach that the Equal Employment Opportunity Commission would presumably take in assessing the response of an employer to a charge of sexual harassment in an adult work setting.

Should the school district be responsible for correcting a nine-year-old's behavior toward another student in the same way that an employer is responsible for dealing with a forty-two-year-old employee's behavior toward a coworker? It seems abundantly clear that the two situations are not analogous. Title VII standards may offer some guidance for the Title IX student-to-student sexual harassment situation, but the wholesale importation to Title IX of case law and analysis under Title VII is ill advised for exactly those reasons—the victims and the harassers are not similarly situated, nor are the school district and the employer.[325] While it would certainly be appropriate to apply Title VII standards in the event a school employee complaining of sexual harassment in the workplace chose to file suit under Title IX instead of

317. *Id.* at 3.
318. *Id.* at 3-5.
319. *Id.* at 4.
320. *Id.*
321. *Id.* at 5.
322. *Id.* at 8.
323. *Id.* at 6.
324. Settlement Agreement, File No. 5-92-1174, at 1 (U.S. Dep't of Educ. Apr. 27, 1993) (on file with author).
325. Of course, when the complaint in a school district is one of employee-to-employee sexual harassment, the school district as employer is then similarly situated to other employers and a Title VII approach is both necessary and appropriate.

Title VII, and it may even be appropriate to use the Title VII analysis if a student is sexually harassed by a school employee because the Title VII standards are rooted in agency principles. Using Title VII to guide Title IX investigations and analysis in student-to-student cases is, however, misguided and inapt.

As stated above, the *Rowinsky* court distinguished the student-to-student sexual harassment situation from the adults-in-the-workplace situation based on the following reasoning:

> Unwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer, or co-worker. . . . [T]he analogy is missing a key ingredient—a power relationship between the harasser and the victim.
>
> . . . .
>
> Title VII cases (cited by Rowinsky) that have found liability for harassment by third parties are inapplicable, because in those cases the power of the employer was implicated.[326]

It is likely that the suffering of children and adolescents from the cruelty of their peers generates a desire to find a remedy in the implied promise of Title IX—that students will be free from all forms of sex discrimination in schools receiving federal financial assistance. Nevertheless, the step-by-step extensions of "implieds" seems to ask more from Title IX than it was ever designed to do.[327]

There is also the practical and legal issue of how schools must deal with special education students. The Individuals with Disabilities Education Act (IDEA)[328] along with the Americans with Disabilities Act of 1990[329] and even section 504 of the Rehabilitation Act of 1973[330] essentially prohibit a school district from punishing a student for behavior related to his or her disability.[331] A number of students labeled as students with disabilities suffer

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326. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) (citations omitted).

327. The step-by-step extensions of implieds came from *Cannon*'s implied private right of action under Title IX when a student is discriminated against by an educational institution, to *Franklin*'s implied right of damages when a student is intentionally subjected to a sexually hostile environment by an employee or agent of the institution, to various courts' acceptance of an implied private right of action and damages when a student is sexually harassed by another student and the educational institution has not been effective in either preventing or stopping it. *See generally* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Cannon v. University of Chicago, 441 U.S. 677 (1979).

328. Individuals with Disabilities Education Act of 1991, 20 U.S.C. §§ 1400-1491 (1994).

329. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

330. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994).

331. *Id.* § 794. "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the

from what some states refer to as behavior disorders or "B.D."[332] Other states may call these or some of these children seriously emotionally disturbed or "S.E.D." The premise of the IDEA is that each child with a disability will be educated in the least restrictive environment,[333] which means in almost every case that the student will at least start out in the school that he or she would attend if not for the disability, ideally in the regular classroom. But even when placed in a separate classroom because his or her behavior is so far from acceptable or controllable in the regular classroom—even with supplemental assistance and supports—the child is likely to be mainstreamed for as much as possible during the day.[334] This usually includes lunch, recess, what educators call the "specials"—art, music, and physical education—and nearly always for transportation.[335]

The two young boys in Eden Prairie, Minnesota, were engaging in their misconduct on the school bus.[336] When the school district punished the students with a series of detentions for verbal improprieties and inappropriate behavior rather than suspending them under the sexual harassment portion of their disciplinary procedures, district officials tried to defend themselves by pointing out that the boys responsible were both labeled B.D., and as special education students, they could not be suspended from school extensively for behavior that was a manifestation of their disabilities.[337] The OCR was unsympathetic. No doubt the district felt squeezed between the proverbial rock and a hard place—arguably violate the IDEA and section 504 by suspending the boys from school for five days, suspend the boys from the bus only and provide expensive alternate transportation, or subject them to several days of detention, only and apparently violate the little girls' rights under Title IX.

In *Clyde K. v. Puyallup School District*,[338] a special education case out of Washington state where the court was asked to determine the propriety of the school district's recommendation to place a student who frequently

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benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." *Id.*

332. Neither the IDEA nor its regulations require states to use uniform labels.

333. *See* 34 C.F.R. § 300.550-.554 (1997).

334. *Id.* § 300.550.

335. *Id.* § 300.553.

336. *See* Region VII Letter, *supra* note 5, at 2. The *Rowinsky* case also involved misconduct on the school bus. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1008 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). As a former colleague of mine is fond of saying, "Where else do we ask one person to supervise sixty kids with her back turned?" Of course students that are prone to act up will take advantage of the situation on the school bus. When complaints are made regarding student conduct while being transported, it is often difficult to investigate because the driver nearly always is concentrating on driving and the safety issues. Therefore, the driver cannot speak to the truth or falsity of the accusations.

337. *See* Region VII Letter, *supra* note 5, at 15.

338. Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994).

engaged in disruptive behavior[339]—no doubt behavior that the OCR would clearly view as sexual harassment—the court wrote, arguably in dicta:

> Ryan [the plaintiff] also directed sexually-explicit remarks at female students, another legitimate cause for concern among school officials. Given the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools. Moreover, school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment.[340]

Frankly, while school officials are generally well-versed in educational theory and methodology, they are not particularly sophisticated when it comes to federal laws. Keeping up with special education law changes as a result of a literal explosion in the number of cases filed over the past few years is a challenge. Staying apprised of developments in the evolution of a cause of action for student-to-student sexual harassment under Title IX, especially when caused by special education students, is nearly impossible.

Even if we acknowledge that this area of the law is unsettled enough to justify a grant of immunity under § 1983 cases, a look at *Doe v. Petaluma City Schools* must give educators pause. While the guidance counselor's advice to the plaintiff was generally abysmal under sexual harassment premises, he was ultimately granted qualified immunity because at the time of the harassment the case law was not well established.[341] The court wrote, "If Homrighouse engaged in the same conduct today [May 1995], he might not be entitled to qualified immunity."[342] The courts impose the legal fiction that school personnel are presumed to know "clearly established" law on any given topic, including sexual harassment of students by their peers.[343]

It seems that more and more school administrators and teachers are being held responsible for a degree of knowledge and legal sophistication that is highly unrealistic. Schools have been given an incredible load to deliver beyond the "3Rs." In a recent keynote address to Iowa school administrators, Jamie Vollmer, a highly respected speaker and observer of socioeducational trends, noted the following with respect to the typical public school curriculum:

> From 1900-1920, we added nutrition, immunization, and health. From 1920-1950 we added vocational education, the practical arts, physical

339. *Id.* at 1398. The disruptive behavior was "taunting other students with name-calling and profanity, insulting teachers with vulgar comments, directing sexually-explicit remarks at female students . . ." and other behavior, some violent. *Id.*

340. *Id.* at 1401-02 (citation omitted).

341. Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1995).

342. *Id.*

343. *Id.* at 1450.

> education, school lunch programs. Then in the 50s we added safety education, driver education, and strengthened foreign language requirements; sex education was introduced (and topics escalate through 1990s). In the 1960s we added consumer education, career education, peace education, leisure education, and recreational education. In the 1970s, the breakup of the American family accelerates and special education is mandated by [Congress], we added drug and alcohol abuse education, parent education, character education, and school breakfast programs appear. In the 1980s the floodgates open and we added keyboarding and computer education, global education, ethnic education, multi-cultural non-sexist education, English-as-a-Second-Language and bi-lingual education, early childhood education, full-day kindergarten, pre-school programs for children at risk, after school programs for children of working parents, stranger-danger education, sexual abuse prevention education, [and] child abuse monitoring becomes a legal requirement for all teachers. And finally, so far in the 1990s we have added HIV-AIDS education, death education, gang education in urban centers, bus safety, and bicycle safety ed. And in most states, we have not added a single minute to the school year for decades.[344]

To all this is added an expectation that the teacher and principal be familiar with judicial pronouncements around the country. Legal fiction, indeed.

The Eleventh Circuit in *Davis II* strongly suggested that school district officials faced with choices in disciplining a student found to have sexually harassed another student would have their judgment clouded by the potential for suits from the victims if the discipline taken was insufficient to stop the harassment.[345] This financial fear of suit and damages would influence the decisionmaker, creating a constitutionally impermissible bias where due process guarantees an impartial decisionmaker in deprivations of property, including the property right to a public education.[346]

Another practical issue that educators have noticed is wrapped up in the language students use to "dis" (disrespect or put down) other students. A review of the OCR letters of finding evidences the fact that, in making a determination whether a complained of incident constitutes sexual harassment, a key factor is whether the language has sexual—as in gender—connotations.[347]

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344. *See* JAMIE VOLLMER, VOLLMER & ASSOCIATES, THE INCREASING BURDEN ON AMERICA'S PUBLIC SCHOOLS (1996) (providing statistics presented by Jamie Vollmer during his keynote presentation at the School Administrators of Iowa annual conference on August. 6, 1997).

345. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1403-04 (11th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

346. *Id.* at 1402-03 (citing Goss v. Lopez, 419 U.S. 565, 574 (1974); *In re* Murchison, 349 U.S. 133, 136 (1954)). The *Davis II* court reviewed recent statistics suggesting that "roughly 7,784,000 public school students in grades eight through eleven would consider themselves to be victims of student-to-student sexual harassment," suggesting that school boards would have reason to believe that "a substantial number of lawsuits will be brought." *Id.* at 1405.

347. *See supra* notes 69, 73, 288-89, 296, and accompanying text.

Thus, if a student castigated another student by calling her a twit—presumably a word without sexual connotation—the OCR would conclude that the "incident" did not meet the definition of sexual harassment. On the other hand, if the student called the other a "bitch," the OCR would find the put-down to violate Title IX if not properly addressed by the school. This oversimplification ignores the fact that children and teens often use sexually-charged words for effect rather than literal meaning. In schools today, about the worst thing one student can call another is "gay." When that happens, does the speaker actually mean he or she believes the other to be a homosexual? Is it not more likely that the speaker is merely searching for the word that most offends? If a student hurled the epithet "MF-er," is the student being called that name actually being accused of having carnal knowledge with his or her mother? And, if that is the assumption, does it not then matter if the student so labeled is male or female? This author suggests that the OCR simply cannot take such a literal view of the language of student put-down discourse. Moreover, as one court pointed out, at least with respect to younger students, "[i]t is possible that children of such tender years are not even sufficiently aware that their conduct is sexual in nature, much less committed because of the harassee's sex."[348]

Then there is the issue of the First Amendment and its viability as a defense to an allegation of a sexually hostile educational environment. Educational institutions learned their lesson from *University of Michigan*.[349] After attempting to write policies that protected students from verbal intimidation or harassment, university officials were fatally discouraged following the *University of Michigan* case, especially in light of the Supreme Court's decision in *R.A.V. v. City of St. Paul*.[350]

Another very practical issue is how school officials are to respond when the harassed student complains but either seeks confidentiality or requests that school officials take no action against the harasser.[351] In my experience, this occurs far more frequently than the situation where the student seeks redress through formal, established school procedures. The OCR also recognized this dilemma for educators. In the final guideline, the OCR addressed the issue in

348. Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 175 (N.D.N.Y. 1996).

349. Doe v. University of Michigan, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

350. R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1991); *see also* Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157, 170-71 (D. Mass. 1994) (striking down that portion of a high school dress code that prohibited students from wearing "clothing that 'harasses, intimidates, or demeans an individual or group of individuals because of sex, color, race, religion, national origin or sexual orientation'" on First Amendment grounds)

351. *See* Torres v. Pisano, 116 F.3d 625, 638 (2d Cir.) (discussing the implications for both the plaintiff and the defendant when the plaintiff-employee seeks redress for sexual harassment from the school-employer after initially demanding confidentiality), *cert. denied*, 118 S. Ct. 563 (1997).

response to concerns raised during the comment period.[352] The OCR responded:

> The Guidance strikes a balance regarding the issue of confidentiality: encouraging students to report harassment, even if students wish to maintain confidentiality, but not placing schools in an untenable position regarding their obligations to remedy and prevent further harassment, or making it impossible for an accused to adequately defend himself or herself. The Guidance encourages schools to honor a student's request that his or her name be withheld, if this can be done consistently with the school's obligation to remedy the harassment and take steps to prevent further harassment.[353]

In addition, the OCR provided clarification by describing factors schools should consider in making these determinations.[354] These factors include the nature of the harassment, the age of the students involved, and the number of incidents and students involved.[355] These factors also may be relevant in balancing a victim's need for confidentiality against the rights of an accused harasser.[356] The Guidance ultimately suggests that the school is nevertheless responsible for investigating and responding to the complaint "consistent with the request [for confidentiality by the complainant] as long as doing so does not preclude the school from responding effectively to the harassment and preventing harassment of other students."[357] This advice or stated expectation appears to conflict with the OCR's stated recommendation to "honor a student's request that his or her name be withheld."[358]

An additional practical issue that arises during or subsequent to litigation involving sexual harassment is the applicability of insurance coverage under the typical "errors and omissions" provision or the denial of coverage under the typical "intentional acts" exclusions.[359] If the courts impose a standard under student-to-student harassment cases that requires intent to discriminate, the schools might well find themselves denied a defense when the petition alleges intentional discrimination, or denied indemnification when the jury rules for the plaintiff.[360] While an intentional standard is generally more

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352. Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).

353. *Id.* at 12,037.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 12,043.

358. *Id.* at 12,037.

359. *See, e.g.*, Commercial Union Ins. Cos. v. Sky, Inc., 810 F. Supp. 249, 253 (W.D. Ark. 1992) ("[I]t strains the imagination to speculate how a pattern of sexual overtures and touching can be 'accidental.'").

360. *See, e.g.*, Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co., 900 F. Supp. 844, 846-47 (W.D. Tex. 1995) (finding that the school district was entitled to a defense and indemnification under the language of the insurance contract), *rev'd*, 99 F.3d 695 (5th Cir. 1996).

difficult for a plaintiff to meet than a negligence standard, if the fact-finder determines that the district's violation was based on an intent to discriminate on the basis of sex—especially given jury instructions to the effect that intent may be inferred from the totality of the circumstances, or if the school appeared to have a callous disregard for the rights of the victim or if the abuse was particularly severe[361]—the district may well be out of coverage or at least be faced with having to engage in more litigation to resolve the insurance coverage issues. It would not be surprising to see insurance contracts being written with specific exclusions for sexual harassment, if they have not been already. In an ideal world, courts would consider and evaluate some of these practical implications before imposing a standard for liability.

## V. SUGGESTED RESOLUTION—A TITLE IX STANDARD FOR STUDENT-TO-STUDENT SEXUAL HARASSMENT

If the Supreme Court was correct in *Franklin v. Gwinnett County Public Schools*[362] when it suggested that a damage remedy is only available under Title IX when *intentional* acts of the recipient constitute sex discrimination[363]—including sexual harassment—then it seems clear that the standard to be applied in student-to-student cases brought against the school district-recipient of federal funds should be one based upon intent rather than negligence principles. As previously discussed, there are a number of practical, public policy, and legally sound reasons not to apply a Title VII negligence analysis to a student-to-student sexual harassment suit brought under Title IX. Notwithstanding the OCR's negligence-based guideline, existing jurisprudence demands a standard focused on intent to discriminate.

The standard proposed in *Rowinsky v. Bryan Independent School District*,[364] that a successful student plaintiff in these cases must prove that school officials intentionally discriminated by treating the plaintiff's complaint of harassment by fellow students differently from complaints made by students of the other gender,[365] does not contemplate the possibility that school officials could ignore student-to-student sexual harassment complaints from both genders, thus treating them the same. In doing so the school officials permit a sexually hostile environment for both boys and girls. Moreover, if there have been no complaints at the school by males, for example, how does a female plaintiff prove the school responded differently to her complaint? This disparate treatment analysis focuses on *gender* discrimination and fails to recognize *sex* discrimination in the form of harassment. As school district-friendly as the *Rowinsky* standard is, it nevertheless fails to take

361. *Cf.* Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 652 (5th Cir. 1997) (rejecting a jury instruction that allowed the jury to use the law of agency to establish the school district's intent to discriminate through vicarious liability).

362. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

363. *Id.* at 75.

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

365. *Id.* at 1016.

into account a course of action by school officials that would foster an ugly and psychologically damaging atmosphere that would certainly violate the intent, if not the letter, of Title IX.

The "hybrid" standard adopted by the Northern District of Iowa as an offshoot of *Davis I* is based on the possibility that a plaintiff may be unable to offer direct evidence of intent to discriminate.[366] In order that the plaintiff's suit not be completely foreclosed in the absence of direct evidence of such intent, in *Burrow v. Postville Community School District*,[367] the court wrote:

> [A]n intent to discriminate on the part of the school district may be inferred by the finder of fact from the totality of relevant evidence, including evidence of the school's failure to prevent or stop the sexual harassment despite actual knowledge of the sexually harassing behavior of students over whom the school exercised some degree of control.[368]

This kind of language creates "the rub." It interjects negligence terminology and principles—"failure to prevent" and "actual knowledge"—into what purports to be an intent standard. Chief Judge Melloy further attempted to mitigate the erosion of the intent standard by requiring "evidence that the school district *knowingly* failed to respond appropriately."[369] Again, the attempt is to elevate the proof above mere negligence while still using negligence terminology.

It appears to this author that courts that adopt a negligence standard have implicitly imposed upon public schools, as recipients of federal funds, an obligation bordering on a "duty to protect" students from the actions of third parties—as opposed to the actions of school employees. This premise is consistent with the OCR's view of Title IX's promise, but is inconsistent with the majority of case law in the negligence arena.[370] Apparently when a

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366. *See* Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419-20 (N.D. Iowa 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205-06 (N.D. Iowa 1996).

367. Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996).

368. *Id.* at 1205.

369. *Id.* (emphasis added).

370. *See, e.g.*, Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412 (5th Cir. 1997) (holding that compulsory attendance laws did not create a special custodial relationship giving rise to constitutionally rooted duty of school officials to protect students from private actors); Mitchell v. Duval County Sch. Bd., 107 F.3d 837 (11th Cir. 1997) (finding that the student's voluntary attendance at a school-sponsored function did not give rise to a special relationship with the school which would render the school board and the school principal liable for the shooting of the student by third parties while the student was waiting for a ride); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (holding that the school district had no duty to protect a student from a nonstudent who shot the plaintiff's son after school in the parking lot); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (holding that the school had no duty to protect a student from sexual assault by other students in the school restroom); Beshears v. Unified Sch. Dist., 930 P.2d 1376 (Kan. 1997) (finding that no special relationship existed between the school district and the student which

student is shot by a third party the school will not usually be held responsible, but if the student is verbally sexually harassed by another student some courts believe that the school can be held liable. The language of Title IX does not create enough of a basis for imposing such liability in sexual harassment situations.

This author proposes that the standard to be adopted for student-to-student sexual harassment suits brought against school districts under Title IX should be one that requires plaintiff students to offer either evidence of an intent to discriminate on the basis of sex (gender) by school officials charged with the duty to respond to and investigate complaints under Title IX[371] or to show proof of deliberate indifference or other direct evidence of intent to discriminate when the cause of action is based on sexual harassment of the plaintiff by his or her peers. Such a standard keeps the focus on the acts of the recipient—the entity subject to the conditions of acceptance of Title IX funds—but, unlike the *Rowinsky* standard, considers that deliberate indifference of a reported situation by school officials can foster or fan the flames of a sexually hostile educational environment. This standard requires intent, not negligence.

*Doe v. University of Illinois*,[372] recently decided by the Seventh Circuit, has established a good starting place for a workable, logical, and sufficiently narrow standard of proof to apply in student-to-student sexual harassment cases brought against public school entities under Title IX. Chief Judge Posner's suggestion, deliberate indifference, has considerable merit. Applying the best of all of the opinions in that case to the not-devoid-of-merit *Rowinsky* holding results in a standard as follows: A student plaintiff in a peer harassment suit against a public school or school district under Title IX must plead and prove that, upon actual knowledge by school officials invested with authority to take action designed to end the peer harassment, defendant's

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would impose a duty of care upon the district to protect the student from assault by another student and the district did not gratuitously assume a duty to protect the student); Danna v. Sewanhaka Cen. High Sch. Dist., 662 N.Y.S.2d 71 (App. Div. 1997) (finding that although schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, they are not insurers of safety and cannot be held liable for every thoughtless or careless act by which one pupil may injure another). *But see* Todd M. v. Richard L., 696 A.2d 1063 (Conn. 1995) (finding that the defendant, school director of transportation, had duty to protect the plaintiff student from intentional sexual and physical abuse by fellow students on the same school bus); Stevens v. Des Moines Indep. Comm. Sch. Dist., 528 N.W.2d 117 (Iowa 1995) (holding that school officials had knowledge of the student's propensity for physically aggressive behavior and the school was liable for the student's assault on another student in hallway during passing period).

371. The regulations implementing Title IX require the designation of at least one person per recipient to whom complaints can be brought. 34 C.F.R. § 106.8 (1996).

372. Doe v. University of Illinois, No. 96-3511, 1998 WL 88341 (7th Cir. Mar. 3, 1998).

actions amounted to deliberate indifference toward plaintiff's complaints or itself constituted discrimination on the basis of gender.[373]

This standard can be translated into elements to be proven as follows: (1) the plaintiff is a student entitled to receive educational benefits; (2) the defendant is a recipient of federal funds, and as such, subject to Title IX; (3) the plaintiff was subjected to harassment by peers that was (a) based on gender or (b) of a sexual nature; (4) the harassment was so severe, persistent, or pervasive as to alter significantly and negatively the conditions of the plaintiff's education; (5) the defendant's officials with the power to take action designed to end the harassment had actual notice of the harassment; and (6) the defendant's officials either (a) intentionally treated the plaintiff differently on the basis of gender, or (b) were deliberately indifferent to the reported harassment.

Liability in suits against school districts under Title IX that are based on sex discrimination, including sexual harassment, by an agent of the recipient—employee-to-student suits—will no doubt be resolved soon when the United States Supreme Court issues a ruling in *Gebser v. Lago Vista Independent School District*.[374] Perhaps the Court, in dicta, will give some direction to the district and circuit courts that are currently struggling with the appropriate standard to be applied in student-to-student sexual harassment cases filed under Title IX. If not, the granting of a writ of certiorari in the next peer harassment case would go a long way in helping to resolve the dilemma between the district courts, circuit courts, and the OCR. That is, unless Congress would step in and clarify or establish its intent, a scenario unlikely to occur.

373. *Id.* at *29.

374. Gebser v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir.), *cert. granted*, 118 S. Ct. 595 (1997).