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PEER HARASSMENT UNDER TITLE IX OF THE EDUCATION
AMENDMENTS OF 1972: WHERE'S THE INTENT

Cover Page Footnote

Greg.

PEER HARASSMENT UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972: WHERE'S THE INTENT?

Chantal N. Senatus*

As a ninth grader, I was assaulted in a classroom by four boys who held my arms and legs and fondled me. The school took no action until it was pushed to do so by a female guidance counselor and . . . my parents. Because I reported the incident, I became the butt of jokes and insulting comments until I graduated. A few years later . . . a girl was gang-raped in the same classroom where I was assaulted.¹

Introduction

In public schools² across the country, administrators cite increasing incidents of peer sexual harassment.³ In a 1993 survey of over 1600 girls and boys, four out of five students have faced some form

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1. *Public Pulse: Editorial - Sickening Abuse of Girls*, THE OMAHA WORLD HERALD, July 7, 1995, at 10.

2. This paper only discusses sexual harassment in elementary and secondary schools because, although sexual harassment is rampant in elementary schools, secondary schools and universities, the problems of children and young adults are analyzed differently. See *infra* note 19. Because more girls than boys are harassed by teachers and their peers, this note focuses on female victims.

3. Monica L. Sherer, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2130 (1993) (citing Massachusetts Board of Education, *Who's Hurt and Who is Liable: Sexual Harassment in Massachusetts Schools* 9 (1986), an article describing sexual harassment incidents as "common occurrences" in high schools); Elementary school girls remember school bus incidents where the boys in the back were constantly trying to pull girls out of their seats and onto the ground in an effort to reach under the girls' shirts to touch them. Eric Adler, *At School, Its No Longer 'Horseplay', Its Harassment; Teasing, Touching and Taunting Are Creating Fear and Trauma for Some*, THE KANSAS CITY STAR, Jan. 25, 1995, at F1.

In 1993, Jessica Hasenbank, a student at Fairview Elementary School, "cowered in fear as she watched six boys slam her girlfriends onto the ground, stuff grass in their mouths to prevent screams, made lewd remarks and tried to strip them." Kristina Sauerwien, *A New Lesson in Schools: Sexual Harassment is Unacceptable*, L.A. TIMES, August 1, 1994, at E1.

of sexual harassment in school.⁴ More than ever before, students and their parents are reporting these incidents and litigating them.⁵

Title IX of the Education Amendments of 1972 has become the vehicle for sexual harassment suits against educational institutions.⁶ Title IX states that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance . . ."⁷ Congress enacted Title IX in response to the growing concern about sex discrimination in education institutions,⁸ seeking it to withhold federal funds from institutions that continue to practice sex discrimination.⁹ At the time of its enactment, Title IX has been used to challenge discriminatory admissions policies,¹⁰ sex-based allocation of federal funds

4. Carrie N. Baker, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L. J. 271, 278, n. 38 (1994) (citing Educational Found. of the Am. Ass'n of Univ. Women, *Hostile Hallways: The AAUW survey of sexual harassment in American Schools* (1993)). This survey covered public school children in grades 8-11.

5. Kristina Sauerwien, *A New Lesson in Schools: Sexual Harassment is Unacceptable*, L.A. TIMES, Aug. 1, 1994, at E1. The Department of Education's Civil Rights office has recorded 143 student complaints of sexual harassment in elementary and secondary schools during the 1992-1993 school year. Only fifteen were reported during the 1987-1988 school year.

The Supreme Court, in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), recognized that the individual may receive monetary damages for intentional sexual harassment. This enabled parties who were unsatisfied by administrative avenues to seek retribution through the legal system.

6. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Ca. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995).

7. 20 U.S.C. §§1681-1686. Title IX was created to protect individuals within federally funded institutions from sexual discrimination. 118 CONG. REC. 5806-07; *see also*, 117 CONG. REC. 30411 (1971) (an alternate proposal asserting the same goals as the current statute offered by Senator McGovern titled "Prohibition Against Sex Discrimination.")

8. *See* Pamela W. Kernie, *Protecting Individuals from Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 156 (1992) (describing the objectives and goals of Title IX through its legislative history).

9. 117 CONG. REC. 39,252 (1971); Kernie, *supra* note 8, at 156-57. Similarly, in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Supreme Court held that Title IX impliedly provides a private cause of action that allows the individual to seek injunctive relief through the courts rather than the Office for Civil Rights.

10. *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (9th Cir. 1974) (challenging an educational institution's application of higher admissions standards to girls in an effort to equalize the male to female ratio in the school). Other policies included discrimination based on marital and parental status. *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, (3d Cir. 1990) (challenging the dismissal of a female student from a high school chapter of the National Honor Society when she became pregnant after engaging in pre-marital sexual activity).

in school athletics programs¹¹ and discriminatory hiring and promotion policies.¹²

More recently, Title IX has been used to combat sexual harassment.¹³ The Department of Education, Office of Civil Rights ("OCR"), the agency that administers Title IX claims, has adopted a broad definition of sexual harassment:

[S]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employer or an agent of a recipient [of federal funds] that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.¹⁴

This broad OCR definition accommodates Title IX suits for sexually harassing behavior and non-sexual harassment¹⁵ that arise out of the desire to discriminate on the basis of gender.

The U.S. Supreme Court has recognized two major types of sexual harassment.¹⁶ The first, *quid pro quo* sexual harassment, is defined as harassment initiated by a superior who demands sexual favors in exchange for a "benefit" to the victim.¹⁷ The second, hostile or abusive environment harassment, occurs where multiple incidents of offensive conduct produce an environment violative of a victim's civil rights.¹⁸

11. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Bennett v. West Tex. State Univ.*, 799 F.2d 155 (5th Cir. 1986); *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

12. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *Chance v. Rice*, 989 F.2d 179 (5th Cir. 1993).

13. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995), *reh'g granted*, 949 F. Supp. 1415 (N.D. Cal. 1996).

14. *Sherer*, *supra* note 3, at 2126 (quoting THE OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1986)).

15. For example, Title IX, when interpreted through Title VII, may also prohibit marital, parental or 'family status' distinctions. *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987). In *Mabry*, the plaintiff alleged that she was fired from her job because of her gender and her marital status. *Id.* at 312-13. The court also stated that Title VII is the most appropriate analog for defining substantive Title IX standards. *Id.* at 317 n.6.

16. These definitions arise out of Title VII case law and are applicable to Title IX cases through *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

17. *See Meritor*, 477 U.S. at 62 (describing how a bank manager asked the plaintiff to start a relationship with him, putting her in fear of losing her job). *Id.* at 60.

18. *Id.* at 67 (finding that hostile environment sexual harassment exists when sexual harassment is "sufficiently severe or pervasive 'to alter the conditions of the victim's working environment.'"); *Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360, 1366 n.2 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986) (citing EEOC's 1980 *Guidelines on Sexual Harassment*).

A number of courts also recognize peer harassment or student-on-student sexual harassment¹⁹ as a sub-category of hostile environment harassment.²⁰ Peer harassment in an educational environment deprives the victim of the ability to learn within that environment.²¹ Courts have recognized the schools' duty to protect students from discriminatory conduct, whether *quid pro quo* or hostile environment, by teachers in their employ.²² However, courts divide over whether it is the school's responsibility to combat deleterious behavior when the perpetrators are fellow students.²³

This Note argues that in peer harassment cases, school districts should face liability under a "known or should have known" standard where the school's intent to discriminate may be determined by the circumstances of the case. Part I provides a brief historical overview of Title IX and the traditional forms of hostile environment harassment that it has been used to combat, demonstrating that courts use the statute to punish harassment where the school has reason to know of the harassment and fails to take appropriate action. Part II explores a subset of hostile environment cases where U.S. circuit courts are divided—peer sexual harassment cases, and analyzes the rationale supporting each position. Part III provides guidelines for when courts should extend Title IX protection to peer sexual harassment claims and articulates standards for school liability.

19. Through Title IX, courts have implied a duty on the part of school officials to protect children who are in school custody. Peer harassment may be compared to co-worker hostile environment cases under Title VII. However, there is a fundamental difference. Adults are on more or less equal footing. In elementary and high school, peer pressures are high and children are not fully aware of appropriate behavior. The victim in elementary school is less likely to know behavior is inappropriate and is less likely to file suit.

20. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1562 (N.D. Ca. 1993), *reh'g granted*, 949 F.Supp. 1415 (N.D. Cal. 1996); *Mennone v. Gordon*, 889 F. Supp. 53, 53-54 (D.Conn. 1995).

21. See *Petaluma* at 1575 (stating that the victim was deprived because she was "driven to quit an education program because of the severity of the sexual harassment she [was] forced to endure in the program.")

22. See *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) (holding that a student may bring suit under Title IX for sexual harassment by a teacher). Other school employees, however, may not face liability under the same rules. For example, in *Floyd v. Waiters*, 831 F. Supp. 867 (M.D. Ga. 1993), the court determined that the school could not be held liable for the acts of the school security guard where the guard assaulted one fourteen-year old plaintiff and a week later kidnaped and raped her twin sister.

23. See *infra* Part II.

I. Hostile Environment Harassment Under Title IX

Title IX has evolved gradually. The Supreme Court identified an implied private right of action in 1979 allowing individuals to sue institutions directly.²⁴ Before *Cannon v. University of Chicago*,²⁵ Title IX was used only as an administrative tool, where the Department of Education could withhold funds from an institution practicing discrimination.²⁶ In *Meritor Savings Bank v. Venison*, a 1992 Title VII harassment case, the Court recognized *quid pro quo* sexual harassment and hostile work environment sexual harassment under Title IX.²⁷ A 1992 Supreme Court decision cited *Meritor*, finding hostile environment harassment actionable under Title IX.²⁸ The Supreme Court's acceptance of these actions²⁹ under Title IX allowed courts to make the leap to school liability in peer sexual harassment cases. Title IX's interpretation in case law enables it to fulfill its purpose- to protect the individual from sexual discrimination in education.³⁰

24. Although Title IX does not explicitly provide for a private cause of action, the Supreme Court held in *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979). The plaintiff was denied admission to defendant's law school because of her sex and the Court found that the plaintiff was a member of the protected class and that there was an legislative intent to create a private cause of action. *Id.*

25. 441 U.S. 677 (1979).

26. The OCR would investigate a complaint filed by a student through the school's internal grievance procedure or the Department of Education. 34 C.F.R. §100.7 (1989). Upon discovering a violation, the OCR could issue a warning requesting that the school change its policies. 34 C.F.R. §100.8 (1989). Should the institution continue to ignore the violation, the OCR can terminate federal funding through administrative proceedings. *Id.* Congress has yet to use the power to terminate federal funds. Tamar Lewin, *Students Use Law on Discrimination in Sex-Abuse Suits*, N.Y. TIMES, June 26, 1995, at A1, A13.

27. 477 U.S. 57 (1986).

28. *Franklin v. Gwinnett City Pub. Sch.*, 503 U.S. 60 (1992).

29. Lower courts found it difficult to define hostile environment harassment under these provisions because it was difficult to determine how much the victim must suffer in order to declare the environment a hostile and abusive one. See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993) (resolving circuit conflicts as to whether serious psychological injury is required for "abusive work environment" harassment).

30. The administrative process is not the most effective means of exacting justice or protecting the individual. Kernie, *supra* note 8, at 159-60. The student and her family must bare the consequences related to reporting a professor or a classmate even after the policy in the school changes. See Bella English, *A Mother's Mission*, THE BOSTON GLOBE, April 23, 1995, at 22. After Elizabeth had Thorpe, a fellow classmate, arrested for sexual harassment, his teammates resented her. The principal held a school wide meeting, admonishing the students not to make judgments based on accusations. *Id.* By the time the problem is resolved, the victim may no longer be attending the school or the harasser may no longer be present. In *Franklin*, the harassing teacher resigned when a complaint was filed with the OCR. 503 U.S. at 60.

A. Hostile Work Environment and Its Development

Courts primarily interpret Title IX through federal anti-discrimination law.³¹ In *Meritor Savings Bank v. Vinson*,³² the U.S. Supreme Court recognized a hostile environment claim under Title VII.³³ Though the plaintiff never formally complained about her treatment, the Court held that an absence of notice “does not necessarily insulate that employer from liability.”³⁴ The plaintiff agreed to a sexual relationship with her supervisor because he might fire her.³⁵ The supervisor touched her breasts in the presence of other employees and fondled other women in the office.³⁶ The district court determined that because Vinson’s relationship with Taylor was “voluntary,” she was not subjected to sexual harassment.³⁷ The Supreme Court disagreed, holding that the plaintiff was the victim of hostile environment harassment.³⁸ In determining whether the supervisor’s behavior was “unwelcome,” the Court examined the harasser’s conduct, not the plaintiff’s participation in the relationship.³⁹ The trier of fact may find that the behavior was unwelcome, taking into account that her supervisor pressured her

The OCR determined that the school was in compliance with Title IX because Hill had resigned and the school had implemented a grievance procedure. *Id.*

31. Title VII, 42 U.S.C. § 2000e-2(a)(1), states that: “It shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex”

32. 477 U.S. 57 (1986).

33. *Id.* at 73.

34. *Id.* at 72. Nor does the existence of a grievance procedure insulate the employer from liability. *Id.* In this case the grievance procedure did not specifically address sexual harassment and the victim was required to report the harassment to her supervisor. Her failure to evoke the procedure was not surprising considering that she was required to report the harassment to her harasser. *Id.* at 72-73.

35. 477 U.S. 57, 60 (1986).

36. 477 U.S. at 60.

37. *Id.* at 61. The District Court decided that if plaintiff did engage in a sexual relationship with her supervisor, it was a voluntary one and there was no sexual harassment. *Id.* at 68. The Supreme Court points out that “the fact that sex-related conduct was “voluntary,” in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. *Id.*

38. *Id.* at 62. The Court looked at the “terms, conditions [and] privileges of [her] employment” as well as her supervisor’s harassment in making its determination. 477 U.S. 57, 64 (1986).

39. 477 U.S. at 68. See *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 174 (N.D.N.Y. 1996) (indicating that to be unwelcome, the harassment must “have interfered with a reasonable person’s . . . performance and . . . emotional well-being.” (internal citation omitted).

into the relationship through his ability to take away her job. The Court applied agency principles to impute liability for employee actions on the bank while acknowledging that agency "principles may not be transferable in all their particulars to Title VII."⁴⁰

The Supreme Court recently determined that the victim could prevail in a hostile environment claim "[s]o long as the environment [c]ould reasonably be perceived . . . as hostile or abusive."⁴¹ In *Harris v. Forklift Systems, Inc.*, during the victim's two years of employment, the president often insulted the petitioner based on her gender in front of other employees.⁴² The president apologized and promised not to do it again after the petitioner informed him that his actions were unacceptable.⁴³ However, he continued belittling her until she quit.⁴⁴ The lower courts found that though Harris may have been offended by the comments, it was not enough to affect her "psychological well-being."⁴⁵ The Supreme Court reversed and explained the breadth of the hostile work environment prohibition:

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can . . . detract from employees' job performance Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all of the circumstances.⁴⁶

The lower courts' focus on whether there was concrete psychological harm or injury was unwarranted. Because no single factor is

40. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). See RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1995) (indicating that if the employer was reckless or negligent, a known or should have known standard of liability is implied). However, lower courts in Title VII cases have also used §219(2)(d) to impute liability on the employer based on apparent authority—that the employee acted in the employer's place or with the employer's consent. See Fredrick J. Lewis and Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search For An Appropriate Standard*, 25 U. MEM. L. REV. 667, 674-75 (1995).

41. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)(citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)). The Court decided both *Meritor* and *Harris* under Title VII.

42. 510 U.S. at 19. He called her a "dumb-ass woman" and suggested that they go to a hotel to discuss a pay raise. *Id.*

43. *Id.*

44. He asked her in front of other employees while she was dealing with a customer whether she promised the customer sex Saturday night. *Id.*

45. *Id.* at 20.

46. 510 U.S. 17, 23 (1993).

required by the Court, the victim is not prevented from bringing suit if there is no serious psychological or economic harm.

*Franklin v. Gwinnett County Public Schools*⁴⁷ greatly expanded the remedial power of courts in harassment suits brought under Title IX. The seventh grade plaintiff was sexually harassed by her sports coach.⁴⁸ Through analogy to *Meritor*, *Franklin* established that courts should interpret Title IX in light of Title VII of the Civil Rights Act of 1964.⁴⁹ Because sexual harassment is a valid cause of action under Title VII, the Court stated that Title IX forbids a school from discriminating on the basis of sex.⁵⁰ Through Title VII standards,⁵¹ the Court determined that sexual harassment existed. Hill interrupted Franklin's classes and interfered with her ability to learn.⁵² The Supreme Court created a right to damages in sexual harassment suits brought under Title IX.⁵³ "[W]here legal rights have been invaded, and a federal statute provides for a general

47. 503 U.S. 60 (1992).

48. *Id.* at 63. Mr. Hill, the sports coach, asked her about her sexual experiences with her boyfriend and engaged her in other sexual discussions. *Id.* He also requested that she be excused from classes, took her to a private office and subjected her to coercive sexual intercourse. *Id.* His behavior constituted hostile environment harassment because it is clear that no benefit was conferred on the victim as in quid pro quo harassment.

49. *Id.* at 75 (1992). The Court stated that "the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe." 503 U.S. 60, 75 (1992).

50. *Id.* at 75. Though the Court compares Title VII to Title IX, the Court does not specifically address the Eleventh Circuit's rejection of petitioner's argument that remedies under Title IX and Title VII are identical. *Id.* at 65 n.4. However, the fact that *Franklin* did not, leads to a split in Title IX suits as to whether Title IX may be interpreted through Title VII of the Civil Rights Act of 1964 or Title VI.

Title VI, 42 U.S.C. §2000d, states in part that "[N]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." A minority of courts, therefore, interpret Title IX through Title VI jurisprudence because of the similarity in the wording of the statute to Title IX. These courts state that there is no hostile environment under Title IX because it was patterned after Title VI, which has no provision for the hostile environment theory. *See Bougher v. University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989). "Title IX simply does not permit a 'hostile environment' claim as described for the workplace by 29 C.F.R. § 1604.11(a)(3)." *Id.* at 145. However the court allows that Title IX does reach "what is defined as quid pro quo." *Id.*

51. Hostile environment harassment occurs where sexual harassing behavior is "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

52. *Franklin*, 503 U.S. at 63.

53. *Id.* at 66.

right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."⁵⁴ The Court assumed the power to compensate a victim for all current and past wrongs. In order to get damages, however, the victim had to establish that the school district was aware of, and did nothing to stop, the harassment.⁵⁵

In light of *Meritor*, *Harris* and *Franklin*, two principles emerge to guide hostile environment discrimination claims. First, although the specific knowledge by the employer of the harassing behavior is not required, courts generally will hold an employer liable under a "knew or should have known" standard.⁵⁶ Second, although physical abuse certainly will suffice as prima facie harassment,⁵⁷ courts will also sustain hostile environment claims where the victim suffers only emotional abuse.⁵⁸

B. The Application of Hostile Environment to Title IX

1. The Basis of Liability

Title IX clearly proscribes "the maintenance of a sexually hostile educational environment in any educational program or activity receiving federal financial assistance."⁵⁹

Employers are held liable under *Meritor* if the employer "knew or should have known" of harassing incidents.⁶⁰ Where there is a showing of an abusive environment of which the employer knew or

54. *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). The individual may be compensated for the harassment even when the student no longer attends the school and/or the teacher has already left or been dismissed prior to the completion of the suit. The Court also looked at the Rehabilitation Act Amendments of 1986 and determined that Congress did not intend to limit the remedies available under Title IX. *Id.* at 72.

55. *Id.* at 74-75. The Court states that allowing damages for unintentional violation of Title IX would not give the school notice that the institution will be liable for a monetary award. 503 U.S. 60, 74-75 (1992). The school must be given the opportunity to change the discriminatory policy once they discover it.

56. *Meritor*, 477 U.S. at 71-72; see *Franklin*, 503 U.S. at 75 (applying *Meritor* and Title VII to hostile environment cases under Title IX).

57. *Meritor*, 477 U.S. at 64 (stating that the language of Title IX is not limited to "economic" or "tangible" harm).

58. *Harris*, 510 U.S. at 23 ("Title IX comes into play before the harassing conduct leads to a nervous breakdown"). In this case the plaintiff was verbally harassed by her employer. *Id.* at 17.

59. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1289-1290 (N.D. Cal. 1993). School districts will be found liable for their employees intentional harassment and abuse of a student. *Oona R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1465 (N.D. Cal. 1995).

60. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 900-01 (1st Cir. 1988) (citing *Meritor*, 477 U.S. at 72).

should have known, if exercising reasonable care, the institution may be held liable "unless the official can show that he or she took appropriate steps to halt it."⁶¹ A lack of actual notice of the existence of a hostile environment will not necessarily insulate an employer from liability.⁶² Institutional liability under this theory depends on negligent failure to act under the circumstances.⁶³

Courts generally impose liability on a defendant institution because of its failure to remedy the harassment.⁶⁴ *Meritor* also allows courts to impute liability through agency principles, making the school district liable for the actions of its employees.⁶⁵ The school may be liable for the torts of its employees "within the scope of their employment."⁶⁶ Because teachers' harassment is clearly not within the scope of employment,⁶⁷ the school cannot be held liable

"[I]t [is] significant that the Court [in *Meritor*] defined the parameters of such liability by further holding that an employer could be liable *even* when the employee alleging hostile environment harassment fails to notify the employer of his or her complaint, and *even* when such employee fails to invoke an existing grievance procedure to protest the alleged harassment." (emphasis provided).

61. *Id.* at 901; *Deborah O. v. Lake Cent. Sch. Corp.*, No. 94-3804, 1995 U.S. App. LEXIS 19194 (7th Cir. 1995). Barmore, the high school band director, became sexually involved with one of his students. *Deborah O.*, 1995 U.S. App. Lexis 19194 at *1. The court required that the plaintiff show that the school district intentionally discriminated against her by proving that the school knew or should have known that the harassment occurred and failed to take action to stop it. *Id.* at *9-10.

62. See *Lipsett*, 864 F.2d at 881. In this case the behavior was such that it was an accepted tradition at the school and the administration must have known about the Playboy centerfolds in the men's lounge, which doubled as a conference room and thought nothing of it. *Id.* at 887-88; see also *Patricia H.*, 830 F. Supp. at 1297 (stating that the victim's mother alleged that the principal suggested that she and her children move out of the district rather than trying to accommodate them when she let the principal know that her children were being harassed by the presence of their molester in the school).

63. See *Patricia H.*, 830 F. Supp. at 1297 (citing *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991)) (stating that the employer is liable if he or she "fails to take 'immediate and appropriate' action 'reasonably calculated' to remedy the harm complained of."). The plaintiffs could not show that she experienced the harassment she claimed. Before the appeal in this case went to trial, the school district settled out of court for 1.8 million dollars, among the first and largest settlements in a sexual harassment case. Jim Doyle, *Berkeley School Dist. Settles Molestation Suit Against Teacher*, S.F. CHRON., Aug. 4, 1994, at A15.

64. After the school became aware of Hill's harassment, the school's administration took no action to stop it and went as far as to discourage Franklin from pressing charges. *Franklin*, 503 U.S. at 64.

65. *Id.* at 60.

66. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1995) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.")

67. Because it is not part of a teacher's duty to harass students, schools may escape liability under agency principles because the harassment is outside the scope of employment.

for hostile environment harassment under this theory. However, where the school's actions are negligent⁶⁸ it may be held liable for employee torts outside the scope of employment.⁶⁹ This theory of liability is reflected in *Franklin's* "knew or should have known" standard of liability.⁷⁰

2. *The Nature of the Harassment*

Courts broadly define harassing behavior. Circumstantial evidence of harassment within a defendant institution⁷¹ can indicate whether it may be held liable for hostile environment sexual harassment. Courts generally consider several factors: the nature of the relationship between the harasser and his victim, the duration of the harassment, and the type of harassment.⁷²

The court may look to the "disparity in age" between the victim and the harasser.⁷³ When a student is harassed by her teacher, whom she considers her mentor or superior, it becomes more diffi-

68. RESTATEMENT (SECOND) OF AGENCY §219(2)(b) (1995) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the master was negligent or reckless. . .").

69. Under §219(2)(b) as applied to Title IX, if the plaintiff can prove that the actions of the school district were negligent, the school would be liable for its employees conduct as well as its own. See RESTATEMENT (SECOND) OF AGENCY §219(2)(b) (1995). Employer negligence may be defined as the failure to remedy a hostile environment of which the employer was or should have been aware. See *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989).

70. A minority use RESTATEMENT (SECOND) OF AGENCY §219(2)(d). Section 219(2)(d) states that "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1995). In a Title VII harassment suit, for example, if the employer does not have a clear policy against harassment or the employer does not remedy incidents of harassment in the workplace, the employer is facilitating the harassment by not punishing harassers.

71. Only an institution may be held liable in an action under Title IX. See *Cannon v. University of Chicago*, 441 U.S. 677, 695-96 (1979); See *Lipsett*, 864 F.2d at 901. Individuals may not be held liable because they do not receive federal funds. *Bougher*, 713 F. Supp. at 143-44; *Doe v. Methacton Sch. Dist.*, No. CIV.A.94-0244, 1995 WL 549089, at *1 (E.D. Pa. Sept. 12, 1995).

72. See *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1296 (N.D. Cal. 1993) (explaining that OCR looks to "the age . . . of the victim(s); the frequency, duration, repetition, location [and] severity . . . of the acts of harassment; [and] the nature of the context of the incidents."). When Jackie and Rebecca H. were ten and twelve years old, respectively, they were sexually molested by Hamilton, a high school band teacher their mother was dating at the time. *Patricia H.*, 830 F. Supp. at 1294. The district court did not apply all of these factors before determining that a jury could find Hamilton's presence created a hostile environment in which they were unable to learn. *Id.* at 1297.

73. *Id.* at 1296-97.

cult for her to prevent the harassment.⁷⁴ This may cause the victims to fear the harasser and feel helpless to end the harassment.

Courts are also consistent in deciding that if the harassment occurred over a period of time, there is reason to believe that the behavior was "so pervasive that the employer must [be] aware of the existence of a hostile environment."⁷⁵ The length of time would make it more likely that the harassment should be noticed and corrected by the employer.

The court may also examine the severity of the harassment.⁷⁶ For example, a third-grade plaintiff recovered where harassment included acts of sodomy in the classroom, on school trips and in the teacher's home.⁷⁷ Other circumstances may also be considered in determining the harassment's severity. When a teacher molested a student before she attended the school and the student's mother informed the principal of the effect the teacher's presence had on her daughter, the school was held liable for failure to act.⁷⁸

The court considers more than just physical harassment to determine the existence of a hostile environment.⁷⁹ As long as the vic-

74. See *Oona R.-S. v. Santa Rosa City Schs.*, 890 F. Supp. 1452 (N.D. Ca. 1995). There is the possibility that the student may not understand that she can defend herself from inappropriate behavior. In *Oona R.-S.*, a student teacher approached the plaintiff and fondled her buttocks. In response, the plaintiff hit the student teacher but did not report the incident because she thought she would get into trouble for hitting him. *Oona R.-S.*, 890 F. Supp. at 1456.

75. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (defining the scope of hostile environment sexual harassment). For example, in *Patricia H.*, though Jackie H. was molested in 1987 and 1988, before attending her high school, she was still affected by a hostile environment during the 1991 and 1992 school years because her harasser was a teacher in the school. *Patricia H.*, 830 F. Supp. at 1295-96. See *Does v. Covington County Sch. Bd.*, 884 F. Supp. 462 (M.D. Ala. 1995) (allowing the plaintiff to recover after being harassed for over a year by his third-grade teacher).

76. *Patricia H.*, 830 F. Supp. at 1296-97 (stating that the severity of the molestation is a factor to consider in granting relief).

77. *Covington*, 884 F. Supp. at 463-64.

78. The first high school hostile environment harassment claim allowed the victims to recover for current hostile harassment created by incidents which occurred prior to the victims attending the school because of the severity of the molestation they experienced as children. *Patricia H.*, 830 F. Supp. at 1297. The harasser's presence in the high school years after he molested the girls created a hostile environment for the them—depriving them of the enjoyment they would have had in attending the school. *Id.* at 1297. The girls attended other schools in the two years after the molestation and once Jackie transferred to Berkeley High School, she avoided any musical activities to avoid contact with her harasser, though she loved to play the piano. *Id.* at 1296.

79. See *Lipsett v. University of P.R.*, 864 F.2d 881, 889 & 891 (1st Cir. 1988) (finding that part of the harassment the female medical school resident experienced included instances where residents and doctors wrote unsubstantiated complaints about plaintiff's work and displayed Playboy centerfolds on the walls of the conference room).

tim is adversely affected by the hostile environment in a sexual manner or based on the victim's sex, the factors that create the environment, such as the frequency and severity of the harassment,⁸⁰ are considered in determining the school district's liability.

3. Intent Requirement

The minimum requirement to find intent to discriminate in hostile environment cases under Title IX is that the school district "knew or should have known of the harassment and yet failed to take appropriate remedial action."⁸¹ Also, *Franklin v. Gwinnett* asserts that the school must intentionally discriminate against the victim in order for the victim to receive damages.⁸² However the Court does not articulate what the plaintiff must do to show to prove intentional harassment.⁸³ *Franklin* and its progeny indicate that the failure to take appropriate action may be sufficient. This failure may be illustrated by facts showing that there is a custom or policy of not addressing sexual harassment or by the school district's failure to investigate incidents or discipline students.⁸⁴ This evidence enables courts to determine an intent to discriminate based on the facts of the case. The plaintiff is allowed to show intent through the schools actions rather than being required to show that the school district had an actual intent to discriminate. It is therefore within the plaintiff's ability to prove. If the school dis-

This case was the first case to recognize a hostile environment claim under Title IX. It must be noted that although the case does involve a medical student being harassed by her peers, the circumstances are such that these peers were also employees of the medical school and considered co-workers. The case explicitly avoids any analysis concerning peer harassment. See *Lipsett*, 864 F.2d at 886-87. Title VII standards for proving discriminatory treatment were held applicable to claims of sexual harassment under Title IX. *Id.* at 897.

80. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

81. *Deborah O. v. Lake Cent. Sch. Corp.*, 61 F.3d 905, No. 94-3804, 1995 U.S. App. LEXIS 19194, at *10 (7th Cir. July 21 1995)(indicating that a failure to take appropriate action is the least the plaintiff may be required to show to prove an intent to harass on the basis of sex); see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 71-72 (1986); *Patricia H.*, 830 F. Supp. at 1297 (stating that school liability is conditioned on at least a constructive notice of the harassment and a "knowing failure to act").

82. *Franklin*, 503 U.S. at 74. The Court remanded the case without detailing what is required for harassment to be intentional. *Id.* at 76. The Court imputes liability on the school district after determining that the teacher, Mr. Hill, intentionally sexually harassed a student *Id.* at 75

83. *But see Oona R.-S.*, 890 F. Supp. at 1465 (determining that illegal harassment by a teacher is presumptively intentional because the employee is an adult and the victim is a student).

84. *R.L.R. v. Prague Pub. School Dist. I-103*, 838 F. Supp. 1526, 1533-34 (W.D. Okla. 1993).

trict failed to act when notified of the harassment, or acted too slowly or inappropriately, the school district may be liable under Title IX.

Under hostile environment harassment, a school district is protected from Title IX liability when it has no reason to know of the harassing conduct. In a case where an eighth grader and her basketball coach were involved in a secret sexual relationship, the suit later brought by the eighth grader was dismissed.⁸⁵ Though coercive sexual intercourse gave rise to a cause of action under Title IX, the discriminatory effect was not enough to find the requisite intent to discriminate.⁸⁶

II. Peer Harassment

Peer harassment involves peer behavior which constitutes harassment and leads to the creation of a hostile environment for the victim. Part of the creation of this environment is the deprivation of a student's opportunity to interact with her peers in a normal and uninhibited fashion.⁸⁷ The Office of Civil Rights (hereinafter "OCR") has taken aggressive posture towards investigating peer harassment under Title IX.⁸⁸ Circuit courts, however, are divided on the question of whether Title IX provides a remedy for peer sexual harassment plaintiffs.

85. *Id.* at 1533-1534. When Thorpe, the school basketball coach, was suspected of having a relationship with a student several years before, the administration warned him that he would be fired. *Id.* at 1528. The director took immediate action upon discovering the relationship between Thorpe and R.L.M.R., suspending Thorpe the same night. *Id.* The plaintiff claimed that Thorpe "unreasonabl[y] interfere[d] with R.L.M.R.'s ability to attend public school and perform her studies and activities in a normal manner." *Id.* at 1529.

86. *R.L.R.*, 838 F. Supp. at 1534. The plaintiff had no evidence of intent to discriminate by the school district because the case clearly indicates that the school district took immediate action to end the harassment when it was discovered. *Id.*

Similarly in *Deborah O.*, because both the student and the teacher denied involvement with each other to the school and the student's parents, 1995 U.S. App. LEXIS 19194, at *2, the school could not be held liable because they did not have notice of the teacher's conduct. *Id.* at *12.

87. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1446, 1447(9th Cir. 1995), *reh'g granted*, 949 F. Supp. 1415 (N.D. Cal. 1996).

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

A. Cases Supporting Peer Harassment as a Valid Cause of Action

For a successful hostile environment sexual harassment claim under Title IX, a plaintiff must demonstrate that her school district, through one of its agents, subjected her to unwelcome sexual harassment thereby creating district liability.⁸⁹ In peer harassment cases, liability stems from the actions of a third party. Because peer harassment does not involve a state actor or teacher through which the school may be held liable, the court must determine whether the harassment is pervasive enough that the school district should have known about the hostile environment. Several courts have found peer harassment to be a valid Title IX claim under this theory.

1. *The Nature of Liability and the Intent Requirement*

Liability in peer harassment cases is based on the schools reaction to harassment—whether the school acts unwisely to remedy the hostile environment or fails to take action at all. The courts rely on the standards asserted in *Meritor*, that the school district is liable if the school district knew or should have known of the harassment and failed to take appropriate action.⁹⁰ Knowledge of the harassment may be either active or constructive.⁹¹ The pervasive-

89. *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 174 (N.D.N.Y. 1996) (indicating that to be unwelcome, the harassment must “have interfered with a reasonable person’s . . . performance and . . . emotional well-being” (citation omitted)).

90. See *Petaluma*, 830 F. Supp. 1560 (creating liability through making Title IX a right to be protected under § 1983); *Oona R.-S. v. Santa Rosa City Schs.*, 890 F. Supp. 1452 (N.D. Ca. 1995).

Also very important to the *Petaluma* decisions is that the lower court stated that *Franklin* was essentially a hostile environment case and the court couldn’t deny monetary damages because it would contravene the Supreme Court decision. *Petaluma*, 830 F. Supp. at 1576.

Petaluma was also the first Title IX peer sexual harassment to go to the Court of Appeals and succeed. 830 F. Supp. 1560. The lower court determined that the standard of liability should be a “known or should have known” standard and a showing of intent which may be based on the circumstances of the case. *Petaluma*, 830 F. Supp. at 1576. These circumstances could include the school district’s failure to act. *Id.* However, in light of the cases which came after its initial decision, the higher court reconsidered, deciding that liability must be based on “the district’s own conduct of knowingly permitting the discriminatory hostile and abusive environment to continue.” *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1421 (N.D. Cal. 1996). The court adopted the Title VII standard, giving the plaintiff a better chance of success under Title IX peer harassment. Therefore, according to the newest *Petaluma* decision, the “known or should have known” standard may be enough.

91. *Oona R.-S.*, 890 F. Supp. at 1469.

ness of the harassment creates an inference of constructive knowledge on the school district and complaints to higher management establish actual knowledge of the harassment.⁹²

To obtain damages in a peer environment case, the plaintiff must prove that the school district⁹³ acted with intent to discriminate on the basis of sex.⁹⁴ *Meritor's* "knew or should have known" standard may not be enough to establish this intent.⁹⁵ The question of what intentional harassment is under Title IX for peer harassment cases is under dispute.⁹⁶ Case law in favor of peer harassment as a cause of action indicates that "intentional" discrimination requires a school district to have willfully disregarded actual or constructive notice by taking unreasonably lenient action.⁹⁷ "[A]n employer who knows or reasonably should have known of a hostile environment is liable even if it attempts in good faith to eliminate the hostile environment if it is found that the employer's efforts were not reasonably calculated to end the hostile environment."⁹⁸ Discrimi-

92. See *id.* (finding that "[discriminatory intent] may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of the male student, or the failure to take adequate steps to deter or punish peer harassment").

93. Actions under Title IX may not be brought against the individual. *Petaluma*, 830 F. Supp. at 1576-77. In codifying *Cannon's* holding that there is an implied right of action under Title IX, the 1986 amendment to Title IX is "consistent with the conclusion that there is no private right of action against individuals, since only remedies against 'public or private entities' are mentioned." *Id.* at 1577.

94. *Id.* at 1571.

95. It is clear that in hostile environment harassment cases, teachers, as adults, are acting intentionally when they harass a student. The school's liability for the acts of students is more tenuous and as such, the *Petaluma* lower court emphasized that school liability requires intent. In the most recent *Petaluma* decision, 949 F. Supp. 1415 (N.D. Cal. 1996), the court describes two elements of intent in a hostile environment case: "the harasser's intentional disparate treatment based on gender and the employer's act of implicitly condoning that disparate treatment by knowingly failing to take steps to remedy it." *Id.* at 1424. This indicates that, in a case of peer sexual harassment, the plaintiff must be able to prove that the school acted or failed to act in such a way as to support the harassing behavior.

96. Gail Sorenson, *Peer Sexual Harassment: Remedies and Guidelines Under Federal Law*, 92 EDUC. L. REP. 1, 3-4 (1994) (indicating that "[i]mplicit in the Supreme Court's [decision] was the suggestion that the school board, as a corporate entity, could be held liable for compensatory damages despite lack of actual knowledge What is less clear is whether the holding applies only to 'intentional' discrimination, and if so, precisely what intentional means").

97. *Bosley v. Kearney R-1 School Dist.*, 904 F. Supp. 1006, 1021-1022 (W.D. Mo. 1995) (finding liability where the school has chosen a course of action, at least in part, "because of the plaintiff's sex" and determining that a school district may also be liable where the school district "has knowledge of a sexually hostile environment and takes no action").

98. *Petaluma*, 830 F. Supp. at 1576.

natory intent is not the same as discriminatory motive. One cannot determine the motives behind school policy or administrative actions. However, the court may infer the school's intent through the circumstances of the case. "[T]he cumulative evidence of action and inaction . . . objectively manifests discriminatory intent."⁹⁹ Therefore, intent is what is shown by the school system's response to sexual harassment claims.¹⁰⁰

Franklin states that if the harassment is intentional, the school is on notice of the fact that it may be liable for monetary damages.¹⁰¹ Without this option, the plaintiff may only receive injunctive relief where it is available. Specific instances of harassment create a cause of action under Title IX and the school district's intent is determined by its response to harassment generally as well as in the case being decided. The school district does not require warning of the possibility of damages in peer harassment cases because "hostile environment harassment" case law has indicated that inaction or inappropriate action demonstrate the school district's intent to discriminate on the basis of sex. The assumption that the school "should have known" about student harassment puts school districts on notice of possible liability for any sexual harassment which creates a hostile environment for the student, especially after the Supreme Court notified school districts that they may be liable for not responding to sexual harassment.¹⁰²

99. *Bosley*, 904 F. Supp. at 1020.

100. The most recent cases support this premise. Adopting a 10th Circuit test, these cases decided that all the circumstances of the case may be taken into account in determining intent. *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1205-1206 (N.D. Iowa 1996) (adopting a five-part test stating that intent may be proven through direct or indirect evidence). The court considered the "totality of relevant evidence from which intent may be inferred." *Id.* at 1205.

This standard is not intended to create successful suits for all plaintiffs; see *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412 (N.D. Iowa 1996). The court in this case found that there was no intent to discriminate because the school took steps to control harassing behavior. More than a negligence standard is required. *Id.* at 1419-1420. See also *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 177 (N.D.N.Y. 1996) (deciding that school districts must at least provide an avenue for complaint).

101. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74-75 (1992). The Court stated that if the harassment is unintentional, the school must be given notice so that it would have the opportunity to address the situation. *Id.* at 74-75; see generally, *Bruneau*, 935 F. Supp. at 173 (holding that the plaintiff must show actual notice of sexually harassing conduct before the school district may be held liable because students are not generally considered school agents). However, the *Bruneau* court illustrated this actual intent through the mere fact that the student informed school agents of the harassment. *Id.* at 173-74.

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

Opponents to allowing the peer harassment cause of action under Title IX state that *Petaluma* does not offer any evidence that *Franklin*, as a teacher hostile environment case, applies directly to *Petaluma*, a peer harassment case.¹⁰³ One view of *Franklin* is that the Court imputes liability to the school district through agency principles, making the school district directly liable for the acts of its agents.¹⁰⁴ In cases involving student-to-student harassment, vicarious liability cannot give rise to Title IX liability because the school is not liable for the actions of third parties.¹⁰⁵ Under this theory school districts may be held liable for the acts of anyone entering the school or hanging around outside the school yard. However, *Franklin* also states that the school district was liable for the harassment because the principle failed to help the plaintiff when he heard complains of sexual harassment.¹⁰⁶ Under this theory of liability, the *Petaluma* court is well rooted in precedent and intent may be demonstrated by the school system's failure to act.

Opposition to peer harassment also claims that allowing this cause of action would cause schools to lose much needed federal money upon a determination that the school is liable.¹⁰⁷ This would lead to the schools' inability to fund educational programs as well as programs against sexual harassment. This concern proves illusory, however, because the school will only be held liable in cases where there was no prompt or proper action taken in response to the harassment complaints. The issue is not that silent plaintiffs may recover from the school because it did not know of the harassment.¹⁰⁸ In peer harassment cases, once the student complains that she is being harassed and the harassment may be

103. See Sorenson, *supra* note 96, at 4-5 (stating that *Petaluma* appears to gloss over the differences between teacher-student harassment and peer harassment in deciding to extend Title IX to cover peer harassment).

104. *Petaluma*, 830 F. Supp. at 1575.

105. Also note that *Meritor*, on which *Franklin* relies, rejects *respondeat superior* liability in favor of agency principles. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986). The *Meritor* Court also admits that agency principles may not be directly applicable to hostile environment harassment cases. *Id.*

106. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1297 (1993) (holding that liability is based on at least a constructive notice of the harassment and a "knowing failure to act"). The court analogizes to *Franklin*, stating that the Gwinnett School District could be held liable after the victims' mother complained to the principal and he refused to take action and help her. *Id.*

107. Kirsten M. Erickson, *What Our Children are Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1817 (1995).

108. See *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006 (W.D. Mo. 1995) (looking to whether the plaintiff complained to the administration about peer sexual harassment as an important contested fact in the case).

established, courts must scrutinize the school's response. Summary judgment of Title IX claims was denied in part where the plaintiff let the defendant school district know about the harassment and the defendant's response was inadequate.¹⁰⁹ The response or lack thereof indicates the schools' dedication to a safe environment. Therefore, peer harassment liability should be supported where the school knew or should have known about the harassment and did nothing about it.

2. *The Nature of the Harassment*

In assessing peer harassment cases, courts generally consider "the frequency of the discriminating conduct; its severity; whether it is physically threatening or humiliating, or . . . mere[ly an] offensive utterance; and whether it unreasonably interferes with [the victim's] work performance."¹¹⁰

Where the harassment continued over an extended period of time, and the harassment was extreme, the court found a valid Title IX claim.¹¹¹ In *Doe v. Petaluma City School District*,¹¹² the plaintiff alleged that, while in the seventh grade, she was repeatedly the subject of harassment by fellow students, consisting primarily of sexual comments about her having a hotdog in her pants or her having sex with a hotdog.¹¹³ School officials did nothing after Jane told them about the situation which continued into spring of the following school year.¹¹⁴

109. See *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1195, 1205 (N.D. Iowa 1996) (indicating that the intent to discriminate is revealed by the school district's failure to respond to Lisa's complaints, as well as reports by "her [p]arents, her attorney, various teachers and the OCR"). Evidence provided to the court included evidence that the school failed to follow proper procedure and the school characterized the harassment as "picking on each other." *Id.*

110. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

111. *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006 (W.D. Mo. 1995). From March 1992 to October 1993, *Id.* at 1015-16, Jennifer was subject to many incidents of sexual harassment including a male student rubbing himself against her in the class and rumors circulating about her being lesbian. *Id.* at 1024

112. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995). Jane was being called violent names, including "hot dog bitch," "slut," and "hoe," on a daily basis. *Petaluma*, 830 F. Supp. at 1565. She was also slapped by another student. *Id.* This harassment continued for over a year. *Id.* Neither she or her parents were ever informed that there was a Title IX Grievance policy in place at the school. *Id.* In fact, until Jane was slapped, the counselor, Mr. Homrighouse claimed he could do nothing until someone actually hit Jane and also responded to the complaints that sooner or later the kids would stop harassing Jane. *Id.*

113. *Petaluma*, 830 F. Supp. at 1564.

114. *Id.*

OCR findings and reports support the idea that peer harassment can give rise to Title IX liability.¹¹⁵ Letters of Findings, though not formal regulations, deserve deference because they represent the opinion of the agency charged with enforcing Title IX.¹¹⁶ The OCR treats both student-to-student harassment and student-teacher harassment as valid types of hostile environment claims.¹¹⁷ If harassment is shown, the district will still not be held liable unless the district did not act in a timely and effective manner to deal with the abusive situation.¹¹⁸ Because of the harmful effects sexual harassment can have on young female students and the school's concern about liability for peer harassment under the hostile environment theory, "public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of . . . schools."¹¹⁹

B. Courts Rejecting the Peer Harassment Cause of Action

Courts that reject peer harassment as a valid Title IX claim often conclude that imposing a duty on school districts to eliminate student-on-student harassment based on a "known or should have known" standard would prove overly burdensome¹²⁰ In the alternative, some courts have concluded that *Franklin* cannot provide a foundation for school liability for peer sexual harassment.¹²¹

1. The Recipients of Federal Funds and Their Liability

Only the recipients of federal funds may be held liable for peer sexual harassment.¹²² The *Rowinsky* court states that because Title IX was created pursuant to Congress' spending power, the most "probable inference is that the condition [imposed by the federal

115. *Id.* at 1573.

116. *Id.* Even *Meritor* looks to the agency in charge of Title VII, the EEOC, to support its holding concerning the two types of sexual harassment. See *Meritor*, 477 U.S. at 65.

117. Sorenson, *supra* note 103, at *6.

118. *Petaluma*, 830 F. Supp. at 1573.

119. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1401-1402 (9th Cir. 1994). A fifteen-year-old student with Tourette's syndrome was removed from his classroom because he caused disruptions in class by making frequent sexual comments towards other students. 35 F.3d at 1396. The court used a policy reason to decide that removing Clyde was not unreasonable or a violation of Title IX.

120. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996) (indicating that there is no basis for a peer harassment cause of action when male and female students were punished in a similar manner).

121. *Mennone v. Gordon*, 889 F. Supp. 53 (D. Conn. 1995); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437 (S.D. Tex. 1994).

122. See 42 U.S.C. §§ 1681-1686 (1996).

grant] prohibits certain behavior by the grant recipients themselves" and not the behavior of third parties.¹²³ In order for the conditions of the statute to be effective, the conditions must not be too difficult to follow.¹²⁴ The Fifth Circuit contends that peer harassment would create the unreasonable requirement of having the school be responsible for the actions of numerous third parties and would thus require an affirmative showing of discrimination by the school and school administrators.¹²⁵

This proposition assumes that the plaintiff is not required to show a great deal to succeed in a peer harassment claim. However, almost half the OCR Letters of Findings concerning peer harassment have found the school district not liable.¹²⁶ To succeed in court, case law shows that the knew or should have known standard is not enough, by itself, to impute liability on the school district.¹²⁷ *Harris* has also contributed to the elements of sexual harassment by requiring that the harassment must be pervasive enough to constitute harassment.¹²⁸ There are standards which must be met by the plaintiff in bringing the claim of peer sexual harassment. Additionally, the school district's "failure to act" creates its liability.¹²⁹ Courts have determined that it makes sense to hold a school district liable for its action or inaction.¹³⁰

Rowinsky takes the "known or should have known standard far enough to make it almost impossible for the victim to find the school district liable. This case demands that the plaintiff show that the school district, in their actions, treated complaints of harassment differently on the basis of sex.¹³¹ That the school district did not respond to harassment would not be enough because only active discrimination would show discriminatory animus.¹³² The

123. 80 F.3d at 1013. In this case, students physically and verbally abused plaintiffs Jane and Janet Doe. When they complained to school officials, minimal efforts were made to address their concerns and they were never informed about Title IX or sexual harassment procedures. *Id.*

124. *Id.*

125. *Id.* at 1013, 1016

126. Sorenson, *supra* note 96, at 10.

127. *See supra* Part II.A.

128. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

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

130. The focus of the peer sexual harassment cause of action is the school district's failure to act. Though the Rowinsky district court decision decided that there was no peer sexual harassment actionable under Title IX because the students, male and female, were punished equally, the fact remains that the school district should be held liable for the creation of a hostile environment. *See Rowinsky*, 80 F.3d at 1010.

131. *Id.* at 1016.

132. *Id.*

Rowinsky Court also mistakes the nature of hostile environment harassment. *Rowinsky* bases its holding on the fact that they are looking at the school's liability for the actions of third parties and not looking at the issue as whether the school district should be held liable based on their failure to act in the face of harassment or their active support of the harassment.¹³³ This assumption provides for inconsistent decisions because of *Rowinsky's* theory that there is school liability only where the school district treats girls' complaints differently from those of boys.¹³⁴ This premise would encourage schools to do nothing about all peer harassment to avoid disparate treatment.

Courts in favor of a more broad theory of liability find that the school district should be held liable for indirect as well as direct harassment.¹³⁵ This flexible standard allows courts to take the "totality of the circumstances" into account.¹³⁶

2. *The Inability to Find Peer Harassment from Hostile Environment Harassment*

After determining that the individual may be held liable for inaction under Title IX in a peer harassment case,¹³⁷ the *Mennone* court decided that although antidiscrimination law mandates a clear duty to protect students from teacher-student harassment, "[t]he extension of liability for failure to protect against student-to-

133. *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1421 (N.D. Cal. 1996).

134. *Id.* The Petaluma court indicates that so long as the harassment is treated the same, regardless of its severity, the school will not be held liable. *Id.*

135. *Id.* (adopting the Title VII "knew or should have known" standard); *Burrow*, 929 F. Supp. at 1205 (holding that the plaintiff must show intent through direct or indirect evidence to find school liability); *Bosley*, 904 F. Supp. at 1020 (determining that cumulative evidence of intent creates liability).

136. *Bosley*, 904 F. Supp. at 1021, 1023 (looking towards the totality of the circumstances and circumstantial evidence in the case to create liability); *Oona R.-S.*, 890 F. Supp. at 1459 (looking at the facts to find a manifestation of intent).

137. *Mennone v. Gordon*, 889 F. Supp. 53, 57-58 (D. Conn. 1995). The defendant, James Bouchard, a high school teacher, stood by and did nothing as plaintiff Johna Mennone was continually harassed and assaulted by another student, Scott Randall. *Mennone*, 889 F. Supp. at 54-55. He made remarks about her breasts, grabbed her hair, buttocks and legs, and threatened to rape her on numerous occasions. *Id.* at 55. The school district became aware of Randall's behavior after Mennone filed a complaint with the police and did nothing to discipline him. *Id.*

The *Mennone* court looked at the plain language of the statute, and saw that Title IX does not clearly prohibit the statute's application to an individual. *Id.* at 56. An individual may fall under the statute so long as they exercise some level of control within the program or activity because those who operate the program, usually have the power to prevent discrimination. *Id.* But see *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993) (stating that the individuals may not be held personally liable under Title IX).

student behavior does not clearly flow from prior sexual harassment and duty to protect cases."¹³⁸ *Franklin* does not support peer sexual harassment because it is a case concerning coach/teacher against student sexual harassment, not student against student.¹³⁹ Even if courts decided to follow *Petaluma's* holding that peer harassment is a valid cause of action, some courts require that the plaintiff show more than a "knew or should have known" standard.¹⁴⁰ The plaintiff's claim that the school had knowledge of the harassment was not enough.¹⁴¹

Where a plaintiff was taped to a towel rack by his teammates after coming out of the locker room shower and then displayed to his prom date,¹⁴² the court found that though the school created and tolerated a hostile educational environment, it was not based on sex.¹⁴³ Even if the court supported the Title VII's hostile environment theory, the plaintiff failed to show that there were "unwelcome sexual advances" or "requests for sexual favors."¹⁴⁴ Though

138. *Mennone v. Gordon*, 889 F. Supp. 53, 58 (D. Conn. 1995). Qualified immunity was applied because Buchard, a government official, did not violate a clearly established constitutional or statutory right which existed at the time the events occurred. Therefore, he was not liable for a violation of Title IX.

139. *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994).

140. The plaintiff should show "evidence of intentional gender-based discrimination." *Garza*, 914 F. Supp. at 1438. The student was sexually harassed and assaulted by a male student at her high school and claimed that the defendants knew about the boy's conduct. These are the only facts given by the court so it is difficult to determine what the court requires to show intent). *Id.*

141. *Id.* The reluctance of some of these courts to find peer sexual harassment, may stem from the assertion that Title VII does not apply to Title IX and, in fact, should be analyzed under Title VI. *Garza* states that a student cannot bring a hostile environment claim under Title IX. *Id.* (citing *Bougher v. University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D. Pa.) *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989)). *Bougher* holds that Title VII's hostile environment theory cannot be applied to Title IX cases because the court is obligated to analyze Title IX through its closest counterpart, Title VI of the Civil Rights Act. The district court applied a standard stemming directly from Title IX indicating that to show a prima facie case of sexual discrimination, the plaintiff must show that she was excluded from participation or denied benefits based on sex and that the program receives federal assistance. *Bougher*, 713 F. Supp. at 143-144; *see also* *Seamons v. Snow*, 864 F. Supp. 1111, 1118 (D.Ct N.D. Utah 1994), *aff'd in part, rev'd in part*, 84 F.3d 1226 (10th Cir. 1996)(stating that important distinctions between Title IX and Title VII convince the court that the use of Title VII to interpret Title IX is inappropriate). This creates a permanent barrier from a peer harassment suit if the court even refuses to recognize that Title IX may support an action against hostile environment sexual harassment.

142. *Seamons*, 864 F. Supp. at 1115.

143. *Seamons*, 84 F.3d at 1232-33; *Seamons*, 864 F. Supp. at 1117. *Seamons* was also suspended from the football team after complaining, *id.* at 1115, and the season was canceled, resulting in increased harassment against *Seamons*. *Id.* at 1117.

144. 864 F. Supp. at 1119.

the incident itself was of a "sexual nature," there was no sexual harassment.

Essentially, these cases decide that the actions of peers do not fall within a program or activity. However, it is clear that if the school district is not responsible for the actions of their students, no one else will accept the liability. If the school cannot be made accountable, schools may become very dangerous places for students and the maintenance of a hostile environment, with no means of halting it, will discourage attendance in schools as well as create an hostile learning environment.

III. Guidelines for the Future of Peer Sexual Harassment

Students deserve the same protection that employees receive in the workplace.¹⁴⁵ Sensitivity to the needs of students should be addressed by the creation and enforcement of sexual harassment policies and other initiatives. Just as the employer is not automatically liable for the torts of his employees, the school district is not directly liable for the actions of third parties in peer harassment cases. The school district is liable because of its failure to remedy the harassment. This failure may be more detrimental in the school environment because by allowing the harassment to take place, the school is telling students that there is nothing wrong with harassing behavior. As a result, the school district must initiate programs that take into account the need to educate students about harassment and allow the school district to avoid liability. It is beneficial to look at the standards imposed by courts in Title VII cases of hostile environment harassment for guidance.¹⁴⁶

A. Liability

Instead of looking for "intent," courts should be looking at the circumstances of each case and creating liability based on the "known or should have known" standard.¹⁴⁷ Opponents to this standard need not fear that school districts will be held liable regardless of whether they tried to end peer harassment.¹⁴⁸

145. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992).

146. There are fundamental differences between Title VII and Title IX cases. The administration does not have the same amount of control over the students as the employer has over the employees generally. In Title VII harassment cases, there is also a greater concern with *Meritor's* "unwelcomeness" requirement because there is a fear that the victim may be bringing suit because of a romantic falling out with a co-worker or supervisor. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

147. *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1021 (W.D. Mo. 1995).

148. See *supra* note 100.

If the school district has no policy addressing harassment, then its schools may be found liable for the effects of student-to-student harassment because the school clearly intended to do nothing when faced with student harassment.¹⁴⁹ The OCR requires that a policy be in place and the violation of this minimal requirement should allow the victim to receive monetary damages, both compensatory and punitive. The intent to discriminate would also be revealed where an investigation finds that the policy is not being enforced.¹⁵⁰

Where a school district tried to remedy the harassment and did not succeed because of problems within the school system, or because of the way the policy is implemented, then it should still be held liable for the harassment. However, the school district should not be penalized to the same extent as a school district with no policy. A school having no policy may be presumed to be ignoring Title IX guidelines. The victim of the harassment should be able to get compensatory damages but not punitive damages.

If the school does not intentionally discriminate, it would make more sense for the court to allow injunctive or equitable relief rather than monetary damages.¹⁵¹ If the school made all appropriate attempts to remedy the harassment, the school should not bear the burden for the student's actions.¹⁵² To punish the school for its efforts would only frustrate the purpose underlying Title IX. The school district may not be motivated to remedy harassment where they would be found liable for the harasser's actions anyway.¹⁵³ This three-tiered liability scheme does not hurt the victim's inter-

149. *Cf. Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1420 (N.D. Iowa 1996) (stating that the school district's failure to have a sexual harassment policy was only negligent because the school district "took steps to punish known incidents of harassment and promptly removed graffiti that had been posted about plaintiff.")

150. *See Petaluma*, 949 F. Supp. 1415, 1422 (N.D. Cal. 1996) *8 (stating that hostile environment case law was developed as "a species of intentional discrimination.").

151. One should note that there are instances where the school should not be held liable at all. The school should not be burdened with liability for the actions of a third parties they cannot control through instruction or employment.

152. Even if the school does everything right, the harasser may not end his harassment. In one instances, a school district took reasonable steps to discipline someone who wrote sexually derogatory letters, including condemning peer harassment throughout the school, allowing the victim to change classes and initiating a prompt investigation. It is the schools' active role in combating harassment that allowed the school district to avoid liability. Sorenson, *supra* note 96, at 7.

153. Though strict liability would provide the school district with the incentive to reduce the probability of private action against it, it is not as equitable a method as imposing three-tiered liability. With this new liability structure, school administrators will understand what makes them liable for students harassing students, and the guidelines created by school districts will be able to address claims more specifically.

ests because where the harassment is pervasive enough to support a cause of action, the victim may be able to take action against the harasser under criminal statutes or tort law even where she cannot recover from the school under Title IX.¹⁵⁴

Discriminatory intent is a fluid concept which is not easily applied in peer sexual harassment cases.¹⁵⁵ Because evidence of harassment may be regarded as circumstantial evidence of the intent to discriminate,¹⁵⁶ courts should scrutinize the actions of the school administration in light of harassing behavior of which they were constructively aware.¹⁵⁷ The school district cannot be held strictly liable for the actions of third parties. In peer harassment cases, liability may only be determined by looking at the hostile environment as a whole and not as a product of the individual harasser's conduct.¹⁵⁸ A standard examining primarily the actions of the harasser would serve to minimize the school district's duty towards students to prevent harassment affecting their ability to learn.

The courts should look to the OCR to determine what the schools should be doing to avoid liability. Because the OCR investigates these situations thoroughly and has the best idea of what is required for there to be a claim of peer sexual harassment, its opinion should be very important to the courts. For example, the OCR generally holds that a school has violated Title IX if there is no

154. In cases involving younger children, the fault generally falls on the school district because it can better control a harasser. The teacher may influence the child as an authority figure or the school can call the harasser's parents. The harassment, in these cases, is more likely the product of a misunderstanding than sexual animus. On the other hand, the older harasser, a high school student for example, is less easily controlled. The student may not respect authority and will harass his peer regardless of the punishment. It is against these harassers that the victim will be able to recover under tort or criminal law.

There are also problems determining whether a young defendant can be held liable under criminal statutes. Suing the individual student may be complicated by new theories of parental liability for the crimes and torts of their children.

155. *Bosley v. Kearney R-1 School Dist.*, 904 F. Supp. 1006, 1020 (W.D. Mo. 1995).

156. *Doe v. Petaluma*, 830 F. Supp., 1560, 1576 (N.D. Ca. 1993); *Bosley*, 904 F. Supp. at 1021. Though *Bosley* claims to treat the evidence of harassment as circumstantial, the court appears to regard the evidence of harassment as determinative and a product of intentional harassment on the basis of sex.

157. Therefore "the cumulative evidence of action and inaction . . . objectively manifests discriminatory intent." *Id.* at 1020 (quoting *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185 (11th Cir. 1983)). The *Bosley* court also makes it clear that intent can be determined through direct evidence or indirectly through an inference from the circumstances. *Id.* at 1021.

158. See Justin S. Weddle, *Title VII Sexual Harassment: Recognizing An Employer's Non-Delegable Duty To Prevent A Hostile Workplace*, 95 COLUM. L. REV. 724, 738 (1995) (indicating that courts tend to look at individual harasser's actions and their impact on the victim and her environment in Title VII co-worker harassment cases).

OCR coordinator for the school, no grievance procedure and childrens' harassment claims are not communicated to the parents.¹⁵⁹ The plaintiff's burden should end with the establishment of the sexual harassment and the school should then show what they did in response to the harassment and what measures they have in place.¹⁶⁰ The school district should be held liable "unless the official can show that he or she took appropriate steps" to stop the harassment.¹⁶¹

Because intent may be established through circumstantial evidence, school systems must play an active role in combating sexual harassment in order to avoid liability. The school policy must clearly define harassment in terms the students can understand.¹⁶² It is more likely that students and schools will follow a clear policy that takes harassment seriously.¹⁶³ Though a school might have a grievance procedure, that alone does not insulate it from liability.¹⁶⁴ Appropriate procedures¹⁶⁵ and penalties are also very important parts of the policy because uniform enforcement will help to maintain the policy and thwart initial allegations that the school district discriminates on the basis of sex. This formal policy will

159. Sorenson, *supra* note 96, at 6. Having an OCR coordinator is an affirmative requirement through 34 C.F.R. §§106.8-106.9 (1989).

160. *See supra* note 150. Because of the reduced burden on the plaintiff in cases of unintentional harassment, the damages under these cases should be limited. *See generally* Leija v. Canutillo Ind. Sch. Dist., 887 F. Supp. 947 (W.D. Tex. 1995) *rev'd* 101 F.3d 393 (5th Cir. 1996) (deciding, in district court, that damages received by the plaintiff for sexual harassment should be limited).

161. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988).

162. "First, have a policy spelling out for students what [is] OK and what [is] not. Second, take sexual harassment seriously, because if the school systems don't, neither will the students. Third, act quickly when allegations arise - and document everything." Sherrell Evans, *Schools Get Tough on Sexual Harassment: Pending Lawsuit About Student-on-Student Contact and 1988 Gwinnett County Case are Prompting Changes*, ATLANTA J. AND CONST., Dec. 17, 1995, at 8G.

The policy may enumerate the types of behavior having the potential to create a hostile environment. For example, Atlanta prohibits "lewd or suggestive comments or gestures; off-color language or jokes of a sexual nature; graphic or degrading verbal comments about an individual or his/her physical attributes; display of sexually suggestive objects, pictures, cards or letters." *Id.*

163. *Id.*

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

165. *See* Janet Hughie Smith and Rick Thaler, *ALI-ABA Course of Study—Sex Discrimination in the Workplace: Some Guidelines for Employers and Legal Update*, C983 ALI-ABA 135, 146-147 (1995) (An employer should also establish procedures for conducting investigations into these claims including meeting with the complaining party and then the harasser after determining all the facts of the case. This data should be the product of a detailed investigation of the harasser and any other incidents in which he was involved.).

instill in the students that sexual harassment is wrong and that anyone engaging in it will be punished.

B. The Nature and Pervasiveness of Student Conduct

The harassment must be of a sexual nature, sexual or based on sex or gender.¹⁶⁶ The sexual conduct in peer sexual harassment cases does not have to be physical in nature.¹⁶⁷ OCR pursues Title IX peer harassment cases ranging from graffiti to verbal and physical harassment.¹⁶⁸ The courts should consider the effect of the harassment on the student¹⁶⁹ as well as the duration of the harassment.¹⁷⁰ The court should also look at objective measurements of the victim's condition to determine the effect of the harassment—such as her grades and interaction with others in class and outside of class.¹⁷¹

Title IX examines discrimination on the basis of sex and should not be extended to generally violent behavior between students. *Harris v. Forklift Systems, Inc.* considers “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or . . . merely an offensive utterance; and whether it unreasonably interferes with [the victim's] work performance.”¹⁷² This language and peer harassment case law indicate that there must be an emotional effect on the victim that causes her to feel inadequate or humiliated by the harassing experience. The experience should also be attributable to sex—either sexual or attacking the victim's sexuality. It would unnecessarily complicate peer harassment case law to create an overly broad definition of what constitutes harassment under Title IX.

The peer harassment policy must address all harassment claims, large or small, in a timely and effective manner. Liability, in many

166. A student rubbing himself in a suggestive manner in front of another student is sexual harassment where calling another student a cow and asking if he could take her home was not harassment of a sexual nature. Sorenson, *supra* note 96, at 7.

167. See *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988) (giving examples of harassment that is not physical in nature).

168. *Id.*

169. See *Sherer*, *supra* note 3, at 2130-31 (describing harassment as making the victim feel bad, angry, degraded, helpless, and cheap).

170. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

171. See *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1295 (N. D. Cal. 1993). Rebecca H. had problems with attendance and lateness during the 1989 school year, ending it with Ds and Fs the second semester. *Id.* at 1295. A therapist also described her as suffering from post traumatic stress because of the molestation. *Id.*

172. *Harris*, 510 U.S. at 23.

cases, depends on prompt and appropriate responses to harassment.¹⁷³ If the case gets to court, the quality of the school investigation should be taken into account in determining whether the school is liable for a failure to act when faced with harassment. This clearly would affect whether the victim may receive compensatory and/or punitive damages. Prompt action will prevent the escalation of smaller incidents like teasing. Under the current case law, the plaintiff would be unable to allege severe and pervasive harassment requiring compensation if there were only a few incidents of harassment.

A Title IX coordinator should be appointed to handle the claims.¹⁷⁴ This person should also play an active role in educating students on what is acceptable behavior. By conducting seminars on sexual harassment in the schools each year or during each semester, the students will find the coordinator approachable should anything happen to them. The coordinator will also be able to determine whether the student has been sexual harassed. The Gwinnett County school district has gone so far as to create a sexual harassment curriculum.¹⁷⁵ Both California and Minnesota have adopted codes requiring all public schools to distribute sexual harassment policies.¹⁷⁶ Teachers and administrators should also be educated about sexual harassment¹⁷⁷ so that they will know what sexual harassment is, recognize when their students are being harassed and report the harassment. Such a policy must be uniform throughout the district and accessible to all students and faculty.¹⁷⁸ A clear policy will facilitate handling cases and create a school-wide awareness of sexual harassment which may produce a hostile environment.

Conclusion

It has been up to the Circuit Courts to determine the liability of the school district in keeping with the Congressional vision to deny

173. Sorenson, *supra* note 96, at 7; *see also* Smith and Thaler, *supra* note 165, at 146 (stating that in Title VII co-worker cases, prompt remedial action is an important factor in assuring that the sexual harassment policy is followed).

174. *See supra* note 159.

175. Evans, *supra* note 162, at 8G.

176. CAL. EDUC. CODE § 212.6 (West 1994); MINN. STAT. ANN. § 127.46 (West 1994 and Supp. 1997).

177. *See* Smith and Thaler, *supra* note 165, at 138 (advocating educating managers, supervisors and other people in mid-to-high level positions about harassment in the workplace).

178. *See id.* at 137 (indicating that a written sexual harassment policy should be distributed making clear what the law is and what the employer prohibits).

federal funds to those who discriminate on the basis of sex. Through a broad interpretation of Title IX's intent requirement, the "known or should have known" standard, the students may get the protection they deserve. Without safeguards in place and the schools' ability and obligation to look after the children and hear their complaints, children will receive a message that this type of behavior is acceptable. The school district must be held liable because common sense tells us that schools and their teachers have the responsibility to act when a child is harassed by her peers.