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How Well Are the Nation's Children Protected from Peer Harassment at School?: Title IX Liability in the Wake of *Davis v. Monroe County Board of Education*

Penelope Jones, a child who has cerebral palsy and is deaf in one ear, was enrolled at a public high school, even though she functioned at a first-grade level.¹ The principal and two special education teachers assured Penelope's mother, Ms. Murrell, that they would carefully supervise Penelope, as she had been sexually assaulted at her prior school.² "John Doe," a male special education student with a history of inappropriate sexual behavior, approached Penelope at school and made harassing phone calls to her home.³ He allegedly assaulted Penelope several times, including one occasion during which he took her to an isolated area of the school and sexually assaulted her to the point that she vomited on herself and bled.⁴ Several teachers allegedly knew of the incident, but did not report it to Penelope's mother and directed Penelope not to tell her mother about the assault.⁵ Because of the assaults, Penelope became self-destructive and suicidal, requiring admittance into a psychiatric hospital.⁶

When Penelope entered the hospital, her mother first learned of the sexual assaults and batteries.⁷ Ms. Murrell contacted Penelope's teachers and attempted to contact the principal, who neither returned her calls nor investigated the assaults.⁸ Ms. Murrell sued the school district, alleging a violation of Title IX of the Education Amendments of 1972 ("Title IX").⁹

1. *See Murrell v. School Dist. No. 1 (Denver Public Schools)*, 186 F.3d 1238, 1243 (10th Cir. 1999).

2. *See id.* at 1243. For a discussion of the presence of sexual harassment in schools, see *infra* notes 77–89 and accompanying text.

3. *See Murrell*, 186 F.3d at 1243.

4. *See id.* John Doe could access this isolated area of the school because he was a janitor's assistant. *See id.*

5. *See id.* at 1243–44.

6. *See id.* at 1244. Upon her release from the hospital, Penelope returned to the high school for only one day because she was assaulted again by John Doe. *See id.*

7. *See id.*

8. *See id.* When Ms. Murrell eventually met with the principal, the school official suggested that the sexual contact was consensual, despite the fact that because of Penelope's condition, she was legally incapable of consenting to such behavior. *See id.*

9. *See id.* at 1242. Title IX applies to any public or private school, as well as any vocational, professional, or higher education institution, that receives federal funds, and

Prior to the Supreme Court's decision in *Davis v. Monroe County Board of Education*,¹⁰ several lower courts had dismissed cases based on school liability for peer sexual harassment.¹¹ The 1999 Supreme Court decision in *Davis*, however, established that severe student-on-student harassment that creates a hostile environment is actionable under Title IX when coupled with deliberate indifference by a school official with authority to remedy the conduct.¹² Based on *Davis*, Ms. Murrell's claim could go forward.

This Note begins by examining the facts and holding of *Davis*.¹³ The Note then offers a brief overview of sexual harassment, Title IX, Title VII, and the case law leading up to *Davis*.¹⁴ Next, the Note discusses the shortcomings associated with the Court's decision, critiquing the standard that the Court chose,¹⁵ and offering suggestions of how courts and schools might interpret the requirements set out by the Court.¹⁶ Finally, this Note examines unsettled issues remaining after *Davis* that will have to be resolved by future litigants such as the Murrell family.¹⁷

Davis involved a fifth grader, G.F., who harassed fellow classmate LaShonda Davis frequently during a five-month period.¹⁸ G.F. attempted to touch LaShonda's breasts and genital area and harassed her with comments such as "I want to get in bed with

the statute bars recipients of federal funds from discriminating based on sex. See 20 U.S.C. § 1681 (1994). For a thorough discussion of Title IX and its history, see *infra* notes 91-98 and accompanying text.

10. 526 U.S. 629 (1999).

11. See, e.g., *Murrell*, 186 F.3d at 1249 (discussing the lower court's dismissal for failure to state a claim); *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc) (affirming a district court's dismissal of a peer harassment case because there was no clear congressional notice to schools that they could be liable for student-on-student sexual harassment), *rev'd and remanded*, 526 U.S. 629 (1999); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir. 1996) (denying a school district's liability for peer sexual harassment). In fact, the district court in *Murrell* did dismiss the case for failure to state a claim. See *Murrell*, 186 F.3d at 1249. The Court of Appeals for the Tenth Circuit reversed, however, holding that Ms. Murrell had proven all of the requirements necessary to state a Title IX claim as set forth in *Davis*. See *id.*

12. See *Davis*, 526 U.S. at 650; see also *Murrell*, 186 F.3d at 1245 (referencing the *Davis* Court's establishment of indifference to sexual harassment as an essential element of a claim for money damages).

13. See *infra* notes 18-67 and accompanying text.

14. See *supra* notes 68-136 and accompanying text.

15. See *infra* notes 137-64 and accompanying text.

16. See *infra* notes 165-89 and accompanying text.

17. See *infra* notes 190-201 and accompanying text. This Note is limited in scope to issues arising in elementary and secondary schools and does not address issues arising in the higher education setting.

18. See *Davis*, 526 U.S. at 633-34. The harassment began in December and continued through April. See *id.*

you' ” and “ ‘I want to feel your boobs.’ ”¹⁹ Other incidents of harassment included G.F. placing a doorstop in his pants, suggestively approaching LaShonda in gym class, and rubbing his body up against hers in a sexually suggestive fashion.²⁰ During the alleged harassment, LaShonda reported G.F.'s conduct to her classroom teacher, another classroom teacher, the physical education teacher, and her mother, Aurelia Davis.²¹ Ms. Davis also contacted LaShonda's teacher, who persuaded her that the principal knew of G.F.'s behavior.²² Although at least three teachers and the principal knew about the harassment, no school official took any disciplinary action against G.F.²³ In fact, LaShonda's classroom teacher waited three months to grant LaShonda's request to be moved from her assigned seat, which was next to G.F.²⁴

The harassment clearly affected LaShonda: her grades dropped, she told her mother she was not sure how much longer she could defend herself from G.F., and she became suicidal.²⁵ Presumably upset by her daughter's suffering, Ms. Davis filed suit in the United States District Court for the Middle District of Georgia against the principal, the school board, and the district superintendent.²⁶ She alleged that G.F.'s harassment interfered with LaShonda's access to education, and that the deliberate indifference of the board created a hostile environment in violation of Title IX.²⁷

The district court ruled that the school board's actions were not sufficient to support a claim under Title IX.²⁸ The United States Court of Appeals for the Eleventh Circuit reversed, holding that Davis's allegations were sufficient to establish a *prima facie* claim for

19. *See id.* at 633.

20. *See id.* at 634.

21. *See id.*

22. *See id.* at 633–34. G.F. also allegedly harassed other classmates. *See id.* at 635. LaShonda and these other female students asked for a meeting with the principal to discuss the incidents, but a teacher denied the request. *See id.* When Aurelia Davis finally spoke with the principal in mid-May, the principal told her that he would speak to G.F. more harshly, but no evidence suggests that anyone disciplined G.F. at any time. *See id.*

23. *See id.*

24. *See id.*

25. *See id.* at 634.

26. *See id.* at 635. Five months after the harassment began, G.F. pleaded guilty to sexual battery. *See id.* The district court dismissed the case against the superintendent and the principal. *See Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994), *aff'd in part, rev'd in part, remanded sub nom. Davis v. Monroe County Bd. of Educ.*, 74 F. 3d 1186 (11th Cir. 1996), *aff'd en banc*, 120 F.3d 1390, 1406 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

27. *See Davis*, 526 U.S. at 636.

28. *See Aurelia D.*, 862 F. Supp. at 367.

sexual discrimination under Title IX, due to the board's indifference to the harassment.²⁹ On rehearing en banc, the Eleventh Circuit affirmed the district court's decision to dismiss the suit, explaining that, because Title IX was passed as congressional Spending Clause legislation,³⁰ the lack of unambiguous notice of the possible liability prohibited holding schools accountable under a private cause of action.³¹ The Supreme Court granted certiorari³² to resolve a conflict in the circuits as to when a recipient of federal funds can be liable for damages as a result of student-on-student sexual harassment and which standards should be utilized in examining such a case.³³

The Supreme Court voted five to four that the school district could be liable for the student-on-student sexual harassment.³⁴ The Court framed the issue as whether a school district's failure to

29. See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1195 (11th Cir. 1996), *aff'd en banc*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999). The Eleventh Circuit panel emphasized that Title VII principles frequently are applied to Title IX cases. See *id.* at 1190. For examples of cases applying Title VII principles to Title IX cases, see *infra* note 98.

30. The Spending Clause of the Constitution states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

31. See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc), *rev'd and remanded*, 526 U.S. 629 (1999). The Supreme Court previously had held that if Congress places conditions on the recipients of federal funds, it must do so unambiguously in order for states to make the decision whether to accept the conditions and, therefore, the federal funds. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24–25 (1981). The *Pennhurst* Court analogized Spending Clause legislation to a contract, explaining that Congress gives money to a state in exchange for state adherence to certain federal conditions. See *id.* at 17. For the contract to be fair, states must accept knowingly and voluntarily the contract terms or conditions, and therefore, Congress must express clearly its intent as to what the conditions involve. See *id.* The requirement of congressional intent often is referred to as "notice," see *id.* at 24–25 (addressing the requirement of "clear notice" to states of the conditions on a grant of federal funds), and should be distinguished from the requirement of actual notice or knowledge set out in the *Davis* test, 526 U.S. at 650.

32. See *Davis v. Monroe County Bd. of Educ.*, 524 U.S. 980 (1998).

33. See *Davis*, 526 U.S. at 637–38. Regarding the conflict in the circuits, the Court compared *Davis*, 120 F.3d at 1390, and *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1008 (5th Cir. 1996), two cases holding that the school district was not liable for peer harassment, with *Doe v. University of Illinois*, 138 F.3d 653, 668 (7th Cir. 1998), and *Oona R.S. v. McCaffrey*, 143 F.3d 473, 478 (9th Cir. 1998), two cases upholding private damages under Title IX for peer harassment. See *Davis*, 526 U.S. at 637–38; see also *infra* notes 131–36 and accompanying text (discussing the different approaches taken by lower courts in analyzing peer harassment claims).

34. See *Davis*, 526 U.S. at 633. Justice O'Connor delivered the majority opinion, joined by Justices Stevens, Souter, Ginsberg, and Breyer. See *id.* Justice Kennedy wrote a dissent in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. See *id.* at 654 (Kennedy, J., dissenting).

respond to reports of peer harassment supports a case for monetary damages under Title IX.³⁵ In this particular case, the Court explained, the school district was being held responsible for its own conduct rather than the conduct of G.F.³⁶ Resolving the conflict in lower courts as to what standard should apply to peer harassment cases, Justice O'Connor's majority opinion invoked a standard similar to that established in *Gebser v. Lago Vista Independent School District*,³⁷ a 1998 case holding that a fund recipient may be held liable in a suit for private damages if the recipient intentionally violates Title IX by showing deliberate indifference to known acts of teacher-student harassment.³⁸ In *Davis*, the Court concluded that in certain circumstances the *Gebser* standard applies to student-on-student harassment.³⁹

Before expanding on the test to be applied in peer harassment cases, the Court noted that it had always treated Title IX as Spending Clause legislation and analyzed the notice issue under that framework.⁴⁰ The Court noted that in Spending Clause cases, a funding recipient can only be held liable for an action if the recipient has adequate notice that the action violates the statute in question.⁴¹ According to the Court, the regulatory scheme surrounding Title IX and the common law gave the school district adequate notice that it could be held liable for the actions of third parties.⁴²

35. See *id.* at 639.

36. See *id.* at 641. The respondent asserted that Aurelia Davis was attempting to hold the school board liable for G.F.'s actions. See *id.*

37. 524 U.S. 274 (1998).

38. See *Davis*, 526 U.S. at 641; *Gebser*, 524 U.S. at 290.

39. See *Davis*, 526 U.S. at 643. Later in the opinion, the Court elaborated on the circumstances in which a school district will be held liable. According to the Court, the funding recipients must be deliberately indifferent to acts of sexual harassment of which they have actual knowledge and those acts must be so severe, pervasive, and offensive as to deprive the victim of access to her education. See *id.* at 650.

40. See *id.* at 640. Because the Supreme Court had suggested previously that Title IX was passed according to the Spending Clause, liability under the statute depends on unambiguous congressional notice of such liability. See *supra* notes 30-31.

41. See *Davis*, 526 U.S. at 640. The Court noted, however, that a case would not be barred for lack of notice if the violation of Title IX was intentional. See *id.* at 642 (citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74 (1992)). For further discussion of *Franklin*, see *infra* notes 116-24 and accompanying text.

42. See *Davis*, 526 U.S. at 643-44. In support of its proposition, the Court cited the Department of Education Office of Civil Rights (OCR) requirements that explicitly state that "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." Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (1997)

After *Davis*, the test to be applied to peer harassment cases contains three requirements: (1) a school district must have actual knowledge of sexual harassment; (2) the harassment must be so severe and pervasive as to deprive its victim of an education; and (3) the school district must have reacted to that harassment with deliberate indifference.⁴³ The Court explained that determining whether the alleged conduct in a given case constitutes severe harassment involves weighing many factors, including the number of students involved and the ages of the harasser and victim.⁴⁴

[hereinafter OCR Guidelines]. With regard to common-law notice, the Court cited the RESTATEMENT (SECOND) OF TORTS, which states that

[o]ne who is required by law to take or who voluntarily takes the custody of another . . . is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other . . . if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 320 (1965); see also *Davis*, 526 U.S. at 644 (citing § 320). Later in the opinion, the Court noted that a National School Boards Association publication had observed that a district might be held liable for peer harassment if it had actual knowledge of such harassment. See *Davis*, 526 U.S. at 647 (citing NATIONAL SCHOOL BODIES ASS'N COUNCIL OF SCHOOL ATTORNEYS SEXUAL HARASSMENT IN SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS 45 (rev. ed 1986)). Whether or not the Court was correct in its finding that the notice requirement was satisfied, school districts certainly are on notice after *Davis* that they can be held liable for peer harassment if the facts of a case support the test articulated by the Court. The dissent disagreed that the school district had notice of possible peer harassment liability. See *id.* at 654–58 (Kennedy, J., dissenting). *Pennhurst* discussed only congressional notice as sufficient to warn fund recipients of liability. See *Pennhurst State Sch. v. Haldeman*, 451 U.S. 1, 25 (1981). The Court in *Davis*, however, relied upon other sources of notice, thus broadening the definition of what constitutes notice under the Spending Clause. See *Davis*, 526 U.S. at 643–44 (referencing the Department of Education Guidelines and the RESTATEMENT (SECOND) OF TORTS). The Court explicitly stated that it was not relying on the publications as an indication of congressional notice, see *id.* at 647, but the majority in *Davis* nonetheless seemed to dismiss the notice problem with no explanation other than its description of the non-traditional sources. See *id.* at 647–48. The dissent in *Davis* correctly noted that “[n]either the [regulatory scheme] nor state tort law . . . could or did provide States the notice required by Spending Clause principles.” *Id.* at 669 (Kennedy, J., dissenting). This expansion of notice principles could have far-reaching effects in future litigation in a variety of areas involving federally funded programs as parties try to circumvent the notice requirement and hold funding recipients liable for violations mentioned only briefly in publications or pamphlets, rather than for regulations clearly explained by Congress and explicitly accepted by the recipients.

43. See *Davis*, 526 U.S. at 650. The actual knowledge requirement is sometimes described as notice to the school district of the harassment. See, e.g., *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (noting that N.Y.U. did not have notice, that is, knowledge, of certain alleged harassment). This concept of knowledge as notice should be distinguished carefully from the notice of possible liability required by Spending Clause legislation that is discussed *supra* notes 30–31.

44. See *Davis*, 526 U.S. at 651. The OCR Guidelines consider the following factors in

Furthermore, the Court emphasized that Title IX does not provide a remedy in cases of simple childish behavior and teasing, but is reserved for those cases in which the harassment is so severe as to deprive the victims of equal access to education.⁴⁵

Presumably to allay school administrators' fears that the scope of *Davis* would cause a flood of litigation, the Court highlighted some limitations on liability in peer harassment cases.⁴⁶ According to the Court, both the deliberate indifference standard and the language of Title IX itself restrict the situations in which a school district can be held responsible in a peer harassment action.⁴⁷ The Court viewed the deliberate indifference standard as narrowing the class of liable parties because the standard applies only when the fund recipient⁴⁸ has control over the harassment and has the authority to take remedial action.⁴⁹ The statutory language of Title IX further limits liability because only those who subject students to the harassment may be held liable and the harassment must occur in an environment that is under the school board's control.⁵⁰ Furthermore, the Court

determining whether peer harassment rises to an actionable level: (1) the degree to which the conduct affected the victim's education; (2) the frequency of the harassment, (3) the number of harassers and victims involved; (4) the age and sex of both the harasser and the victim; (5) the size of the school and under what context the harassment occurred; and (6) whether other incidents involving different students contributed to the hostile environment. See OCR Guidelines, *supra* note 42, at 12,041–42.

45. See *Davis*, 526 U.S. at 651–52; see also *infra* notes 167–75 and accompanying text (discussing the difficulty in defining actionable harassment).

46. See *Davis*, 526 U.S. at 652–53. In fact, the actual knowledge standard greatly limited the protections afforded schoolchildren. See *infra* notes 145–63 and accompanying text.

47. See *Davis*, 526 U.S. at 652–53.

48. Title IX applies only to those educational programs that receive federal funds. See 20 U.S.C. § 1681(a) (1994).

49. See *id.* One commentator has emphasized the difficulties in applying this standard. See Cynthia Gorney, *Teaching Johnny the Appropriate Way to Flirt*, N.Y. TIMES, June 13, 1999, § 6 (Magazine) at 43 (predicting a flood of lawsuits “as school officials scramble to figure out what ‘deliberate indifference’ means” (quoting 20 U.S.C. §§ 1681(a), 1687 (1994))). In an earlier case before the Seventh Circuit Court of Appeals, Judge Posner in dissent endorsed a deliberate indifference standard. See *Doe v. University of Ill.*, 138 F.3d 653, 680 (7th Cir. 1998) (Posner, J., dissenting). Judge Posner reasoned that a negligence standard would give schools insufficient protection and that a hybrid standard requiring actual knowledge and a failure of a school to respond promptly would be unworkable unless it was defined clearly. See *id.* at 679–80 (Posner, J., dissenting). He preferred a deliberate indifference standard, judging it to be a simpler, more workable alternative. See *id.* at 680 (Posner, J., dissenting).

50. See *Davis*, 526 U.S. at 652–53 (explaining that the scope of Title IX is limited because a recipient only can be liable for harassment that occurs “‘under’ ‘the operations of’ a funding recipient,” that is, in an environment that the funding recipient controls (quoting 20 U.S.C. §§ 1681(a), 1687 (1994))). The Court explained that, in addition to direct harassment by the school district, the district could also subject students to

emphasized that the standard does not require school districts to take any particular action or even to be successful in ending the harassment.⁵¹ Rather, *Davis* simply requires administrators who have actual knowledge of the harassment to respond in a reasonable manner.⁵²

The Court acknowledged that cases involving peer harassment are far less likely to survive these standards than cases involving teacher harassment of students.⁵³ In Aurelia Davis's case, however, the Court recognized that the facts might be sufficient to satisfy the elements required to sustain a claim for peer harassment against the school district.⁵⁴ Consequently, the Court reversed the Eleventh Circuit's judgment and remanded the case for further proceedings.⁵⁵

Justice Kennedy's dissenting opinion found the Court's treatment of federalism and congressional Spending Clause legislation problematic.⁵⁶ In addition, the dissent argued that the indifference standard articulated by the Court was inadequate because the standard offered no definition of actionable harassment and no explanation as to who must have actual knowledge of the harassment.⁵⁷ With regard to federalism, Justice Kennedy argued that if unchecked, Congress could erase the distinctions between federal and state domains through the use of its Spending Clause power.⁵⁸ The notice requirement, according to the dissent, is a vital safeguard against such federal intrusion on local spheres because it enables

harassment by its deliberate indifference, which has the effect of making student victims vulnerable to continued peer harassment. *See id.*

51. *See id.* at 648–49. One commentator has explained that a bona fide remedial action will suffice to satisfy this requirement. *See* Kathleen A. Sullivan, *Student to Student Sexual Harassment: Which Tack Will the Supreme Court Take in a Sea of Analyses?*, 132 EDUC. L. REP. 609, 612 (1999). In *Doe v. University of Illinois*, Judge Posner suggested that to be deliberately indifferent a school would have to do nothing or react in a manner that it knew would be ineffectual. *Doe*, 138 F.3d at 680 (Posner, J., dissenting).

52. *See Davis*, 526 U.S. at 648–49; *see also infra* notes 183–89 and accompanying text (discussing the deliberate indifference standard).

53. *See Davis*, 526 U.S. at 653.

54. *See id.* at 654. The Court reached this decision because the petitioner's complaint had alleged all the elements of the offense: (1) harassment that had a negative effect on LaShonda's access to education; (2) deliberate indifference; and (3) actual knowledge of the harassment by the school district. *See id.*

55. *See id.*

56. *See id.* at 654–72 (Kennedy, J., dissenting).

57. *See id.* at 672–86 (Kennedy, J., dissenting).

58. *See id.* at 654–55 (Kennedy, J., dissenting) (arguing that Congress could aggrandize its power outside what Article I of the Constitution allows by attaching conditions to federal funds and therefore controlling local domains by setting policy at a federal level).

states to police federal regulations.⁵⁹ The dissent suggested that in order to stay true to Spending Clause principles and check unconstrained congressional power, the Court in *Davis* should have required a demonstration that Congress gave funding recipients clear and unambiguous notice of liability for failure to remedy peer harassment.⁶⁰ Justice Kennedy disagreed with the majority's position that either the Department of Education regulations or a National School Boards Association publication satisfied the notice required by Spending Clause principles.⁶¹

Justice Kennedy also found the majority's articulation of a standard of liability to be inadequate, as it offered no guidance in recognizing instances of actionable harassment.⁶² He questioned the appropriateness of labeling immature behavior as gender discrimination, arguing that an analogy to Title VII workplace standards was inapplicable because "schools are not workplaces and children are not adults."⁶³ The dissent argued that the Court's views on the amount of control that a school possesses over students are impractical because that control is "complicated and limited," in contrast to the control a school has over its teachers, who have employment contracts with the school.⁶⁴ In further support of his argument, Justice Kennedy noted that federal constitutional constraints require schools to give notice and a hearing before

59. *See id.* at 655 (Kennedy, J., dissenting). After concluding her announcement of the decision for the Court, Justice O'Connor addressed the dissenters' federalism argument by asserting that, instead of the dissent's view that the decision would "teach little Johnny a perverse lesson in Federalism," *Davis* "assures that little Mary may attend class." Linda Greenhouse, *Sex Harassment in Class Ruled Schools' Liability*, N.Y. TIMES, May 25, 1999, at A1 (quoting Justice O'Connor).

60. *See Davis*, 526 U.S. at 657 (Kennedy, J., dissenting) (characterizing the Court's failure to provide a clear rule as to notice as "neither sensible nor faithful to Spending Clause principles").

61. *See id.* at 669-72 (Kennedy, J., dissenting).

62. *See id.* at 672 (Kennedy, J., dissenting); *see also infra* notes 165-89 and accompanying text (discussing difficulties resulting from the Court's standard).

63. *Davis*, 526 U.S. at 675 (Kennedy, J., dissenting).

64. *Id.* at 664 (Kennedy, J., dissenting). The dissent noted that a school's disciplinary authority over students is limited by due process requirements of notice and a hearing in suspension cases and by the Individuals with Disabilities Education Act, which limits the actions that schools can take to discipline students with behavior disorder disabilities. *See id.* at 665-66 (Kennedy, J., dissenting). The dissent also pointed out that public schools have no control in choosing the students who attend their schools, as no screening processes exist. *See id.* at 664 (Kennedy, J., dissenting). *Compare id.* (Kennedy, J., dissenting) (noting a school's inability to choose its students), *with infra* note 157 and accompanying text (noting the inability of children to change to a different school when faced with harassment).

suspending a student.⁶⁵

Additionally, the dissent viewed the majority's test as too broad and predicted that such an expansive test would invite courts into the classroom to police conduct, resulting in endless peer-harassment litigation.⁶⁶ In contrast to the majority, Justice Kennedy would have recognized that only a pattern of discriminatory behavior by a school in response to harassment could be actionable, for example, if a school failed to discipline boys for harassing girls "on a widespread level, day after day."⁶⁷ In sum, the dissent thought that the majority failed to follow Spending Clause principles and failed to provide funding recipients with adequate guidance in understanding the standard articulated.

Although the Court in *Davis* did not define sexual harassment,⁶⁸ that term was first explained as discrimination on the basis of sex in *Meritor Savings Bank, FSB v. Vinson*.⁶⁹ The *Meritor* Court accepted the Equal Employment Opportunity Commission's (EEOC) definition of sexual harassment as including two categories of behavior: quid pro quo harassment and hostile environment harassment.⁷⁰ The Department of Education's Office of Civil Rights (OCR), the body that enforces Title IX,⁷¹ includes these two types of

65. See *Davis*, 526 U.S. at 665 (Kennedy, J., dissenting); see also *infra* notes 155–57 and accompanying text (discussing the control exercised by school officials).

66. See *Davis*, 526 U.S. at 677–80 (Kennedy, J., dissenting). The dissent also noted that Title IX places no limit on damages. See *id.* at 680 (Kennedy, J., dissenting).

67. *Id.* at 683 (Kennedy, J., dissenting).

68. See *id.* at 677 (Kennedy, J., dissenting) (noting the Court's "inability to provide any workable definition of actionable peer harassment").

69. 477 U.S. 57, 63 (1986).

70. See *id.* at 65. Sexual harassment in the workplace is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," when: (1) a person's employment is conditioned on submitting to such conduct; (2) employment decisions affecting the victim of the conduct are based on submission to or rejection of the sexual conduct; or (3) the conduct subjects the victim to an offensive and hostile working environment. 29 C.F.R. § 1604.11(a) (1999). In two recent cases, the Supreme Court has erased the distinction between liability for quid pro quo and hostile environment sexual harassment as applied to harassment of an employee by a supervisor, thereby mandating absolute liability of employers for both types. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 804–08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761–65 (1998); Paul E. Starkman, *Learning the New Rules of Sexual Harassment: Faragher, Ellerth, and Beyond*, 66 DEF. COUNS. J. 317, 318 (1999); see also Rosalind S. Fink, *Overview of Sexual Harassment Law*, in HOW TO HANDLE YOUR FIRST EMPLOYMENT DISCRIMINATION CASE 7, 14–15 (PLI Litig. & Admin. Practice Course Handbook Series No. 386, 1999) (discussing categories of sexual harassment after these two cases).

71. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. §§ 106.1–.71 (1996) (setting forth OCR regulations under Title IX).

sexual harassment in its guidelines.⁷² Under OCR Guidelines, quid pro quo harassment occurs when a school employee conditions a student's access to educational opportunities on the student's compliance with unwelcome sexual conduct, which includes requests for sexual favors and other verbal or nonverbal sexual conduct.⁷³ Hostile environment sexual harassment also includes unwelcome sexual overtures, demands for sexual favors, and other verbal and non-verbal sexual conduct, but it occurs when sexual harassment by an employee, student, or third party is sufficiently severe to create a hostile educational environment or to interfere with a victim's access to education.⁷⁴ This type of sexual harassment occurs more frequently and, yet, is more misunderstood than quid pro quo harassment⁷⁵ because it is more difficult to recognize.⁷⁶

Although sexual harassment among adults may be well publicized, harassment among children is equally prevalent. Peer sexual harassment, or student-on-student sexual harassment, has been described as "the most rapidly emerging, controversial, and potentially volatile issue of sexual harassment."⁷⁷ Courts frequently have encountered difficulty in defining student-on-student sexual harassment and in evaluating the harm and liability in such cases because of students' immaturity.⁷⁸ This difficulty in considering

72. See OCR Guidelines, *supra* note 42, at 12,038.

73. See *id.*

74. See *id.*; see also AUDREY COHAN ET AL., *SEXUAL HARASSMENT AND SEXUAL ABUSE: A HANDBOOK FOR TEACHERS AND ADMINISTRATORS* 6 (1996) (defining a hostile environment as an atmosphere so offensive that it "interferes with an individual's ability to work or with a student's ability to learn or to participate in learning activities in and around the school environment"). This Note focuses on hostile environment sexual harassment, the type of harassment that was involved in *Davis*. *Davis*, 526 U.S. at 650 (noting that for harassment to be actionable it must be so severe as to interfere with a victim's access to education).

75. See ROBERT J. SHOOP & DEBRA L. EDWARDS, *HOW TO STOP SEXUAL HARASSMENT IN OUR SCHOOLS: A HANDBOOK AND CURRICULUM GUIDE FOR ADMINISTRATORS AND TEACHERS* 20 (1994).

76. See COHAN ET AL., *supra* note 74, at 7 (attributing the difficulty in recognizing hostile environment behavior to the use of a "boys will be boys" rationale as justification for the harassment). Other commentators aptly point out that the difficulty schools are having mirrors the confusion in the courts. See Verna L. Williams & Deborah L. Brake, *When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423, 424 (1997).

77. Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205, 206 (1999).

78. See SHOOP & EDWARDS, *supra* note 75, at 71; Dennie D. Butterfield, *Student-to-Student Sexual Harassment and Discrimination*, B.Y.U. EDUC. & L.J., Spring 1995, at 21, 21-22, 38. Peer harassment has not been recognized as widely as workplace harassment due to the lack of documentation and attention. See John T. Wolohan, *Sexual Harassment*

sexual harassment in the context of small children is illustrated by one commentator's suggestion that small children are incapable of sexual harassment because, at young ages, children are essentially asexual.⁷⁹

Regardless of the age of the harasser, however, uninvited sexually based behavior is unwelcome.⁸⁰ A national survey of students in the eighth through eleventh grades found that 80% of students in those grades acknowledged being sexually harassed at school.⁸¹ The survey found that 85% of girls and 76% of boys considered themselves subjected to unwelcome sexual propositions that disrupted their lives.⁸² Of those harassed, 79% had been subjected to peer harassment.⁸³ These statistics are illustrative of the fact that sexual harassment occurs often in elementary and secondary schools, as boys grab and proposition girls.⁸⁴ The psychological effects of harassment are serious, including hopelessness and low self-esteem,⁸⁵ embarrassment, humiliation, isolation, withdrawal,

of Students by Students: Do School Administrators Have an Affirmative Duty to Prevent Such Conduct?, 103 EDUC. L. REP. 889, 889 (1995). As a consequence of courts' greater recognition of workplace harassment, employers have strong motivation to create procedures and policies to combat harassment because they are legally liable if they "knew or should have known" of harassment, but school districts have not had such motivation because, until *Davis*, they did not know which liability standard would be applied to peer harassment. See Andrea Giampetro-Meyer et al., *Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in the Title IX Peer Sexual Harassment Cases*, 12 WIS. WOMEN'S L.J. 301, 301 (1997).

79. See G.D. Gearino, *Mensch Behaving Badly*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 27, 1996, at D1; see also John Leland, *A Kiss Isn't Just a Kiss*, NEWSWEEK, Oct. 21, 1996, at 71, 72 (noting that some child-development experts disagree as to whether certain conduct by young children should be labeled as sexual harassment).

80. See *First-Grader Must Remember This: A Kiss Is More Than Just a Kiss*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 25, 1996, at A3 (quoting a school spokeswoman); see also Fink, *supra* note 70, at 19-20 (stating that the effect of the behavior on the victim, not the intent of the harasser, determines liability for sexual harassment).

81. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICAN SCHOOLS 7* (1993) [hereinafter *HOSTILE HALLWAYS*]. Conducted in February and March of 1993, the survey reported results from 1632 students, grades eight through eleven, in 79 U.S. schools. See *id.* at 5.

82. See *id.* at 7.

83. See *id.* at 11.

84. See SHOOP & EDWARDS, *supra* note 75, at 55. The authors describe harassment in schools as having reached "epidemic proportions." *Id.* In addition to these studies, being a school-age child is increasingly difficult, due not only to the increase in weapons and violence in schools but also to the sexually explicit material directed at children by television, music, video games, movies, advertising, and the internet. See Gorney, *supra* note 49, at 43.

85. See SHOOP & EDWARDS, *supra* note 75, at 62 (noting that students who are victims of harassment experience a change in attitude about school and themselves as well as feelings of hopelessness and low self-esteem); see also Butterfield, *supra* note 78, at 23 (noting the danger and long-lasting effects of a damaged self-image).

personality changes,⁸⁶ and a desire to miss school or to stay silent in class.⁸⁷ Physical symptoms can include headaches and ulcers.⁸⁸ The evidence presented in these studies overwhelmingly establishes the prevalence of peer harassment in schools.⁸⁹

Because peer harassment is such a pervasive problem in schools, children need an avenue through which to stop peer harassment and to hold those responsible for the harassment accountable for their actions, or, in some cases, for their inaction.⁹⁰ One such avenue exists in the form of Title IX, which prohibits federal funding recipients from discriminating against or depriving a person of education because of that person's sex.⁹¹ Congress enacted Title IX to accomplish two main goals: to avoid using federal funds to support those involved in discriminatory practices and to give women adequate protection against discrimination.⁹²

Congress patterned Title IX after Title VI of the 1964 Civil Rights Act⁹³ and designed it to fill a void between Title VI and Title VII.⁹⁴ Title VI prohibits an institutional recipient of federal funds from discriminating based on race or national origin,⁹⁵ and Title VII prohibits an employer's act of discrimination based on sex.⁹⁶ Title IX fills the gap by making it unlawful for an educational institution receiving federal funds to discriminate based on sex.⁹⁷ When courts

86. See COHAN ET AL., *supra* note 74, at 61; HOSTILE HALLWAYS, *supra* note 81, at 16-17.

87. See HOSTILE HALLWAYS, *supra* note 81, at 15.

88. See SHOOP & EDWARDS, *supra* note 75, at 63.

89. See *id.* at 55; see also HOSTILE HALLWAYS, *supra* note 81, at 22 (noting that peer harassment is widespread).

90. 20 U.S.C.A. § 1681 (1999).

91. See *id.* The statute reads: "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." *Id.*

92. Senator Bayh, the bill's sponsor, stated during the congressional debate that "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers." 118 CONG. REC. 5806-07 (1972) (statement of Sen. Bayh); see also Williams & Brake, *supra* note 76, at 432-33 (noting the dual purposes of Title IX).

93. See *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979) (noting that Title IX was patterned after Title VI). During the congressional debate, Senator Bayh recognized that the language in Title IX was "specifically taken from Title VI of the 1964 Civil Rights Act." 117 CONG. REC. 30,407 (1971).

94. See 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh); Emmalena K. Quesada, Note, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1021 (1998).

95. 42 U.S.C. § 2000(d) (1994).

96. 42 U.S.C. § 2000e-2(a)(1) (1994).

97. 20 U.S.C.A. § 1681 (1999). Congress specifically noted that Title VII excludes

interpret Title IX, they frequently look to Title VII case law both because the legislative history suggests such an analogy and because the Supreme Court has established a link between the two statutes.⁹⁸

Title VII's⁹⁹ prohibition on sex discrimination by an employer includes hostile environment sexual harassment that unreasonably disrupts an individual's performance or creates a hostile or offensive environment.¹⁰⁰ The Supreme Court first recognized a claim for hostile environment harassment in the workplace in *Meritor Savings Bank, FSB v. Vinson*.¹⁰¹ In *Meritor*, the Court stated that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex," thereby recognizing sexual harassment as a form of discrimination.¹⁰² The Court then rejected the notion that, for harassment to be actionable, the victim must be deprived of some tangible aspect of employment, by acknowledging that harassment may be based on a psychological atmosphere created by the abuse.¹⁰³ In defining sexual harassment, the Court gave great deference to the EEOC's Guidelines, which recognized sexual harassment that creates

education. See H.R. REP. No. 92-554, at 2 (1972), reprinted in 1972 U.S.C.C.A.N. 2462, 2463.

98. See 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh) (emphasizing that Title IX would extend to education Title VII's prohibition on sex discrimination in the workplace); see also *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (using Title VII principles to decide a Title IX case); *supra* notes 116-24 and accompanying text (discussing *Franklin* in more depth). Additionally, the Office of Civil Rights has interpreted Title IX as consistent with Title VII. See OCR Guidelines, *supra* note 42, at 12,034 (stating that the OCR's policy regarding claims under Title IX is consistent with Title IX principles and with "related anti-discrimination provisions of Title VI and Title VII of the Civil Rights Act of 1964"). For examples of cases applying Title VII principles, see *Oona v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988); *Mabry v. State Board of Community Colleges and Occupational Education*, 813 F.2d 311, 316 n.6 (10th Cir. 1987); see also Thomas M. Melsheimer et al., *The Law of Sexual Harassment on Campus: A Work in Progress*, 13 REV. LITIG. 529, 532 (1994) (stating that Title VII law guides courts in their interpretation of Title IX); Jill Suzanne Miller, *Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 703 (1995) (same). Miller argues that even looking to Title VI to interpret Title IX cases will "springboard" courts into applying Title VII standards. Miller, *supra*, at 725.

99. See 42 U.S.C. § 2000e-2(a)(1).

100. See 29 CFR § 1604.11(a)(3) (2000); *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

101. 477 U.S. 57, 73 (1986) (stating that "a claim of 'hostile environment' sex discrimination is actionable under Title VII"). The plaintiff in *Meritor* was a bank teller who claimed that during a four-year period her supervisor frequently subjected her to sexual harassment. See *id.* at 59-61. The alleged harassment included compelling her to have sexual relations and forcibly raping her several times. See *id.* at 60.

102. *Id.* at 64.

103. See *id.*

an intimidating and hostile atmosphere in the workplace as a form of employment discrimination.¹⁰⁴ The Court did qualify hostile environment sexual harassment, however, by holding that plaintiffs cannot recover unless it is so “severe or pervasive” as to create an intimidating environment.¹⁰⁵

Although the Court in *Meritor* recognized a hostile environment sexual harassment claim, it did not articulate a standard of employer liability for such claims.¹⁰⁶ The Court acknowledged that agency principles should be applied in Title VII cases, but rejected the argument that Congress intended employers automatically to be liable for the behavior of their supervisors.¹⁰⁷ Thus, the task was left to future courts to decide what standard of liability should be applied in these cases and what behavior constitutes “severe and pervasive harassment.”¹⁰⁸

Since *Meritor*, the Court has agreed on the standard of liability for employers under Title VII, holding that in a claim for hostile environment sexual harassment, an employer may be vicariously liable¹⁰⁹ for harassment by a supervisor.¹¹⁰ Harassment between

104. See *id.* at 65. The court noted that, although agency guidelines are not binding on courts, they represent experience and judgment on which both courts and litigants should rely. See *id.* (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976)). The EEOC Guidelines include sexual conduct “creating an intimidating, hostile, or offensive working environment” in the definition of sexual harassment. 29 C.F.R. § 1604.11(a) (1999).

105. *Meritor*, 477 U.S. at 67. Compare *id.* (requiring severe or pervasive harassment for a hostile environment sexual harassment action in the employment context), with *Davis*, 526 U.S. at 650 (providing that harassment must be severe and pervasive to be actionable). The *Meritor* Court found the allegations adequate to state a claim. See *Meritor*, 477 U.S. at 67.

106. See *Meritor*, 477 U.S. at 72; see also Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 727 (1999) (recognizing that *Meritor* left the standard of liability for sexual harassment unresolved).

107. See *Meritor*, 477 U.S. at 72.

108. White, *supra* note 106, at 727. Professor White describes the issues that remained unanswered after *Meritor* as: what constitutes employer liability; what circumstances rise to severe and pervasive harassment; whether such behavior is judged from a subjective or objective standard; and whether a victim needs to establish psychological harm. See *id.*; see also Starkman, *supra* note 70, at 318 (noting that courts continue to wrestle with the issue of what constitutes actionable harassment).

109. Under a Title VII respondeat superior or vicarious liability theory, an employer is liable for intentional acts of an employee that are committed in furtherance of the employment relationship. See *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986).

110. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). These two cases also set out an affirmative defense, which is available if: (1) the employer exercised reasonable care to prevent and correct the harassment; and (2) the plaintiff unreasonably failed to utilize the employer's complaint procedures or policies. See *Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 765;

employees carries a different standard of liability. In such cases, an employer will be liable for conduct that is sufficiently severe and pervasive to interfere with a victim's work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action.¹¹¹ The Court in *Harris v. Forklift Systems, Inc.*¹¹² laid out several factors to be considered in deciding whether conduct constitutes severe and pervasive harassment, including whether an objective reasonable person would find the harassment offensive and whether the victim finds the conduct interferes with her working environment.¹¹³

Case law regarding Title IX has departed in some significant ways from case law dealing with sexual harassment in the employment context. While courts addressing Title VII issues were struggling to define employer liability, courts facing Title IX disputes were defining the scope of that statute and attempting to articulate the principles that should be applied in education cases.¹¹⁴ The first major step in defining Title IX standards came from *Franklin v. Gwinnett County Public Schools*,¹¹⁵ in which the Supreme Court established that sexual harassment constitutes discrimination based

Starkman, *supra* note 70, at 328.

111. See *Hall v. Gus*, 842 F.2d 1010, 1013 (8th Cir. 1988); *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982); *Barrett v. Omaha Nat'l Bank*, 584 F. Supp. 22, 28 (D. Neb. 1983) (mem.), *aff'd*, 726 F.2d 424 (8th Cir. 1984); *Ferguson v. E.I. duPont de Nemours and Co.*, 560 F. Supp. 1172, 1198-99 (D. Del. 1983); see also 29 C.F.R. § 1604.11(d) (1999) (suggesting that an employer will be liable for harassment between employees when it knew or should have known of the behavior); FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW 47-49 (1999) (discussing a constructive notice standard in negligence cases in the employment context); *Fink*, *supra* note 70, at 17 (discussing liability for actions between co-workers and third parties); *Williams & Brake*, *supra* note 76, at 454 (explaining that the "knew-or-should-have-known" standard applies in the employment context).

112. 510 U.S. 17 (1993).

113. See *id.* at 21-23. *Harris* denotes the Court's willingness to expand the scope of hostile environment sexual harassment, as the Court recognized that harassment that is intangible is nonetheless serious. See *Miller*, *supra* note 98, at 705.

114. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (defining the test for teacher-student sexual harassment); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992) (recognizing that sexual harassment amounts to discrimination based on sex under Title IX); *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (holding that Title IX includes an implied private right of action).

115. 503 U.S. 60 (1992). The petitioner in *Franklin* alleged that her teacher sexually harassed her by forcibly kissing her and eventually forcing her to have intercourse. See *id.* at 63. She further alleged that teachers and school administrators knew of the harassment and took no action to halt the teacher's behavior. See *id.* at 63-64. These facts are similar to the facts in *Davis*, except that *Franklin* dealt with teacher-student harassment, while *Davis* dealt with student-on-student harassment. See *supra* notes 18-25 and accompanying text (discussing the facts in *Davis*).

on sex under Title IX.¹¹⁶ This endorsement of Title VII principles established a Supreme Court-approved link between Title IX and Title VII and led some lower courts to begin applying workplace harassment standards to Title IX cases.¹¹⁷ This “clear authority for courts to consult Title VII principles when addressing Title IX sexual harassment claims” assisted courts because judges have experience with Title VII standards that can be used in addressing educational harassment issues, in contrast to the undefined Title IX standards.¹¹⁸

116. See *Franklin*, 503 U.S. at 75. The Court reasoned that because *Meritor* states that a supervisor’s sexual harassment of a subordinate constitutes discrimination based on sex, the same rule should apply to a teacher’s sexual harassment of a student. See *id.* (citing *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). For a discussion of *Meritor*, see *supra* notes 102–08 and accompanying text.

117. See *Oona v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290–93 (N.D. Cal. 1993). The court in *Oona* pointed out that *Franklin* analogized Title IX duties to those of Title VII, leaving the door open for subsequent courts to apply such analogies even where they could not before. See *Oona*, 143 F.3d at 476; see also Kathy Lee Collins, *Student-to-Student Sexual Harassment Under Title IX: The Legal and Practical Issues*, 46 DRAKE L. REV. 789, 795 (1998) (noting that some lower courts saw this reference to *Meritor* as rationalizing the application of Title VII principles to Title IX cases); Charles J. Russo et al., *Sexual Harassment and Student Rights: The Supreme Court Expands Title IX Remedies*, 75 EDUC. L. REP., 733, 739 (1992) (arguing that the analogy to *Meritor* finding sexual harassment constitutes sexual discrimination is the most important aspect of *Franklin*); *supra* note 98 (listing cases applying Title VII principles). The Court in *Murray* noted that the Court’s citation of *Meritor* in *Franklin* supported an inference that Title IX cases could be analyzed similarly to Title VII cases. See *Murray*, 57 F.3d at 249. Similarly, the *Petaluma* Court noted that although the defendant in the case had no notice of a duty imposed under Title IX and therefore could not be held liable, in the future Title VII cases might be used by analogy to establish such a duty under Title IX. See *Petaluma*, 54 F.3d at 1452. The *Patricia H.* court looked to *Meritor* in analyzing the plaintiff’s hostile environment claim, noting that the Supreme Court in *Franklin* did so as well. See *Patricia H.*, 830 F. Supp. at 1292. Judges have disagreed as to how far the Court’s approval of Title VII principles should reach, with some arguing that the use of the principles in *Franklin* mandated an analogy to Title VII in all situations, see *Oona*, 143 F.3d at 476–77, and others asserting that the analogy was meant to apply only to teacher-student sexual harassment, see *id.* at 479 (Hall, J., dissenting) (interpreting *Franklin* as approving the application of Title VII analogies in teacher-on-student harassment cases only); see also Russo et al., *supra*, at 740 (noting that *Franklin* did not define the scope of the application of *Meritor* principles to Title IX cases). In addition to establishing a link between Title VII and Title IX, *Franklin* motivated schools to curb harassment, see MARJORIE FINK, *ADOLESCENT SEXUAL ASSAULT & HARASSMENT PREVENTION CURRICULUM* 24 (1995) (maintaining that *Franklin* decision motivated school districts to develop policies to combat sexual harassment), and spawned litigation, see *Ellen J. Vargyas, Franklin v. Gwinnett County Public Schools and Its Impact in Title IX Enforcement*, 19 J.C. & U.L. 373, 383 (1993) (arguing that *Franklin* “provided an important new tool to eradicate the pernicious and stubborn problem of sex discrimination from our nation’s schools”).

118. Williams & Brake, *supra* note 76, at 442. Some commentators discussed the implications of the Court’s holding in *Franklin*, noting that the direct application of the

Additionally, in *Franklin* the Court explored the remedies available to a plaintiff suing under Title IX¹¹⁹ and asked whether Congress had intended to limit those remedies.¹²⁰ In *Cannon v. University of Chicago*,¹²¹ the Court previously had established that Title IX includes an implied private right of action.¹²² In concluding that Congress did not intend to limit the available remedies, the Court noted that if Congress had disapproved of the implied cause of action, it could have limited damages in conjunction with several amendments passed after *Cannon*.¹²³ Thus, the Court found that monetary damages are an available remedy under Title IX.¹²⁴

After *Franklin*, the Court developed a more detailed standard

Meritor ruling leads to questions of whether the Court would apply all *Meritor* rules in the school setting or whether *Franklin* is meant to be a more limited holding. See Russo et al., *supra* note 117, at 740. According to Russo, the language of *Franklin* could be interpreted either way.

119. See *Franklin*, 503 U.S. at 65. *Franklin* is perhaps more important as a remedies case than as a case dealing with sexual harassment law. See Russo et al., *supra* note 117, at 740. But see Vargyas, *supra* note 117, at 373 (noting that the court in *Franklin* provided an important tool to deal with sex discrimination in schools).

120. See *Franklin*, 503 U.S. at 71.

121. 441 U.S. 677 (1979).

122. See *id.* at 717; see also *Franklin*, 503 U.S. at 71-72 (discussing *Cannon*). The petitioner in *Cannon* did not bring suit based on harassment as the petitioner in *Davis* did but rather based her claim on sex discrimination, alleging that she was rejected from medical school because of her sex. See *Cannon*, 441 U.S. at 680-81. In determining that a private right of action was appropriate, the Court analyzed Title IX under a four-factor test, examining: (1) whether the statute was designed to benefit the class to which the plaintiff belonged; (2) whether the legislative history pointed to congressional intent to include an implied remedy; (3) whether implying such an action would contravene the statute; and (4) whether an implied remedy would encroach on an area of law typically regulated by the states. See *id.* at 688-709.

123. See *Franklin*, 503 U.S. at 72. In support of its theory, the Court referenced two amendments enacted after *Cannon*: the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1986 (1986) (codified as amended at 29 U.S.C. §§ 716, 717, 794d, 42 U.S.C. § 2000d-7 (1994)), and the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687, 1688 and 42 U.S.C. § 2000d-4(a) (1994)). See *Franklin*, 503 U.S. at 72-73. The Court reasoned that, because the Rehabilitation Act Amendments abrogated states' immunity under the Eleventh Amendment with regard to Title IX, Congress must have intended to validate the holding in *Cannon*. See *id.* at 72. The Civil Rights Restoration Act, according to the Court, lent further support to the contention that Congress agreed with the decision in *Cannon* because the Act did not restrict the right of action implied in Title IX, even though the Act sought to correct a judicial holding in another case. See *id.* at 73 (referencing Congress's use of legislation to correct what it saw as an "unacceptable decision" by the Court in *Grove City College v. Bell*, 465 U.S. 555, 563 (1984)).

124. See *Franklin*, 503 U.S. at 76. One group of commentators emphasized the importance of this holding, noting that the right to monetary damages will allow more plaintiffs access to a jury trial and result in more recoveries against school districts. See David S. Tatel et al., *The 1991-92 Term of the United States Supreme Court and Its Impact on Public Schools*, 78 EDUC. L. REP. 3, 15 (1992).

for school system liability and moved away from applying Title VII principles in *Gebser v. Lago Vista Independent School District*.¹²⁵ In *Gebser*, the Court determined the circumstances under which a school district would face Title IX liability for a teacher's harassment of a student.¹²⁶ The Court concluded that damages would only be available if: (1) a school district official had the authority to take action; (2) the official had actual notice of the harassment; and (3) the official responded with deliberate indifference.¹²⁷

The petitioners in *Gebser* argued that standards used in judging Title VII cases, particularly respondeat superior and constructive notice principles, should apply to Title IX cases as well.¹²⁸ Because the Court saw no congressional intent to allow liability based on respondeat superior or constructive notice principles, however, it was not willing to imply such far-reaching liability.¹²⁹ Examining the purposes of the statute and the regulatory scheme set up to enforce it, the Court concluded that a district will be liable only when an "appropriate person," one who has the authority to take action to end the harassment, has actual notice of the discrimination and reacts with deliberate indifference.¹³⁰

125. 524 U.S. 274 (1998). The petitioner in *Gebser* was an eighth-grade student whose book club leader made sexually suggestive comments and kissed, fondled, and had intercourse with her. See *id.* at 277-78. The petitioner did not report the incidents, but parents of two other students had reported the teacher's sexually suggestive comments to the principal. See *id.* at 278. The lower court granted summary judgment for the school district and the Circuit Court of Appeals affirmed the decision. See *id.* at 279.

126. See *id.* at 277.

127. See *id.* *Gebser* restricted what had been an expanding view of the scope of Title IX liability under *Cannon* and *Franklin*. See Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Civil Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 780 (1999); see also Fink, *supra* note 70, at 21 (stating that the Supreme Court in *Gebser* "severely curtailed" liability for harassment of students by teachers); cf. *Davis*, 526 U.S. at 650 (choosing a similar standard and therefore curtailing liability for peer harassment as well).

128. See *Gebser*, 524 U.S. at 282. The petitioners relied on the *Franklin* Court's citation of *Meritor* as establishing a basis for using Title VII principles as guidance in Title IX cases. See *id.* *Meritor* mandated courts' use of common law agency principles in examining a case of employer liability for a supervisor's harassment of a subordinate. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). Application of a respondeat superior theory to a Title IX case would impute knowledge to a school district whenever a teacher's authority over a student aided in the harassment, regardless of whether the school district had actual knowledge of the harassment. See *Gebser*, 524 U.S. at 282; see also RESTATEMENT (SECOND) OF AGENCY § 219 (1984 App.) (discussing an employer's automatic liability for a supervisor's actions if the supervisor accomplished the harassment with the aid of the employment relationship).

129. See *Gebser*, 524 U.S. at 287-88.

130. *Id.* at 285-91. Ironically, the *Gebser* standard was handed down during the same term that the Court articulated the vicarious liability standard for acts of supervisors in the

Although the *Gebser* Court defined the test for teacher-student harassment, the Court had not addressed a standard to be used in peer harassment cases prior to *Davis*. Lower courts differed in their approaches to the problem of which standard to use in assessing peer harassment cases.¹³¹ The different methods applied in lower courts¹³² included holdings that: (1) a school district could not be held liable for peer harassment;¹³³ (2) a district could be liable only for direct sexual discrimination by the school district;¹³⁴ and (3) a district's liability would be evaluated under Title VII principles.¹³⁵ Because

employment context, sending "two wholly irreconcilable messages." James S. Rosenfeld, *Sex Harassment Decisions: Take Your Statute as You Find It!*, 77 MICH. B.J. 1098, 1098 (1998). Mr. Rosenfeld further questioned the anomaly of the inconsistent decisions: "Do we really want it to be the case that children have a more difficult time suing for harassment by their teachers than employees have suing for harassment by their employers?" *Id.*

131. See *supra* notes 126-30 and accompanying text (discussing the standard articulated in *Gebser*).

132. See Williams & Brake, *supra* note 76, at 424-25 (discussing the varied liability standards in the lower courts).

133. See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc), *rev'd and remanded*, 526 U.S. 629 (1999). The Eleventh Circuit Court of Appeals, sitting en banc, flatly held that a school district could not be liable for student-on-student sexual harassment under Title IX because the requisite congressional notice was not present. See *id.* at 1406. The circuit court's dissent raised an interesting rejoinder to this argument by pointing out that the cause of action upheld in *Franklin* also was not mentioned in legislative history, but that surely the majority did not appear to question its existence. See *id.* at 1414 (Barkett, J., dissenting). The Eleventh Circuit declined to use Title VII principles in analyzing the Title IX case, arguing that: (1) Title VII was worded differently than Title IX and therefore should be treated differently; (2) Title VII was enacted under the Commerce Clause and the Fourteenth Amendment and not under the Spending Clause; and (3) Title VII depends on agency principles that should not be applied to these facts. See *id.* at 1399 n.13.

134. See, e.g., *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir. 1996) (holding that liability would not exist under Title IX unless evidence showed that the school district itself had discriminated sexually against the plaintiff). *Rowinsky* involved the harassment of two eighth-grade girls by several boys on the bus to school and in the classroom. See *id.* The girls and their parents reported the harassment several times to the school bus driver, the school's principal, and the school district superintendent, but the only punishment that the alleged harassers received was a three-day suspension from riding the bus. See *id.* *Rowinsky* argued that discrimination under the statute included the school district's liability for "hostile environment" sexual harassment, an argument that the court rejected because it did not believe that principles from the adult employment context should be applicable to Title IX cases. See *id.* at 1011 n.11. According to the *Rowinsky* court, a plaintiff must show that the school district itself responded differently to complaints of harassment made by boys than it responded to those made by girls. See *id.* at 1016.

135. See *Oona v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998). In *Oona*, the plaintiff sued under Title IX alleging liability for the failure to remedy two types of harassment, that by a teacher and that by other classmates. See *id.* at 474. The complaint alleged that a student-teacher fondled, kissed, and engaged in inappropriate conduct with the plaintiff,

lower courts remained divided as to which principles to follow, the Supreme Court in *Davis* delivered a much-needed standard for assessing school district liability.¹³⁶

The Court in *Davis* purported to settle the question of school district liability in peer harassment cases by imposing a standard requiring actual knowledge of and indifference to sexual harassment that is sufficiently severe and pervasive to deprive a victim of educational opportunities.¹³⁷ At least one element of this standard appears similar to that applied in employment sexual harassment cases recognizing a hostile environment, peer harassment cause of action,¹³⁸ the requirement that a plaintiff prove harassment sufficiently severe and pervasive to interfere with a victim's access to education parallels the language used in *Meritor* hostile workplace analysis.¹³⁹

sometimes in front of a tenured teacher and principal, and that some male students called the plaintiff names, hit her in the face, and told her to "[g]et used to it." *Id.* at 475. When her parents complained about these incidents to the principal and the Director of Elementary Education, a teacher responded by lowering the plaintiff's grade and withholding awards from her. *See id.* The Ninth Circuit reasoned that the case must be analyzed in accordance with the Supreme Court's decision in *Franklin*, which analogized Title IX to Title VII. *See id.* at 476-77 (noting that the *Franklin* Court's rationale that the duty arising from *Meritor* prohibiting a supervisor from harassing a subordinate should also prohibit a teacher from sexually harassing a student).

By referencing *Meritor*, the Ninth Circuit reasoned that the Supreme Court in *Franklin* must have implicitly approved of applying hostile environment sexual harassment principles to Title IX claims. *See Oona*, 143 F.3d at 476. The court also referred to courts in other districts that had used Title VII principles in deciding Title IX cases. *See id.* at 476-77 (citing *Doe v. University of Ill.*, 138 F.3d 653, 661-62 (7th Cir. 1998); *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 957 (4th Cir. 1997) (en banc), cert. granted by United States v. Morrison, 120 S. Ct. 11 (1999); *Doe v. Clairborne County*, 103 F.3d 495, 514-15 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996)). The court therefore asserted that Title VII standards should apply to *Oona's* case, *see id.* at 477, and affirmed the district court's decision denying the school officials qualified immunity, *see id.* at 478. Judge Hall wrote a separate opinion, reasoning that *Franklin* was not meant to have such a sweeping effect but rather was meant to approve of applying Title VII standards only to cases of teacher-student harassment. *See id.* at 479 (Hall, J., concurring in part and dissenting in part).

136. *See Giampetro-Meyer et al.*, *supra* note 78, at 314; Miller, *supra* note 99, at 725; Sullivan, *supra* note 51, at 627; David P. Thompson & A'Lann Truelock, *Student-to-Student Sexual Harassment: Sifting Through the Wreckage*, 125 EDUC. L. REP. 1035, 1035 (1998). Thompson and Truelock saw the confusion in appellate courts as two-fold. *See* Thompson & Truelock, *supra*, at 1048. Courts disagreed as to whether Title IX included a remedy for peer harassment at all and, if it did, they disagreed as to what standard should be applied in analyzing such a case. *See id.*

137. *Davis*, 526 U.S. at 650.

138. *See id.* (referring to harassment that is sufficiently severe to interfere with the victim's educational environment). *Cf. Meritor*, 477 U.S. at 67 (recognizing a hostile environment cause of action for workplace harassment).

139. *See Davis*, 526 U.S. at 650 (articulating a test that focused on *Meritor* terms such

The standard articulated by the *Davis* Court, however, was essentially the *Gebser* standard,¹⁴⁰ and was thus a rejection of the application of Title VII principles to Title IX cases. Arguably, the Court could have chosen to view *Franklin* as endorsing the use of Title VII principles¹⁴¹ and could have applied a more plaintiff-friendly, constructive notice standard.¹⁴² Moreover, because Congress mandated that Title IX be given “a sweep as broad as its language”¹⁴³ and intended to combat sexual discrimination in the classroom,¹⁴⁴ the Court’s decision in *Davis* arguably contravened the purpose of Title IX as well as the spirit of *Franklin*. From a legal perspective, the Court in *Davis* could have applied Title VII standards, thus articulating a constructive knowledge standard that would have afforded students the full legal protection from discrimination that Congress had envisioned.

From a policy perspective, the application of Title VII standards to Title IX cases would aid student victims of harassment.¹⁴⁵ As the dissent in *Davis* pointed out, however, “schools are not workplaces and children are not adults.”¹⁴⁶ Some may find it uncomfortable to hold children to the same standards as those to which adults are held,¹⁴⁷ but children at school should receive at least as much protection from harassment as do adults in the workplace.¹⁴⁸ In cases

as severe and pervasive, and on whether the harassment deprived access to educational opportunities).

140. See *id.* at 650; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

141. See *supra* note 135 and accompanying text (reviewing those courts that applied Title VII principles based on *Franklin*’s citation of *Meritor*); see also Williams & Brake, *supra* note 76 at 442–43 (arguing that *Franklin* gave courts the “clear authority” to apply Title VII principles to Title IX cases).

142. See *infra* notes 152–63 and accompanying text (discussing the merits of a constructive notice standard in cases involving students).

143. *Grove City College v. Bell*, 465 U.S. 555, 564 (1984).

144. See *supra* note 92.

145. See Sullivan, *supra* note 51, at 626 (classifying a constructive notice standard and a response standard approaching negligence as beneficial to students). Additionally, curbing sexual harassment at an early age will have a positive effect on those children when they grow up and enter the workplace. See Lisa M. Kelsey, Note, *Kids with the Kisses and Schools with the Jitters: Finding a Reasonable Solution to the Problem of Student-to-Student Sexual Harassment in Elementary Schools*, 8 B.U. PUB. INT. L.J. 119, 133 (1998).

146. *Davis*, 526 U.S. at 675 (Kennedy, J., dissenting).

147. See Gorney, *supra* note 49, at 43 (noting the difficulty in applying standards developed for the workplace to “the messy emotional lives of schoolchildren”).

148. See Ellen Goodman, Editorial, *More Than Teasing*, BOSTON GLOBE, Jan. 17, 1999, at C7 (arguing for a protective standard for children); Andrea M. Roberts & Paul A. Bokota, *Peer Sexual Harassment: Does Title IX Make Schools Liable for Harassment by Children?*, RES GESTAE, Oct. 1998, at 26 (arguing that, if employees have protection at work, they also should be protected at the institution of their training). One commentator

of harassment between employees, Title VII courts have applied a constructive knowledge standard, finding an employer liable if it knew or should have known of the harassment.¹⁴⁹ The actual knowledge standard chosen by the *Davis* Court amounts to a more difficult standard for plaintiffs to overcome because the school district will be held liable only if an official knew of the harassment, regardless of whether the official should have known.¹⁵⁰ In order to give children the protection they need, the Court in *Gebser* and in *Davis* should have followed the OCR's Guidelines, which apply a constructive liability standard.¹⁵¹

A constructive standard would be preferable because children deserve a more protective standard than actual notice because they are more vulnerable than adults.¹⁵² Children are more easily intimidated by the harassing behavior, may not recognize a satisfactory redress for harassment, may fear isolation from their peers in retaliation for turning in a classmate, and may blame themselves for the harassment.¹⁵³ Because children are less experienced than adults are, they are also less likely to label behavior as harassment and report it to the appropriate person.¹⁵⁴ Moreover, school officials exercise more control and supervision over students than employers do over employees, which also mandates a standard

has noted that the Supreme Court in effect has held that "students are separate, less equal, and more vulnerable legally . . . to sexual harassment under Title IX than are adult workers under Title VII." Jeffrey A. Thaler, *Are Schools Protecting Children from Harassment? Not Well Enough, and the U.S. Supreme Court's Recent Interpretation of Title IX Is Shielding Schools from Liability*, TRIAL, Aug. 1999 at 32, 32.

149. See 29 C.F.R. § 1604.11(d) (1999); ACHAMPONG, *supra* note 111, at 108 (citing *Magnuson v. Peak Technical Servs., Inc.*, 808 F. Supp. 500, 512 (E.D. Va. 1992)); Giampetro-Meyer et al., *supra* note 78, at 310-11.

150. See Giampetro-Meyer et al., *supra* note 78, at 301 (noting that an actual knowledge standard makes it more difficult to hold school districts liable than the standard for employers because a student must show the district's actual knowledge rather than that the district "knew or should have known" of the harassment). Two commentators noticed a trend that district courts even before *Davis* were applying an actual notice standard rather than the constructive notice standard applied in Title VII cases. See Thompson & Truelock, *supra* note 136, at 1050.

151. See OCR Guidelines, *supra* note 42 at 12,039; Collins, *supra* note 117, at 820; Thaler, *supra* note 148, at 34.

152. See Butterfield, *supra* note 78, at 22-23; see also Williams & Brake, *supra* note 76, at 428-29 (noting that harassment has a greater impact on young victims and leads to an institutionalization of sexual harassment as acceptable behavior). Additionally, children are minors and, consequently, they deserve heightened legal protections. See Giampetro-Meyer et al., *supra* note 78, at 318.

153. See Butterfield, *supra* note 78, at 23.

154. See Fisk & Chemerinsky, *supra* note 127, at 794; Kindred, *supra* note 77, at 220.

at least equivalent to constructive knowledge.¹⁵⁵ Teachers have been viewed as substitute parents,¹⁵⁶ inheriting a duty absent in the employer-employee relationship. Furthermore, students are compelled to attend school, and transferring to a different school is often more difficult than changing jobs.¹⁵⁷

Some courts have argued that Title VII standards should not be applied to school children because the power relationship evident in the employment harassment context does not exist between students and their peers in a school setting.¹⁵⁸ The argument can be countered, however, by a recognition that children do manipulate their peers through peer pressure and by capitalizing on students' desires to fit in among classmates.¹⁵⁹ Although this power does not affect hire and fire decisions, it allows students to inflict serious emotional damage upon each other, unless measures are taken to prevent abuse. Just like employees, young, vulnerable students who are compelled to attend a particular school and classroom may not be able to protect themselves without outside help from school officials and, when officials fail in their duties, judicial redress.

The requirement of a constructive notice standard would force schools to develop policies against harassment and to monitor more closely student interaction in the classroom, arguably leading to the earlier detection of and, perhaps, prevention of harassment.¹⁶⁰ In the

155. See Giampetro-Meyer et al., *supra* note 78, at 319. Moreover, schools already have "a broad range of disciplinary options" available to regulate further the behavior of children. *Id.* at 325; see also Fisk & Chemerinsky, *supra* note 127, at 793 (noting that children are "at the mercy of the schools" in a way adults are not). Students expect both guidance and protection from teachers, a fact that gives teachers more influence than an employer has over adults. See Williams & Brake, *supra* note 76, at 428. In fact, the Court in *Davis* referenced other decisions in which the Court has concluded that school districts do have a degree of control and supervision that could not be exercised over "free adults." *Davis*, 526 U.S. at 646 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 & n.9 (1985); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969)).

156. See Thaler, *supra* note 148, at 37.

157. See Giampetro-Meyer, *supra* note 78, at 318-19; Miller, *supra* note 98, at 722; Williams & Brake, *supra* note 76, at 429.

158. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir. 1996) (discussing the absence of a power relationship between students); Collins, *supra* note 117 at 825.

159. See Butterfield, *supra* note 78, at 23 (noting that some children may be more worried about their peer relationships than the harassment itself); Quesada, *supra* note 94, at 1053 (noting that a power dynamic is significantly involved in peer harassment due to an imbalance of power between boys and girls in school).

160. See Giampetro-Meyer et al., *supra* note 78, at 301 (arguing that a "knew or should have known" standard is necessary to motivate affirmative action by school districts); see also *The Supreme Court, 1999 Term—Leading Cases*, 113 HARV. L. REV. 368, 374 (1999) [hereinafter *Leading Cases*]. *Leading Cases* suggests that a constructive notice standard

employment context, the constructive standard encourages employers to take preemptive action by developing policies that help to prevent harassment.¹⁶¹ Applying this standard to schools would not place a heavier burden on school administrators because they already have some duties to protect children from harm.¹⁶² Instead, by applying an actual knowledge standard, *Davis* encourages school districts only to react to harassment rather than to take a preventative stance against it.¹⁶³

The *Davis* standard is also problematic because the Court did not give significant guidance regarding: (1) what constitutes severe and pervasive behavior to the point of interfering with education; (2) who must possess actual knowledge of the harassment; or (3) what constitutes reacting with deliberate indifference.¹⁶⁴ Although OCR Guidelines¹⁶⁵ and Title VII¹⁶⁶ provide some guidance in applying the *Davis* standard, substantial uncertainties remain. Moreover, because

would motivate school officials to create preventative measures against peer harassment and would better protect plaintiffs such as LaShonda Davis. See *Leading Cases, supra*, at 374-75.

161. See Fisk & Chemerinsky, *supra* note 127, at 799.

162. See Butterfield, *supra* note 78, at 38. But see Collins, *supra* note 117, at 827 (noting the unfairness of subjecting administrators to a "degree of knowledge and legal sophistication that is highly unrealistic" in expecting them to monitor harassment).

163. See *Leading Cases, supra* note 160, at 377-78 (stating that a constructive notice standard would require school officials to take a proactive rather than reactive position against harassment); see also Wolohan, *supra* note 78, at 899 (urging administrators to "take a proactive role in eliminating the sexual harassment of students in the classroom, hallways, and locker room"); cf. Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 269 (1996) (arguing that a failure by employers to take a proactive position regarding workplace sexual harassment will result in expensive litigation, low employee morale, loss of production, and a negative public image). The new standard of vicarious liability set out by the Court in the employment context gives employers even more incentives to take action. See Fink, *supra* note 70, at 47. One commentator suggests that, by applying the actual knowledge standard in *Gebser*, the Court implied that school districts did not need encouragement to re-examine the manner in which they prohibit sexual harassment in their schools. See Rosenfeld, *supra* note 130, at 1098. The Court's reasoning was flawed in light of the pervasiveness and effects of harassment in schools. See *supra* notes 77-89 and accompanying text. The Court should have provided protection equal to what adult employees receive.

164. See *Davis*, 526 U.S. at 650 (articulating the indifference standard).

165. This Note does not argue that a court would find OCR guidelines binding but rather that a school district or court could benefit from definitions and suggestions set out by the agencies. The Supreme Court has ruled that EEOC guidelines should be accorded deference, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975), and lower courts arguably should give the same deference to OCR Guidelines.

166. See SHOOP & EDWARDS, *supra* note 75, at 84 (suggesting that courts will apply *Meritor* principles to Title IX cases). Title VII is a useful guideline for Title IX cases because both regulate the same behavior and prohibit discriminatory atmospheres. See Williams & Brake, *supra* note 76, at 451.

the *Davis* Court rejected the application of OCR Guidelines and Title VII case law with regard to constructive notice, it is not clear how much weight courts will give those sources in future Title IX rulings. Because no straightforward guidelines exist for courts to follow in analyzing Title IX cases, however, courts should look to OCR Guidelines and Title VII case law for assistance until more guidance is provided.

One way in which OCR Guidelines and Title VII case law may offer guidance to courts is by defining harassment. Schools and courts may find it difficult to discern what rises to the level of actionable sexual harassment under *Davis*, especially because adolescents commonly engage in teasing and other childish behavior.¹⁶⁷ In fact, the difficulty that schools face in recognizing and reacting to peer sexual harassment has been evidenced by cases like that of a child being suspended for a harmless kiss.¹⁶⁸ The decision in *Meritor* spawned a similar debate over what constitutes harassment in the workplace.¹⁶⁹

In the employment context, to determine whether harassment rises to the level of severe and pervasive, the Court has suggested weighing several factors. These factors include: whether the discrimination was frequent and severe, whether the behavior was

167. See *Davis*, 526 U.S. at 676 (Kennedy, J., dissenting). The *Davis* dissenters pointed out that schools would now be faced with litigation from both sides, sued by the victim for not responding and sued by the alleged harasser for responding unreasonably to childish behavior. See *id.* at 682 (Kennedy, J., dissenting). One commentator has asked what the harasser did to make Justice Kennedy characterize what happened to LaShonda as normal childish behavior: "Was it when he slid a doorstop into his pants and made sexually explicit gestures to her during gym class? Was it when he groped her in the hall? . . . Was it when he pleaded guilty to sexual battery?" Eileen McNamara, *It Wasn't Just "Teasing,"* *Judge*, BOSTON GLOBE, May 26, 1999, at B1.

168. See, e.g., Joan Biskupic, *High Court Reviews Sexual Harassment*, WASH. POST, Jan. 11, 1999, at A6 (referencing an incident in 1996 when a child in North Carolina was suspended for kissing a classmate). According to *Davis*, a funding recipient would not be liable for simple bantering or teasing, and the determination whether certain behavior rises to sexual harassment would depend on many different circumstances. See *Davis*, 526 U.S. at 651-52. The Court included "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it" as actions that would not qualify for liability under Title IX. *Id.* This instruction to examine the totality of the circumstances also appears in the employment context. See 29 C.F.R. § 1604.11(b) (1999) (stating that, in its investigations of harassment, the EEOC will examine "the record as a whole" and "the totality of the circumstances").

169. See *Roberts & Mann*, *supra* note 163, at 277 (stating that *Meritor* "gave rise to a debate over . . . [w]hat degree of abuse is needed to constitute hostility that interferes unreasonably with a victim's work performance"); see also *Kindred*, *supra* note 77, at 214 (stating that *Meritor* left unanswered the question of what level of severity constitutes hostile environment harassment).

physically threatening or humiliating or merely offensive, and whether the discrimination unreasonably interfered with the employee's work performance.¹⁷⁰ Courts tend to apply an objective standard, asking whether the conduct would offend a reasonable person rather than whether it offended the particular victim.¹⁷¹ The OCR Guidelines also list a number of factors to be considered in assessing severity in peer harassment cases, such as the degree to which a student's education was affected, the frequency of the conduct, the relationship between the harasser and the victim, and the age and sex of the harasser.¹⁷² The Guidelines suggest that both a subjective and objective perspective should be used in analyzing this severity element.¹⁷³

Because both Title VII law and OCR Guidelines recommend weighing similar factors in assessing the level of actionable harassment in discrimination cases, lower courts may utilize these same factors for guidance in applying the *Davis* test. Many courts analyzing Title VII cases, however, encounter difficulty in determining the level of harassment that is actionable,¹⁷⁴ suggesting that determining what constitutes harassment will continue to be problematic for school districts and courts.¹⁷⁵

A second issue that may create difficulties after *Davis* is defining what constitutes actual notice. The *Davis* Court stated that a Title IX action will succeed only if the funding recipient with knowledge of the

170. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Additionally, quick reporting and investigation of claims could keep conduct from becoming severe and pervasive. See *White*, *supra* note 106, at 748.

171. See *Starkman*, *supra* note 70, at 319–20.

172. See OCR Guidelines, *supra* note 42, at 12,041–42. These factors are consistent with *Davis*, which suggested that circumstances such as age and the number of students involved should be examined. *Davis*, 526 U.S. at 651.

173. See OCR Guidelines, *supra* note 42, at 12,041.

174. See *Starkman*, *supra* note 70, at 319 (stating that “[t]he line between actionable hostile work environment harassment and non-actionable conduct remains as amorphous as ever”).

175. Although there is no bright-line test for actionable harassment, courts in the Title VII context tend to find a hostile environment when the following are present: sexual propositions, pornography, remarkably vulgar language, sexual touching, degrading comments, or embarrassing questions or jokes. See *Roberts & Mann*, *supra* note 163, at 277. Analogous behavior by students likely will rise to actionable harassment as well. Some commentators predict that behavior that could constitute harassment includes sexually suggestive comments, unwelcome touching, verbal abuse and obscenities, propositioning female students as they pass in the hall, grabbing females, and pulling down the pants of females or lifting up their skirts. See *SHOOP & EDWARDS*, *supra* note 75, at 116. Behavior that would likely not constitute sexual harassment includes a male pressing up against a female student once in the hall, an isolated incident of gender-related jokes, or a single request for a date, even if the request is unwelcome. See *id.* at 117.

harassment has the authority to take action. For example, a court would examine "the recipient's degree of control over the harasser and the environment in which the harassment occurs."¹⁷⁶ Beyond this vague description of what a court should examine, the Court offered no further guidance in establishing what level of official and authority should be held liable.¹⁷⁷ This ambiguity could lead school administrators to close lines of communication with teachers so that administrators can argue that their districts should not be held liable because school authorities never had actual knowledge of the harassment.¹⁷⁸ Such a result does not serve the interests of students.

Title VII principles have established that notice must be given to the employer or someone with the employer's authority to make personnel changes, rather than just a simple supervisor lacking such control.¹⁷⁹ In contrast to developments under Title VII standards, however, OCR Guidelines suggest that if "an agent or responsible employee" knows of the harassment, the school also has knowledge.¹⁸⁰ A teacher appears to fall under the OCR's definition of an agent or employee of the school. The Court in *Davis*, however, chose not to defer to the OCR's guidance regarding the correct standard of liability.¹⁸¹ In the future, the Court could decide to follow the Title VII approach and require that an official with higher authority than a teacher know of the harassment. This approach, however, would not afford children the protection they deserve. Because teachers are the authorities with the most supervision and control over students on a daily basis,¹⁸² courts should hold that notice to a teacher is sufficient to constitute actual knowledge by the school

176. *Davis*, 526 U.S. at 644. Title VII cases similarly examine whether someone who has the authority to remedy the harassment received notice. See Thompson & Truelock, *supra* note 136, at 1052.

177. See *Leading Cases*, *supra* note 160, at 377. Two commentators predict that the problem of who must receive notice will make it difficult for children to succeed in establishing a school district's actual knowledge. See Thompson & Truelock, *supra* note 136, at 1052.

178. See *Leading Cases*, *supra* note 160, at 377 (arguing that a school board, if it is the entity required to have actual knowledge, may close lines of communication, allowing teachers to ignore outrageous harassment as long as the school board has no knowledge and, thus, no liability).

179. See Starkman, *supra* note 70, at 326; Thompson & Truelock, *supra* note 136, at 1053.

180. OCR Guidelines, *supra* note 42, at 12,042. The Guidelines explain that schools can receive notice of harassment by: (1) the student filing a complaint; (2) a student or parent reporting the conduct to school personnel; (3) an agent witnessing the harassment; or (4) in an indirect manner, such as by a media report. See *id.*

181. See *supra* note 151.

182. See *supra* notes 155-56 (discussing control of teachers).

district.

Another difficulty *Davis* leaves unanswered is defining what constitutes deliberate indifference in responding to harassment.¹⁸³ The only instruction given by the Court was that the reaction by school officials may not be clearly unreasonable.¹⁸⁴ Based on Title VII principles, courts will analyze the actions of a school district only after the district had notice and will judge schools by the reasonableness of their reaction to the harassment, not by their success in terminating it.¹⁸⁵

OCR Guidelines suggest that immediate, appropriate action should be taken once a school official has knowledge of harassment.¹⁸⁶ The *Davis* Court approved this standard despite disagreeing with the OCR on other issues.¹⁸⁷ In its holding, the Court sent a clear message that parallels the OCR Guidelines: a school official with actual notice must take prompt action in response to a report of peer sexual harassment.¹⁸⁸ Although not required by *Davis*, a preventative approach to harassment and creation of a sexual harassment policy and grievance procedure would offer children the protection they need and deserve.¹⁸⁹

In addition to these difficulties in interpreting *Davis*'s standard, several other issues remain unresolved in connection with Title IX litigation. For example, the Court in *Davis* did not confront the issue of punitive damages,¹⁹⁰ which may or may not be available under Title

183. See Gorney, *supra* note 49, at 43 (predicting that officials will "scramble to figure out what 'deliberate indifference' means").

184. See *Davis*, 526 U.S. at 648.

185. See Thompson & Truelock, *supra* note 136, at 1053.

186. See OCR Guidelines, *supra* note 42, at 12,042. Furthermore, the agency elaborates on responding to student reports or eye-witness accounts of harassment, responding to indirect notice of harassment, and responding to harassed students' requests for confidentiality. See *id.* at 12,042-44.

187. See *supra* notes 142-63 and accompanying text (discussing constructive notice).

188. See *Davis*, 526 U.S. at 650; Gorney, *supra* note 49, at 43; see also *Schools May Be Liable for Student-on-Student Sexual Harassment*, MICH. EMPLOYMENT L. LETTER, July 1999, 3, 3 (recommending that school officials take complaints of sexual harassment seriously, investigate promptly, and discipline appropriately). Compare Gorney, *supra* note 49, at 43 (urging schools not to ignore complaints of sexual harassment but rather to "intervene at least actively enough to avoid being accused of 'deliberate indifference'"), with Roberts & Mann, *supra* note 163, at 286 (suggesting that employers must take aggressive action and respond quickly to complaints of workplace harassment).

189. See Thompson & Truelock, *supra* note 136, at 1054.

190. See *Davis*, 526 U.S. at 680-81 (Kennedy, J., dissenting); see also Michael Delikat & Rene Kathawala, *Sexual Harassment in Schools: Courts as Arbitrators of Schoolyard Conduct*, N.Y. L.J., Aug. 2, 1999, at 1 (noting that punitive damages were not specifically addressed by the *Davis* Court).

IX.¹⁹¹ In 1991, Congress amended Title VII to include the recovery of punitive damages.¹⁹² Title VII includes damage caps in its express cause of action; the Court in *Davis* and in previous decisions, however, included no such limitation on Title IX damages.¹⁹³ The dissent shrewdly suggested that without a limitation on damages, “school liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school districts.”¹⁹⁴ Because the *Davis* majority shied away from adopting Title VII analogies in applying a standard to Title IX cases, it might not set a cap on damages to allow schools the same protections that employers are furnished.¹⁹⁵ Limitations on punitive damages therefore may be “the next important Title IX battle.”¹⁹⁶

In sum, *Davis* made certain important strides in clarifying Title

191. See Delikat & Kathawala, *supra* note 190, at 1 (finding support in *Davis* for the proposition that punitive damages are not available as a Title IX remedy). But see Vargyas, *supra* note 117, at 377 (suggesting that the analysis in *Franklin* implies the availability of punitive damages).

192. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a)(1), 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (1994)). Plaintiffs may collect punitive damages only if they show an employer acted with malice or reckless indifference. See 42 U.S.C. § 1981a(b)(1). One commentator suggests that Congress added punitive damages as an available remedy under Title VII because hostile environment sexual harassment plaintiffs suffer no out-of-pocket losses and, therefore, had no remedy under the statute’s previous provision allowing only equitable relief. See White, *supra* note 106, at 739.

193. See *Davis*, 526 U.S. at 680 (Kennedy, J., dissenting).

194. *Id.* (Kennedy, J., dissenting).

195. See *id.* at 681 (Kennedy, J., dissenting) (suggesting that “[t]he limitless liability confronting our schools under the implied Title IX cause of action puts schools in a far worse position than businesses”).

196. Delikat & Kathawala, *supra* note 190, at 1. The Court in *Franklin* examined whether Congress clearly expressed its intent concerning damages and whether punitive damages would be appropriate. See *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 71–76 (1992). Delikat and Kathawala suggest that the importance of congressional intent would weigh against allowing punitive damages in Title IX cases. See Delikat & Kathawala, *supra* note 190, at 1.

Another difficulty that remains for further litigation involves the First Amendment issues intertwined with sexual harassment as officials struggle to discern prohibited harassment from protected speech. See *Kindred*, *supra* note 77, at 222. Because of the immaturity of school children, their free speech rights are somewhat more limited than the rights of adults. See *id.* For a detailed discussion of the development of free speech in the schools, see *id.* at 227–39. Because officials have substantial power to govern speech in schools, most cases of harassing speech would be susceptible to prohibition without infringing on First Amendment rights. See *id.* at 239.

Another issue that may appear in future litigation is whether an individual teacher may be sued under Title IX. See *Murrell v. School Dist. No. 1 (Denver Public Schools)*, 186 F.3d 1238, 1252 (10th Cir. 1999) (Anderson, J., concurring in part and concurring in the judgment). Most lower courts have held that Title VII does not include an action for individual liability and courts would likely hold the same in Title IX cases. See *Fink*, *supra* note 70, at 25; *Starkman*, *supra* note 70, at 326–27.

IX by settling the issue of liability for student-on-student harassment and choosing a standard by which these cases should be judged. School districts now should be on notice that if an appropriate official knows of sufficient sexual harassment and is deliberately indifferent in responding to the harassment, the school district could be held liable for damages in a private cause of action brought by the victim. Until *Davis*, these important standards remained unclear.

Yet, although *Davis* did settle particular issues of liability, it left critical issues unresolved. The Court did not, and perhaps could not, offer a bright-line test by which school officials can distinguish between sexual harassment and childish behavior,¹⁹⁷ or by which courts can determine what constitutes an official with actual knowledge.¹⁹⁸ Nor did the Court specify what response rises to the level of deliberate indifference.¹⁹⁹ Much discretion remains in the hands of school officials and lower courts to define the test the Court articulated, but courts and school officials should use existing Title VII principles and OCR Guidelines to flesh out the standard. Although the contours of Title IX liability may take years to map out, after *Davis*, school officials will be more cautious in dismissing a student's claim of sexual harassment because they now know that they are responsible for the hostility of the school environment. In cases like *Murrell*,²⁰⁰ in which the facts show clear, deliberate indifference and actual knowledge by school officials, plaintiffs will succeed in holding school districts liable for discrimination. Ultimately, however, many children will remain helpless victims of peer harassment because of the Supreme Court's rejection of constructive notice in favor of an actual notice standard, which will be difficult to meet absent egregious circumstances such as those in *Murrell*.²⁰¹ That will be the tragic legacy of *Davis*.

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197. See *supra* notes 167–75 and accompanying text.

198. See *supra* notes 176–82 and accompanying text.

199. See *supra* notes 183–89 and accompanying text.

200. See *supra* notes 1–9 and accompanying text.

201. See *supra* notes 145–63 and accompanying text.