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Making the Hallways Safe: Using Title IX to Combat Peer Sexual Harassment

Gregory E. Karpenko

Note

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In the spring of 1993, fifth-grader LaShonda Davis wrote a suicide note indicating she was going to end her life because of the sexual abuse she endured during her fifth grade year.[1] Throughout the year, LaShonda was tormented by a fellow fifth grader, named "G.F." by the courts, who constantly harassed and abused LaShonda.[2] G.F.'s actions included trying to touch LaShonda's breast and vaginal areas and saying "I want to get in bed with you" and "I want to feel your boobs."[3] On one occasion, G.F. placed a doorstop in his pants and mimicked sexual acts.[4] As the year passed, G.F.'s harassment became so severe that he was charged with and pled guilty to sexual battery.[5]

Throughout the year, LaShonda continually complained to school officials. These officials did nothing to remedy G.F.'s sexual harassment.[6] In fact, they even denied LaShonda's request to be moved from a classroom seat next to G.F.[7] After one particular incident of sexual harassment, LaShonda and several other girls requested permission from their teacher to report G.F. to the principal.[8] To the girls' surprise, the teacher responded, "If he [the principal] wants you, he'll call you."[9] Af-

* J.D. Candidate 1998, University of Minnesota Law School; B.A. 1995, Valparaiso University.

1. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1189 (11th Cir.), *reh'g granted and opinion vacated*, 91 F.3d 1418 (11th Cir. 1996).
2. *Id.* at 1188-89.
3. *Id.* at 1189.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

ter another incident, the principal asked LaShonda "why she was the only one complaining."[10]

Until recently, neither the American public nor the courts recognized the problems of peer sexual harassment.[11] Recent studies, however, demonstrate the staggering prevalence of peer sexual harassment and the threat it poses to our school systems.[12] These studies also illustrate the damage peer sexual harassment causes to the mental and emotional development of young male and female students.[13]

One of the most promising statutory vehicles for addressing peer sexual harassment is Title IX of the Education Amendments of 1972.[14] Title IX prohibits sex discrimination

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10. *Id.*

11. *See* Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2121-23 (1993) (noting that peer sexual harassment issues have been largely absent from legal and nonlegal literature, research studies, and the courtroom).

12. A 1993 study by the American Association of University Women Education Foundation (AAUW) found that 85% of girls and 76% of boys in grades eight through eleven have been the victims of unwanted sexual comments or touching in school. AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY OF SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993) [hereinafter AAUW]. Of the girls reporting sexual harassment, 66% reported experiencing harassment "often" or "occasionally." *Id.*; *see also* NOW LEGAL DEFENSE AND EDUC. FUND & WELLESLEY COLLEGE CTR. FOR RESEARCH ON WOMEN, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 2 (1993) [hereinafter NOW/WELLESLEY] (finding that 83% of girls ages 9 to 19 have been touched, pinched, or grabbed and that 39% reported that this harassment occurred daily).

13. *See, e.g.*, AAUW, *supra* note 12, at 15 (finding that of the girls who were victims of sexual harassment, 33% did not want to attend school, 32% did not want to talk in class as often, and 24% skipped class or school to avoid the harassment). The testimonies of Title IX plaintiffs seeking redress for peer sexual harassment bear out the sad story contained in the survey results. *See, e.g.*, Schofield *ex rel.* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 166 (N.D.N.Y. 1996) (stating that sexual harassment by peers made the plaintiff feel unsafe and depressed, and interfered with her education). Bruneau's experience is typical of peer sexual harassment victims, who commonly display symptoms such as insomnia, listlessness and depression. *See* Sherer, *supra* note 11, at 2133-34 (describing the physical and emotional consequences of peer sexual harassment). One commentator observed that "[i]f sexual harassment is allowed to occur it disrupts the right to equal education by interfering with the student's psychological, social, and physical well-being, plus learning, attendance, course choices, grades and therefore economic potential." Susan Strauss, *Sexual Harassment in the School: Legal Implications for Principals*, NAT'L ASS'N OF SECONDARY SCH. PRINCIPALS BULL., Mar. 1988, at 93.

14. 20 U.S.C. §§ 1681-1688 (1994).

by federally funded educational institutions.[15] While the Supreme Court has yet to consider Title IX liability for a school's failure to remedy peer sexual harassment, lower federal courts have used Title IX to recognize peer hostile environment sexual harassment and impose school liability.[16] The courts recognizing peer hostile environment sexual harassment claims disagree, however, about the nature of school liability. Federal courts are currently split over whether a student seeking damages under Title IX must prove intentional discrimination or whether the student may state a claim using the Title VII "knew or should have known" liability standard.[17]

The absence of a definitive legal standard for assessing school liability prevents our society from addressing the already difficult problem of peer sexual harassment. The confusion in federal courts leaves student victims unsure of their legal rights and, as a result, may discourage them from seeking relief in the courts.[18] Furthermore, the absence of a definitive liability standard provides little incentive for schools to adopt peer sexual harassment policies and programs that address the problem of peer sexual harassment.[19]

This Note argues that courts should allow a victim of peer sexual harassment to recover monetary damages under Title IX when a school intentionally discriminates against the student on the basis of sex by failing to remedy the abuse. Part I briefly describes the development of Title IX as a tool for fighting sexual harassment in educational institutions and Title IX's relationship to Title VI and Title VII of the Civil Rights

15. *See infra* notes 20-21 and accompanying text (describing the purpose of Title IX and quoting the statutory language).

16. *See infra* notes 89-124 and accompanying text (summarizing cases addressing peer sexual harassment under Title IX).

17. *See infra* text accompanying notes 84-88 (stating that federal courts currently apply four different standards to determine school liability).

18. A clear legal standard is essential because numerous factors already cause many young victims of sexual harassment to be unwilling to report abuse. *See* SUSAN STRAUSS, SEXUAL HARASSMENT AND TEENS: A PROGRAM FOR POSITIVE CHANGE 117 (1992) (noting that many teens do not report sexual harassment because they blame themselves, do not know how to report incidents, do not trust their perception of the events, are afraid to create a scene, are embarrassed, or do not think that reporting will make a difference). A clear legal standard of liability will at least give students the knowledge that if their school fails to act on reports of peer sexual harassment, the courts can provide a remedy.

19. *See* Sherer, *supra* note 11, at 2165-66 (arguing that a clear cause of action would provide an incentive for school officials to promptly investigate and discipline instances of peer sexual harassment).

Act of 1964. Part II outlines the Supreme Court's approval of monetary damages in Title IX claims and the lower federal courts' recognition of a Title IX claim for victims of peer sexual harassment. Part III argues that Title IX plaintiffs must prove that schools intentionally discriminated on the basis of sex to receive monetary damages for failure to remedy peer sexual harassment. In support of this claim, Part III demonstrates that Title VII standards are inconsistent with Title IX precedent, that proof of intentional discrimination meets the requirements of Title IX, and that public policy supports adopting intentional discrimination standards instead of Title VII "knew or should have known" liability.

I. STATUTORY HISTORY OF SEXUAL HARASSMENT

A. TITLE IX AS A REMEDY FOR SEX DISCRIMINATION

Congress enacted Title IX in 1972 to protect individuals from sex discrimination within federally funded educational institutions.[20] Title IX provides that "[n]o 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."[21] Prior to the passage of Title IX, no legal remedy was available to victims of sexual harassment in educational institutions because of a peculiar gap that existed between Title VI and Title VII of the Civil Rights Act of 1964. Title VI prohibits discrimination in all federally funded programs but does not regard gender as a prohibited classification.[22] Conversely, Title VII prohibits sex discrimination in the workplace but originally exempted educational institutions from its scope.[23]

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20. Senator Birch Bayh, the sponsor of the Senate bill, stated 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. 5803, 5806-07 (1972) (statement of Sen. Bayh).

21. 20 U.S.C. § 1681(a) (1994).

22. *See* 42 U.S.C. §§ 2000d to 2000d-4 (1994) (prohibiting discrimination based on race, color, or national origin by recipients of federal funds).

23. *See* Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1803 (1995) (noting that Congress enacted Title IX in part to fill the gap between Title VI and Title VII).

After passing Title VI and Title VII of the Civil Rights Act of 1964, Congress recognized that these statutes failed to protect women in educational institutions.[24] Accordingly, Congress amended the Civil Rights Act in 1972, adding Title IX. Title IX addressed the problem of sex discrimination in educational institutions by prohibiting financial aid and admissions procedures which deterred female application and admission to colleges.[25] In addition, Title IX protected women employed in educational institutions from sex-based discrimination by extending protection similar to that guaranteed to workers in noneducational workplaces by Title VII.[26]

Title IX's language, however, did not specify what types of sex discrimination constitute a violation of Title IX or the methods by which a plaintiff may establish her case.[27] Legislative history made it clear that sexually discriminatory admission procedures and employment practices violated Title IX, but did not address issues such as sexual harassment of students.[28] As a result, courts had no congressional guidance for assessing many sexual harassment claims brought under Title IX. Lacking clear congressional intent, courts supplemented Title IX by drawing from established Title VI and Title VII case law.[29]

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24. *See id.* (noting that "[t]he data presented to Congress during the Title IX debates clearly showed that women were being discriminated against in the field of education").

25. *See* 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh) (explaining that "the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds [which] would cover such crucial aspects as admissions procedures [and] scholarships").

26. *See id.* at 5812 (statement of Sen. Bayh) (explaining that Title IX deals with discrimination "in employment within an institution, as a member of a faculty or whatever").

27. *See* 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, 714-15 (noting that Title IX fails to provide any guidelines as to what types of sex discrimination are actionable under Title IX).

28. *See, e.g.*, *supra* notes 25-26 (quoting testimony by Senator Bayh concerning the focus of Title IX).

29. *See, e.g.*, Yusuf v. Vassar College, 35 F.3d 709, 714-15 (2d Cir. 1994) (finding that in the case of gender discrimination occurring in college disciplinary proceedings, courts should interpret Title IX by looking to the body of law developed under Title VI as well as the case law interpreting Title VII); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (stating that Title VII provides "the most appropriate analogue when defining Title IX's substantive standards") (quoting Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987)).

B. TITLE VI: TITLE IX'S PARENT STATUTE

Title VI states that "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[30] Although Title VI does not refer to gender, its language closely resembles the statutory language of Title IX.[31] These similarities exist because Congress intentionally modeled Title IX on Title VI, providing in Title IX's provisions that Title VI regulations should be incorporated into Title IX.[32] This evidence of congressional intent and the similarity of language led the Supreme Court to interpret the two statutes in a similar manner.[33]

The liability of federally funded educational institutions under Title VI is limited by the fact that Congress enacted Title VI pursuant to its Spending Clause powers.[34] Under this power, Congress may place conditions upon the receipt of federal aid in return for compliance with federal conditions.[35] To receive federal aid under Title VI, recipients cannot discriminate on the basis of race, color, or national origin. Because spending power legislation is comparable to a contract, federal aid recipients are not bound by federally imposed conditions unless they "voluntarily and knowingly" accept the terms of the contract.[36] Hence, the remedies available to private plaintiffs under Spending Clause statutes are typically limited to declaratory and injunctive relief.[37]

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30. 42 U.S.C. § 2000d (1994).

31. *See supra* text accompanying note 21 (quoting Title IX).

32. *See* 34 C.F.R. § 106.71 (1995) (incorporating provisions of Title VI in regulations implementing Title IX).

33. *See* Cannon v. University of Chicago, 441 U.S. 677, 694-99 (1979) (describing the similarities between Title VI and Title IX to justify fashioning a private right of action under Title IX similar to the right already recognized under Title VI).

34. *See* Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 598-99 (1983) (noting that Title VI is Spending Clause legislation).

35. *See id.* at 599-602 (quoting Title VI legislative history describing Title VI as a contractual relationship and concluding that injunctive relief is the only available remedy under the statute).

36. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (noting that Spending Clause legislation resembles a contract because the states agree to comply with certain conditions in exchange for federal funds).

37. *See id.* at 29-30 (explaining that the contractual nature of a Title VI spending grant limits the remedies available to plaintiffs in a private suit because an action by a private plaintiff introduces costs not originally considered

In *Guardians Ass'n v. Civil Service Commission of New York*,[38] the Supreme Court extended the remedies available to plaintiffs under Spending Clause statutes. In so doing, it distinguished between intentional and unintentional violations of Title VI. The Court stated that Title VI plaintiffs were limited to injunctive relief for unintentional violations of Title VI,[39] but noted that a plaintiff proving intentional discrimination is entitled to compensatory relief.[40]

C. TITLE VII SEXUAL HARASSMENT LITIGATION

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against any individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[41] The House of Representatives added the classification of sex with limited discussion shortly before voting on the bill.[42] As a result, courts and the Equal Employment Opportunity Commission (EEOC), the agency Congress created to enforce Title VII, can refer to no legislative history to de-

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when the grant recipient accepted the federal money). The *Pennhurst* court further held that a federal grant recipient must always have the choice of complying with the additional obligations and duties mandated by the court's ruling or terminating its receipt of federal funds. *Id.* In accordance with the contractual nature of federal grants under the Spending Power, the *Pennhurst* court noted that it had never "required a [grant recipient] to provide money to plaintiffs." *Id.* at 29.

38. 463 U.S. 582 (1983).

39. *Id.* at 607.

40. *Id.* at 597. Seven members of the *Guardians* Court agreed that a violation of Title VI itself required proof of discriminatory intent. *See id.* at 608 n.1 (Powell, J., concurring) (summarizing the Court's division on the issue of intent). A separate majority found that a plaintiff could establish a violation of Title VI's implementing regulations pursuant to 42 U.S.C. § 1983 with proof of discriminatory impact alone. *See id.* at 607 n.27 (explaining that "[t]he dissenters, Justices Brennan, Marshall, Blackmun, and Stevens, join [Justice White] to form a majority upholding the validity of the regulations incorporating a disparate-impact standard"); Eriksson, *supra* note 23, at 1813 (noting that "[a] different majority . . . held that Title VI's implementing regulations prohibit actions or regulations that have a disparate impact on minorities").

41. 42 U.S.C. § 2000e-2(a)(1) (1994).

42. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986) (citing 110 CONG. REC. H2577 (daily ed. Feb. 8, 1964)). Opponents of the amendment to add sex to Title VII's list of prohibited characteristics argued that sex discrimination was different from other forms of discrimination and should receive separate legislative redress. *Id.* at 64. This argument failed and Congress passed the bill with a prohibition against discrimination based on sex. *Id.*

termine what Congress intended by prohibiting discrimination based on sex.

Both the courts and the EEOC determined, however, that sexual harassment violates Title VII's prohibition of sex discrimination. The EEOC issued guidelines classifying the types of sexual harassment which violate Title VII. These guidelines state:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[43]

Under these guidelines sexual harassment occurs in one of two forms: "quid pro quo" sexual harassment or "hostile environment" harassment.[44] An employer commits quid pro quo sexual harassment when the employer promises an employee a job benefit should the employee perform a sexual act with the employer, or when the employer threatens to fire the employee if the employee objects to sexual overtures.[45] Conversely, hostile environment sexual harassment involves non-economic threats.[46] Hostile environment sexual harassment occurs when "unwelcome sexual attention . . . 'creates an intimidating workplace or interferes with an employee's job performance.'"[47]

Federal courts have recognized that Title VII's prohibition on sex discrimination encompasses both quid pro quo and hostile environment sexual harassment.[48] Originally, lower

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43. 29 C.F.R. § 1604.11(a) (1996). Before defining "sexual harassment," the EEOC first stated that sexual harassment is indeed a form of sex discrimination which violates Title VII. *Id.*

44. *See Meritor*, 477 U.S. at 65 (introducing the two different forms of sexual harassment).

45. *See id.* (describing activities that would constitute quid pro quo sexual harassment).

46. *Id.* at 65-67.

47. Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 567 (1996) (quoting Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 90 (1992)). Bodnar lists sexual jokes, remarks, touching, or pornographic displays as examples of unwelcome sexual attention. *Id.*

48. *See Meritor*, 477 U.S. at 64-65.

federal courts only recognized hostile environment discrimination claims for classifications based on race, religion, and national origin.[49] Following the EEOC's pronouncement in 1980 that sexual harassment violates Title VII, federal district and appellate courts used existing precedent on hostile environment causes of action to hold that Title VII prohibited hostile environment sexual harassment as well as quid pro quo sexual harassment.[50] In *Meritor Savings Bank v. Vinson*,[51] the Supreme Court agreed with the lower courts and held that both quid pro quo and hostile environment sexual harassment violate Title VII.[52] The Supreme Court found that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[53]

Unfortunately, the Supreme Court failed to define the standard of intent required for employer liability in a hostile environment sexual harassment case.[54] Taking note of Con-

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49. In *Rogers v. Equal Employment Opportunity Commission*, the Fifth Circuit became the first circuit court to recognize a discriminatory work environment claim. 454 F.2d 234, 239 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The *Rogers* court found that an employer who created a hostile work environment for a Hispanic employee by engaging in discriminatory treatment of Hispanic clientele violated Title VII. *Id.*

50. For example, the Court of Appeals for the Eleventh Circuit stated in *Henson v. City of Dundee*:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

682 F.2d 897, 902 (11th Cir. 1982).

51. 477 U.S. 57 (1986).

52. *Id.* at 64-66.

53. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The Supreme Court returned to the issue of severity in *Harris v. Forklift Systems., Inc.*, 114 S. Ct. 367 (1993). In *Harris*, the Court stated that the *Meritor* standard requires both an objectively hostile work environment and the victim's subjective perception that the conduct is abusive. *Id.* at 370. The Court adopted a totality of circumstances approach for determining the existence of an objectively hostile environment. *Id.* at 371. The Court held, however, that hostile environment sexual harassment need not "seriously affect [an employee's] psychological well-being" or cause actual injury before it creates a cause of action under Title VII. *Id.*

54. *Meritor*, 477 U.S. at 72. The district court adopted a standard requiring that the employer have notice of the hostile environment. *Id.* at 69. The court of appeals took the opposite view, holding the employer "strictly liable

gress's decision to define "employer" in Title VII to include "any 'agent' of an employer,"[55] the Court found a congressional intent to "place some limits on the acts of employees for which employers under Title VII are to be held responsible."[56] Accordingly, the Court stated that, although employers are not automatically liable for sexual harassment by their supervisors, the absence of notice "does not necessarily insulate that employer from liability."[57]

While the Supreme Court declined to decide what level of employer intent or notice plaintiffs must show to establish hostile environment sexual harassment claims under Title VII, federal appellate courts have uniformly held that an employer will be liable for the acts of a supervisor, coworker or third party if the employer knew or should have known of the hostile environment and took insufficient remedial action.[58] To prove hostile environment sexual harassment, therefore, federal appellate courts require that a plaintiff show that:

> (1) [the plaintiff] belongs to a protected group; (2) [the plaintiff] was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) [the defendant] knew or should have known of the harassment and failed to take proper remedial action.[59]

D. THE DEVELOPMENT OF TITLE IX AS A TOOL FOR ADDRESSING SEXUAL HARASSMENT

Courts first expanded Title IX's capacity to address sexual harassment by adopting Title VII case law. In 1977, the District Court of Connecticut in *Alexander v. Yale University*[60] be-

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for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct." *Id.* at 69-70. The court of appeals held that strict liability applied because the supervisor is "necessarily an 'agent' of his employer for all Title VII purposes." *Id.* at 70.

55. *Id.* at 72 (citing 42 U.S.C. § 2000e(b)).

56. *Id.*

57. *Id.*

58. Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421-22 (N.D. Cal. 1996). For cases holding that employers will be liable for acts of coworkers, supervisors, or third parties if they know or should have known of the sexual harassment and did not take reasonable steps to eliminate it, see, for example, *Murray v. New York University College of Dentistry*, 57 F.3d 243, 249 (2nd Cir. 1995); *Equal Employment Opportunity Commission v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988).

59. Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993).

60. 459 F. Supp 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

came the first court to hold that Title IX recognized a cause of action for quid pro quo sexual harassment.[61] The court reached its holding by analogizing the alleged quid pro quo sexual harassment to Title VII's prohibition of similar harassment in the workplace.[62] The court found it "perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment."[63]

In 1981, the Office for Civil Rights of the U.S. Department of Education (OCR), the agency that administers Title IX, recognized the expansion of Title IX by promulgating its own definition of sexual harassment.[64] The OCR Policy Memorandum defined sexual harassment as "verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX."[65]

Subsequently, the Supreme Court expanded the scope of Title IX sexual harassment claims. In *Cannon v. University of Chicago*,[66] the Court used Title VI jurisprudence to create a private right of action for Title IX plaintiffs.[67] Then, in *North Haven Board of Education v. Bell*,[68] the Supreme Court stated

61. *Id.* at 4-5.

62. *Id.* at 4.

63. *Id.*

64. *See* Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 806 (1994) (discussing the definition of sexual harassment and noting that the OCR Policy Memorandum did not define sexual harassment in the student-to-student context). The OCR published the memorandum specifically to address federal financial grant recipients who were engaging in sexual harassment. *See id.* (noting that the OCR Policy Memorandum did nothing to protect students from peer sexual harassment).

65. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir. 1996) (citing OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors 10 (Aug. 31, 1981) (on file with author) [hereinafter OCR Policy Memorandum]).

66. 441 U.S. 677 (1979).

67. *Id.* at 694-98.

68. 456 U.S. 512 (1982).

that when determining its scope, courts should accord Title IX "a sweep as broad as its language."[69]

Federal courts continued to expand the scope of Title IX by returning to Title VII jurisprudence and recognizing a cause of action for hostile environment sexual harassment in claims brought by employees of educational institutions.[70] The Tenth Circuit stated that Title VII should serve as the source for Title IX's hostile environment sexual harassment standard because Title VII prohibits the "identical conduct" proscribed by Title IX.[71] The First Circuit agreed, holding that an educational institution could be held liable under Title IX upon a finding that the institution knew or reasonably should have known of the hostile environment sexual harassment and failed to take remedial action.[72]

II. THE *FRANKLIN* DECISION AND ITS EFFECT ON TITLE IX LIABILITY STANDARDS

While the Supreme Court created a private right of action in *Cannon*, the only remedy available to Title IX plaintiffs was injunctive relief, which denied financial aid to the institution if it engaged in sexually discriminatory practices.[73] In the landmark case of *Franklin v. Gwinnett County Public Schools*,[74]

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69. *Id.* at 521.

70. *See* Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1366-67 (E.D. Pa. 1985) (adopting the Title VII hostile work environment sexual harassment standard in a Title IX claim), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986).

71. Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987).

72. *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988) (holding an educational institution liable under Title IX for failing to remedy hostile environment sexual harassment perpetrated by supervisors and coworkers of the plaintiff).

73. Cannon v. University of Chicago, 441 U.S. 677, 704-05 (1979).

74. 503 U.S. 60 (1992). Christine Franklin, a student in the Gwinnett County Public School system, alleged in her complaint that her teacher had sexually harassed her on an ongoing basis by asking her about her sexual experiences, asking her whether she would have sex with an older man, forcibly kissing her on the mouth, telephoning her at home, and coercing her to have intercourse with him. *Id.* at 63. Franklin did not allege that her teacher conditioned her academic achievement upon submission to his sexual demands. She alleged that other teachers and administrators, though aware of the harassment, did not try to prevent the continued abuse. *Id.* at 63-64. Franklin sued the school district for damages under Title IX, stating that the school district intentionally discriminated against her on the basis of sex. *Id.* at 64.

however, the Supreme Court unanimously held that private plaintiffs could receive monetary damages for intentional violations of Title IX.[75] In authorizing an award for damages under Title IX, the Supreme Court relied upon the presumption that Congress intends that all appropriate remedies are available to plaintiffs unless it expressly indicates otherwise.[76] The Supreme Court rejected the argument that the presumption of appropriate remedies should not apply because Congress enacted Title IX pursuant to its Spending Clause power.[77] The Court noted that monetary damages are not permitted for unintentional violations of Spending Clause statutes because the "receiving entity of federal funds lacks notice that it will be liable for a monetary award."[78] Lack of notice does not exist, however, when the plaintiff alleges intentional discrimination.[79]

In *Franklin*, the Supreme Court stated that Title IX "unquestionably"[80] imposed a duty on the school district not to discriminate on the basis of sex. The Court found that Gwinnett County discriminated on the basis of sex by analogizing teacher/student harassment to Title VII employment discrimination cases.[81] Citing *Meritor*, a Title VII case, the Court stated that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."[82] The Court concluded that the same rule of liability should apply in the Title IX context when a teacher sexually harasses a student.[83]

While *Franklin* clarified that damages are available for violations of Title IX, the decision left considerable confusion

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75. *Id.* at 76. The sole issue on appeal in *Franklin* was whether or not Title IX supported a claim for monetary damages. *Id.* at 65-66.

76. *Id.* at 66 (citing Davis v. Passman, 442 U.S. 228, 246-47 (1979)).

77. *Id.* at 74. The Supreme Court did not determine which power Congress utilized in enacting Title IX because it concluded that a money damages remedy was available regardless of the constitutional source of Title IX. *Id.* at 75 n.8. The defendant also argued that the traditional presumption of appropriate relief should not apply because an award of damages would violate separation of powers principles and because Title IX relief should be limited to backpay and prospective relief. *Id.* at 73-76. The Supreme Court rejected both arguments. *Id.*

78. *Id.* at 74.

79. *Id.* at 74-75.

80. *Id.* at 75.

81. *Id.*

82. *Id.* (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

83. *Id.*

as to what a plaintiff must prove to state a Title IX claim against a school district for its failure to remedy hostile environment sexual harassment. Federal courts addressing this issue disagree over whether a student seeking damages under Title IX must prove intent to discriminate on the part of the school board, or whether the student may state a claim using the Title VII "knew or should have known" liability standard.

Federal circuit and district court opinions have developed four different standards for school board liability: (1) Title VII "knew or should have known" liability;[84] (2) actual notice;[85] (3) intentional discrimination proven by direct and circumstantial evidence;[86] and (4) disparate treatment.[87] Title VII liability standards hold the school district liable if it knew or should have known of the sexual harassment and failed to take adequate steps to remedy the problem. Actual notice liability limits school board liability to situations where the school had actual knowledge of the discrimination. The third and forth standards function as variations of requiring intentional discrimination for school liability. The intentional discrimination by direct and circumstantial evidence standard requires the plaintiff to prove intentional discrimination, but allows the court to infer the existence of intentional discrimination when the school fails to address reports of peer sexual harassment. The disparate treatment liability standard requires plaintiffs to prove that the school intentionally discriminated by responding differently to claims of sexual harassment based on a student's gender. The Title VII liability standard and intentional discrimination approaches represent the dominant resolutions of the issue of school liability and the heart of the current federal court split.[88]

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84. *See infra* part II.A (describing the Eleventh Circuit and the Northern District Court of California's adoption of Title VII standards).

85. *See infra* note 88 (describing the Northern District of New York's adoption of the actual notice standard).

86. *See infra* part II.B (outlining the "intentional discrimination through direct and circumstantial evidence" standard).

87. *See infra* part II.C (reciting the Fifth Circuit's approach to school board liability).

88. The Northern District of New York in *Schofield ex rel. Bruneau v. South Kortright Central School District* became the only court to adopt the actual notice standard for school board liability. 935 F. Supp. 162, 173 (N.D.N.Y. 1996). In *Bruneau*, the court adopted Title VII standards in general but declined to adopt a "knew or should have known" liability standard because the agency relationships inherent in the employer-employee relationship do not exist between students and the school. *Id.* at 170-74. As of this

A. TITLE VII "KNEW OR SHOULD HAVE KNOWN" LIABILITY

In *Davis v. Monroe County Board of Education*,[89] the Eleventh Circuit addressed the issue of school board liability for peer sexual harassment.[90] Noting the connection drawn between Title VII standards and Title IX by the Supreme Court in *Franklin*,[91] and the Court's mandate to read Title IX broadly,[92] the *Davis* court concluded that Title IX encompasses a claim for hostile environment peer sexual harassment in the same manner as Title VII.[93] The court also cited a Letter of Finding by the OCR stating that "[i]f the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."[94] Based on its determination that Title VII standards were appropriate, the *Davis* court found that a school board could be held liable if it "knew or should have known" of the harassment and failed to take remedial action.[95]

Note's publication, no other court or commentator had adopted the "actual notice" liability standard. As a practical matter, the actual notice standard produces the same results as the intentional discrimination through direct and circumstantial evidence standard. Both standards require some form of direct knowledge of the harassment before school liability can occur, and both standards infer liability from this knowledge. Because the actual notice standard produces results identical to another standard and only one court has adopted the actual notice standard, it will not be discussed in this Note.

89. 74 F.3d 1186 (11th Cir.), *reh'g en banc granted, opinion vacated*, 91 F.3d 1418 (11th Cir. 1996).

90. The Eleventh Circuit, however, vacated the *Davis* decision and granted a rehearing en banc. Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996). The initial decision nonetheless merits mention because of its centrality in subsequent federal court opinions. At the time this Note was written, the Eleventh Circuit had not reheard the case.

91. *Davis*, 74 F.3d at 1190-92. The *Davis* court also noted the use of the *Franklin* opinion by lower courts as authority for applying Title VII standards to student sexual harassment claims under Title IX: "The [*Franklin*] Court's citation of Meritor . . . , a Title VII case, in support of *Franklin*'s central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995).

92. *Davis*, 74 F.3d at 1190; *see supra* note 69 accompanying text (stating the Supreme Court's mandate in *North Haven Board of Education v. Bell*).

93. *Davis*, 74 F.3d at 1193.

94. *Id.* at 1192 (quoting Letters of Findings by John E. Palomino, Regional Civil Rights Director, Region IV, at 2 (July 24, 1992) (on file with author)).

95. *Id.* at 1195.

The *Davis* court stated several public policy rationales for granting students greater protection than employees in the workplace. First, teachers have a greater ability than employers to model and control appropriate behavior in the classroom.[96] Second, sexual harassment can cause greater damage in the classroom than in the workplace because of the youth of the victims and the tendency for schools to institutionalize certain behaviors if they are allowed to continue.[97] Third, it is more difficult for students to leave their school than for employees to find new employment.[98] Finally, a nondiscriminatory classroom is essential for proper intellectual and emotional growth.[99]

Drawing from Title VII hostile environment liability standards, the *Davis* court fashioned a five-prong test. Under this test a plaintiff must show:

> (1) that [the plaintiff] is a member of a protected group; (2) that [the plaintiff] was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of [the plaintiff's] education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.[100]

Applying this test, the *Davis* court held that the fifth prong of the test could be shown if the school district "knew or should have known" of the sexual harassment and failed to take remedial action.[101]

One federal district court adopting the "knew or should have known" standard[102] has attempted to reconcile its adop-

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96. *Id.* at 1193.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1194. The Tenth Circuit recently addressed the issue of peer sexual harassment in *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), and adopted the five-prong *Davis* test for Title IX peer sexual harassment claims. *Id.* at 1232-33. The court held, however, that Seamons failed to meet the third element of the *Davis* standard, i.e., "that the harassment was based on sex." *Id.* Since Seamons did not satisfy the third prong, the Tenth Circuit declined to decide whether Title VII or intentional discrimination standards determined school board liability. *Id.* at 1232 n.7.

101. *Davis*, 74 F.3d at 1195.

102. This opinion was issued after the court granted plaintiff's motion for reconsideration of the court's earlier verdict. Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1416 (N.D. Cal. 1996). The *Doe* court found that the adoption of Title VII liability standards was appropriate in light of the significant Title IX case law adopting Title VII substantive standards in other contexts. *Id.* at 1421. The court also noted the strong public policy rationale for adopt-

tion of Title VII standards with the requirement of intentional discrimination in the Supreme Court's *Franklin* opinion. In *Doe v. Petaluma City School District*,[103] the court stated that the Supreme Court's use of Title VII hostile environment discrimination in cases following *Franklin* clarified the meaning of the phrase "intentional discrimination."[104] The *Doe* court also noted that the development of Title VII case law illustrates that the hostile work environment cause of action is "a species of intentional discrimination."[105] Therefore, the court concluded that intentional discrimination is "established by

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ing Title VII standards and the lack of any congressional intent in Title IX to provide a lesser degree of protection to students. *Id.* at 1422.

The *Doe* court had previously held that a plaintiff seeking damages under Title IX for peer sexual harassment must prove intentional discrimination: "[I]t is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it." Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571 (N.D. Cal. 1993). The "Petaluma I" court had allowed the plaintiff to prove intentional discrimination by circumstantial evidence. *Id.* at 1576.

103. 949 F. Supp. 1415 (N.D. Cal. 1996).

104. *Id.* at 1422. The *Doe* court began its analysis by turning to the Supreme Court's 1994 opinion in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In *Landgraf*, the plaintiff alleged Title VII liability for an immediate supervisor's failure to remedy sexual harassment by a peer coworker. *Id.* at 1488. In determining the validity of the plaintiff's claim for monetary damages the Court examined the 1991 amendments to Title VII which preclude the award of monetary damages in cases not involving "intentional discrimination." *Id.* The *Doe* court characterized the definition of intentional discrimination in the amendments as "any form of discrimination other than 'an employment practice that is unlawful because of its disparate impact.'" *Doe*, 949 F. Supp. at 1422 (quoting 42 U.S.C. § 1981a(a)(1) (1994)). The *Doe* court construed the Supreme Court's discussion of the retroactivity of the 1991 amendments as an implicit recognition that hostile environment discrimination is a form of intentional discrimination. *Id.* The *Doe* court specifically cited the Supreme Court's determination that the 1991 amendment "confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged." *Id.* (quoting *Landgraf*, 114 S. Ct. at 1506).

105. *Id.* at 1422-23. The *Doe* court first distinguished unlawful disparate treatment and unlawful disparate impact as the two bases for proving Title VII violations. *Id.* Disparate treatment requires the proof of intentional discrimination, whereas unlawful disparate impact does not. The *Doe* court then concluded that the elements for Title VII liability most closely resemble disparate treatment standards. *Id.* at 1423. On the issue of employer liability, the *Doe* court found that the Ninth Circuit courts applying the Title VII "knew or should have known" standard of liability viewed the standard as an intentional discrimination standard and not a negligence standard. *Id.* (citing Equal Employment Opportunity Comm'n v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989); Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1421-22 (7th Cir. 1986)).

proof of the elements required to prove the cause of action and needs no additional proof."[106]

B. INTENTIONAL DISCRIMINATION THROUGH DIRECT AND CIRCUMSTANTIAL EVIDENCE

The majority of courts confronting the issue of peer sexual harassment have held that plaintiffs must show that the school intentionally discriminated against them on the basis of their sex in order to collect monetary damages under Title IX.[107] These courts allow the trier of fact to infer an intent to discriminate from the totality of the circumstances, including evidence of the "school's failure to prevent or stop the harassment despite actual knowledge, the school's toleration of the harassing behavior and the pervasiveness or severity of the harassment."[108]

Typically, these courts rely on *Franklin* in reaching the conclusion that Title IX requires a showing of intentional discrimination. For example, in *Wright v. Mason City Community School District*[109] the court noted that the "Supreme Court's opinion in *Franklin* explicitly demands more than mere negligence to create liability for monetary damages for a violation of

106. *Id.* at 1424 (finding that the "two elements of intent, the harasser's intentional disparate treatment based on gender and the employer's act of implicitly condoning that disparate treatment by knowingly failing to take steps to remedy it, are included within the elements of hostile work environment discrimination required under Title VII" and accordingly require no additional proof).

107. *See, e.g.*, Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (W.D. Mo. 1995); Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1463-65 (N.D. Cal. 1995). The Northern District Court of Iowa also adjudicated a peer sexual harassment case under the requirement of intentional discrimination. Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996). In *Burrow*, however, the plaintiff conceded that she must prove intent to discriminate and the court accordingly assumed that intent was required, while reserving final judgment for a later time. *Id.* at 1205.

108. *Burrow*, 929 F. Supp. at 1204; *see also Bosley*, 904 F. Supp. at 1020 (holding that discriminatory intent does not "require proof that unlawful discrimination is the sole purpose behind each act of the defendant . . . . It is, rather, the cumulative evidence of action and inaction which objectively manifests discriminatory intent."); *Oona*, 890 F. Supp. at 1469 ("Such discrimination may manifest itself in the active encouragement of peer harassment, the toleration of harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment.").

109. 940 F. Supp. 1412 (N.D. Iowa 1996).

Title IX—it requires plaintiffs to show an intent to discriminate."[110]

These courts also address *Franklin*'s use of Title VII case law. In *Bosley v. Kearney R-1 School District*,[111] the court, noting *Franklin*'s reliance on *Meritor*, held that Title VII case law should provide the remaining substantive elements for a Title IX sexually hostile environment claim.[112] These courts accordingly adjust the elements for hostile environment sexual harassment under Title VII to reflect its determination that *Franklin* requires a showing of intentional discrimination.[113]

C. DISPARATE TREATMENT LIABILITY

In *Rowinsky v. Bryan Independent School District*,[114] the Fifth Circuit rejected the "knew or should have known" standard and found that a Title IX plaintiff seeking to establish liability for failure to remedy peer sexual harassment must prove that the school district directly discriminated by responding to the harassment differently based on the sex of the victim.[115] Unlike the Eleventh Circuit, the Fifth Circuit construed the issue of peer sexual harassment as a broader question of whether courts can hold a recipient of federal grant money liable for the sexually discriminatory conduct of a party other than the recipient or the recipient's agent.[116] The *Rowin-*

110. *Id.* at 1419. The Northern District Court of California in *Oona* likewise concluded that the *Franklin* decision required a showing of intentional discrimination. 890 F. Supp. at 1465. In determining the meaning of the *Franklin* decision, the *Oona* court specifically relied upon the manner in which the *Franklin* court used *Pennhurst* to distinguish intentional from unintentional discrimination. *Id.*

111. 904 F. Supp. 1006 (W.D. Mo. 1995).

112. *Id.* at 1022 ("*Franklin* supports the conclusion that Title VII law provides standards for enforcing the anti-discrimination provisions of Title IX."). The *Bosley* court noted that this holding was consistent with the Supreme Court's command to accord Title IX a broad sweep, as well as with the trend in federal courts to use Title VII in analyzing Title IX claims and with the instructions of the EEOC guidelines to "consider Title VII standards in determining whether an employer has violated Title IX." *Id.*

113. *Id.* at 1023 (requiring proof that "the school district knew of the harassment and intentionally failed to take proper remedial action"). The *Wright* and *Burrow* courts adopted the same five-prong standard. Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205-06 (N.D. Iowa 1996).

114. 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 156 (1996).

115. *Id.* at 1016.

116. *Id.* at 1010. The *Rowinsky* court subsequently rejected the proposi-

sky court found that while the text of Title IX was ambiguous as to the conduct of third parties, the scope,[117] structure,[118] legislative history,[119] and agency interpretation by the OCR[120] all indicated that Title IX liability exists when grant recipients or their agents discriminate on the basis of sex.[121] Accordingly, the *Rowinsky* court held that a Title IX plaintiff seeking to establish liability for failure to prevent peer sexual harassment must show discrimination based on sex.[122]

The Fifth Circuit also found that the word "discrimination" in Title IX could not be read to include hostile environment sexual harassment in the case of peer sexual harassment by students, because a theory of discrimination fashioned for the adult workplace is inappropriate for a situation involving chil-

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tion that a student might be considered an agent of the school. *Id.* at 1010-11 n.9.

117. The *Rowinsky* court stated that the scope of Title IX is limited to grant recipients because Congress enacted Title IX under its Spending Clause powers. *Id.* at 1012. While the Fifth Circuit acknowledged that the Supreme Court has left the issue open, it nonetheless concluded that three factors strongly suggest that Title IX is a Spending Clause statute. *Id.* at 1012 n.14. First, Title IX was modeled after Title VI, a Spending Clause statute, and should be given the same construction. *Id.* Second, the statute regulates purely private academic institutions. *Id.* Finally, the Supreme Court will not attribute congressional intent to act under the Fourteenth Amendment, unless it expressly indicates it is doing so. *Id.* at 1012-13 n.14 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981)).

Based on the conclusion that Title IX is a Spending Clause statute, the *Rowinsky* court held that liability exists only for the acts of grant recipients and their agents. Noting that the "value of a spending condition is that it will induce the grant recipient to comply with the requirement in order to get the needed funds," *id.* at 1013, the *Rowinsky* court reasoned that "[i]n order for the coercion to be effective, the likelihood of violating the prohibition cannot be too great." *Id.* Imposing liability for the acts of third parties would destroy the effectiveness of the spending condition because grant recipients have minimal control over third party actions. *Id.*

118. The *Rowinsky* court noted that with the exception of one phrase, the statute exclusively discusses discrimination by grant recipients. *Id.*

119. The Fifth Circuit quoted numerous speeches by Senator Bayh, the statute's sponsor, which list the purposes of Title IX. *Id.* at 1014. The court noted that all of the purposes concerned the acts of grant recipients. *Id.*

120. *See supra* note 65 and accompanying text (quoting the OCR Policy Memorandum). The *Rowinsky* court explicitly stated that the OCR Letters of Finding which were used by the *Davis* court should be accorded little weight because the letters "do not reflect the deliberate consideration of a rulemaking proceeding." Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

121. *Rowinsky*, 80 F.3d at 1012-16.

122. *Id.* at 1016 (specifying that "a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls").

dren.[123] Moreover, the court stated that all Title VII cases finding liability for harassment by third parties were inapplicable to the case of peer student harassment because the Title VII cases always involved the "power of the employer."[124]

III. TITLE VII VS. INTENTIONAL DISCRIMINATION: THE TWO HEADS OF TITLE IX

While courts facing peer sexual harassment have naturally turned to Title VII case law, they must recognize that "Title VII jurisprudence is a guide, and . . . court[s] should not blindly apply Title VII to determine the issues raised in a Title IX case."[125] Federal courts must look to both Title VII hostile environment case law and Title VI intentional discrimination requirements in fashioning an appropriate and legally sound remedy for victims of peer sexual harassment. This Note proposes that a student plaintiff seeking to hold a school district liable under Title IX for failing to remedy peer sexual harassment must show that the educational institution knew of the harassment and intentionally failed to take the proper remedial measures because of the plaintiff's sex.[126]

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123. *Id.* at 1011 n.11. The court explained that the "problem with sexual harassment is 'the unwanted imposition of sexual requirements in the imposition of unequal power.'" *Id.* (quoting CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979)). The court then argued that the only unequal power relationship in a school is the relationship between the school and the student. Since no unequal power situation exists, "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker." *Id.*

124. *Id.* The *Rowinsky* court specifically stated that the plaintiff could not rely on *Franklin* to establish the proposition that sexual harassment by students may be attributed to the school board. *Id.* The court noted that sexual harassment by a teacher involves the power of the employer because the teacher is an agent of the grant recipient. *Id.*

125. Schofield *ex rel.* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 170 (N.D.N.Y. 1996).

126. Before reaching the basis for institutional liability, federal courts must first determine whether Title IX recognizes a claim for the unique situation of peer hostile environment sexual harassment, and whether the plaintiff has proven the first four elements of the hostile environment sexual harassment standard. The specific legal and policy issues in these two steps fall outside the scope of this Note. In general, district and circuit courts addressing the issue of liability for student sexual harassment have—with the exception of the Fifth Circuit—concluded that the school district has potential liability in some form for peer sexual harassment. Most courts and commentators have rejected the Fifth Circuit's approach on the grounds that it incorrectly focuses on the conduct of the harassing students, instead of the actions or inactions of the school district and its agents. *See, e.g.*, Doe v. Petaluma

A. COURTS THAT APPLY TITLE VII STANDARDS MISINTERPRET TITLE VII CASE LAW

Federal courts adopting Title VII's "knew or should have known" standard for liability rely on the Supreme Court's decision in *Franklin*, the Court's directive to accord Title IX a sweep as broad as its language, and agency interpretations by the OCR.[127] These sources, however, do not support the adoption of Title VII liability standards. Federal courts and commentators relying on these sources have either misread or overstated their significance in applying Title VII's broad liability standard.

1. Title VII Courts Misinterpret the Relationship Between *Franklin* and *Meritor*

Typically, courts cite the Supreme Court's opinion in *Franklin* as the primary rationale for adopting Title VII standards in Title IX peer sexual harassment cases.[128] The *Frank-*

City Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (finding that the Fifth Circuit fundamentally misunderstood the nature of the peer sexual harassment claim because "[t]he actual thrust of this type of claim, is to impose liability on the school district based not on the harassing conduct of its students, but on the district's own conduct of knowingly permitting the discriminatory hostile and abusive environment to continue"); *see also* Recent Case, *Sexual Harassment—Title IX—Fifth Circuit Holds School District Not Liable for Student-to-Student Sexual Harassment*—Rowinsky v. Bryan Independent School District, 110 HARV. L. REV. 787, 792 (1996) (claiming that the Fifth Circuit's three justifications for denying school liability actually support finding school liability for the acts of third parties in peer sexual harassment cases).

Furthermore, the *Rowinsky* court's standard of liability yields results at odds with fundamental anti-sex discrimination principles. Under the *Rowinsky* approach, a school district can avoid liability as long as boys and girls are treated equally. This would mean that schools could avoid liability by ignoring all student harassment. In a school where only harassment against girls existed, the school could intentionally discriminate against girls by ignoring their protests and still avoid liability. Such a standard runs contrary to Title IX, which seeks to prevent all sex discrimination in educational institutions.

127. *See, e.g.*, *supra* part II.A (describing the *Davis* court's reliance on the *Franklin* opinion, the Supreme Court's mandate, and the OCR Letters of Finding).

128. *See supra* note 91 and accompanying text (noting the Eleventh and Second Circuit's citation to *Franklin*). Commentators also point to *Franklin* as grounds for adopting Title VII liability standards in Title IX peer sexual harassment cases. *See, e.g.*, Elizabeth J. Gant, Comment, *Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972: An Avenue of Relief for Victims of Student-To-Student Harassment in the Schools*, 98 DICK. L. REV. 489, 506 (1994) (finding the Supreme

lin opinion, however, cannot be read to sanction the adoption of Title VII hostile environment sexual harassment standards because the school's liability in that case rested on agency principles, not "knew or should have known" liability. Federal courts claiming that *Franklin* adopted Title VII standards point to the Court's citation of *Meritor Savings Bank, FSB v. Vinson*,[129] which served as the basis for finding that the teacher's conduct constituted sexual harassment.[130] Upon closer examination, however, the phrase taken from *Meritor* does not compel, or even suggest, an adoption of Title VII liability standards.

The *Franklin* Court quoted *Meritor* for the proposition that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."[131] The *Meritor* Court made this statement in determining whether the plaintiff had been sexually harassed at all, not when determining the employer's liability.[132] Accordingly, the statement relates to the existence of the second prong of the hostile environment sexual harassment claim, whether the plaintiff was subjected to unwelcome sexual harassment, and not the fifth prong, the basis of institutional liability. In the context of the *Franklin* opinion, therefore, the statement taken from *Meritor* stands for the unremarkable proposition that by sexually harassing Christine Franklin, the teacher himself engaged in sex discrimination.

The statements made by the *Franklin* Court following the quote from *Meritor* further support the determination that the Court did not invoke or adopt Title VII liability standards. After determining that the teacher engaged in sex discrimination, the Court did not apply any existing Title VII liability standard to find the school board liable.[133] While the facts in *Franklin* supported Title VII liability because the plaintiff alleged that teachers and administrators actually knew of the harassment,[134] the Court did not refer to that information

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Court's opinion in *Franklin* justifies the extension of Title VII "knew or should have known" liability standards).

129. 477 U.S. 57 (1986).

130. *See supra* note 82 and accompanying text (describing the *Franklin* Court's citation to *Meritor*).

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

132. *Meritor*, 477 U.S. at 64.

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

134. *Id.* at 63-64.

when it characterized the plaintiff's claim as one for intentional discrimination.[135]

The *Franklin* Court's refusal to mention or adopt Title VII standards suggests that the Court used an alternative principle to find the school liable for the intentional acts of the teacher. The Court did not mention the actions of anyone other than the teacher in finding intentional discrimination, indicating that the Court found the school liable on the basis of agency principles.[136] Because the teacher was an agent of the school, the school was liable for his actions. The *Franklin* opinion, therefore, does not support Title VII liability standards as a basis for institutional liability in Title IX actions.

2. Title VII Courts Misinterpret Supreme Court Precedent on Title IX's Scope

Federal courts adopting Title VII liability standards have also misstated the importance of the Supreme Court's directive to accord Title IX "a sweep as broad as its language." The Supreme Court directed courts to give Title IX a sweep as broad as its language in the context of determining what parties would fall within the scope of the statute.[137] When the Court turned to analyze other Title IX concerns in the case, it did not apply the directive.[138] In the peer sexual harassment context, therefore, the Supreme Court's directive dictates that courts consider students a protected class under Title IX. The directive, however, does not speak to what standard of institutional liability the courts should adopt. Therefore, courts must not read the Supreme Court's dictate as advocating Title VII liability standards.

3. Title VII Courts Misinterpret Agency Interpretation

Finally, courts have overstated the significance of the OCR's interpretations on the subject of sexual harassment in

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135. *Id.* at 75.

136. *See* Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1575 (N.D. Cal. 1993) (concluding that the *Franklin* Court held the school liable because of agency principles, not Title VII liability standards).

137. *See* Northhaven Bd. of Educ. v. Bell, 456 U.S. 512, 520-22 (1982) (giving Title IX an expansive scope by recognizing that the word "person" encompasses employees, as well as students, of federally funded education programs).

138. *See id.* at 535-40 (analyzing whether regulations promulgated under Title IX needed to be program-specific without adopting a sweeping mode of statutory interpretation used to determine scope).

general, and peer sexual harassment in particular. Several courts cite OCR interpretations as support for a "knew or should have known" liability standard in Title IX peer sexual harassment cases.[139] The OCR Policy Memorandum,[140] the "most definitive statement by the OCR on sexual harassment,"[141] left the issue of Title IX grant recipient liability for student peer sexual harassment unresolved.[142] The Policy Memorandum, therefore, does not compel Title VII standards.

The only OCR documents which address peer sexual harassment are two sets of Letters of Finding by regional offices.[143] These OCR Letters of Finding state that educational institutions should be held liable for peer sexual harassment under Title VII standards.[144] These documents, however, do not compel Title VII liability. Letters of Finding do not deserve the same degree of judicial deference as official policy regulations because they are not the product of an agency rule-making decision.[145] Furthermore, as the Fifth Circuit observed, the purpose of the Letters of Finding is to "compel voluntary compliance by an offending institution."[146] This fact is crucial, because the Letters of Finding by the OCR regional offices "do not address what private judicial remedies are available under Title IX."[147] Indeed, a standard of liability for school districts

139. *See, e.g., supra* note 94 and accompanying text (stating the *Davis* court's reliance on an OCR Letter of Finding in holding that Title VII standards should apply).

140. *See* OCR Policy Memorandum, *supra* note 65, at 10 (defining "sexual harassment").

141. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir. 1996).

142. *See* OCR Policy Memorandum, *supra* note 65, at 10 (leaving unresolved the issue of a recipient's liability for "sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other students").

143. Letters of Findings by Kenneth A. Mines, Regional Civil Rights Director, Region V (April 27, 1993) (on file with author); Letters of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992) (on file with author).

144. *See supra* text accompanying note 94 (quoting 1992 Letters of Findings which proposes Title VII liability standards).

145. *See supra* note 120 (noting the Fifth Circuit's determination that agency decisions which are not the product of official rule-making processes do not merit as much judicial deference).

146. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

147. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1573 (N.D. Cal. 1993).

may be appropriate for certain types of relief, such as voluntary compliance, and not for others, such as private damages.[148] As the Supreme Court stated, "Whether a litigant has a cause of action 'is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'"[149] Since neither the *Franklin* decision, the Supreme Court's directive, nor OCR interpretations support Title VII standards, federal courts adopting "knew or should have known" liability standards incorrectly interpret the law governing Title IX.

4. Title VII "Knew or Should Have Known" Liability Does Not Constitute Proof of Intentional Discrimination

Federal Courts also should not attempt to circumvent legal precedent by finding that Title VII liability standards constitute proof of intentional discrimination. The majority of federal courts addressing the issue of school liability for peer sexual harassment characterize Title VII "knew or should have known" standards as distinct from intentional discrimination.[150] In *Doe*, however, the Northern District Court of California found that the Title VII liability standard actually developed as a species of intentional discrimination and accordingly met the requirements of *Franklin*.[151]

The *Doe* court correctly determined that hostile environment sexual harassment claims developed as a species of disparate treatment violations which require proof of intentional discrimination. The court, however, entirely missed the fact that these claims function as disparate treatment claims because of the intentional discrimination committed by the harassing parties, not the conduct of the employer/institution who "should have known" of the harassment and failed to provide a

148. Title IX's status as a Spending Clause statute imposes different standards of proof according to the type of remedy sought. *See infra* notes 174-179 and accompanying text (stating that Title IX plaintiffs can only seek monetary damages if they allege intentional discrimination).

149. Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 595 (1983) (quoting Davis v. Passman, 442 U.S. 228, 239 (1979)).

150. *See, e.g.*, Schofield *ex rel.* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 173 (N.D.N.Y. 1996) (stating that the constructive notice prong, or the "should have known" element of the Title VII test is a negligence standard); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1206 (N.D. Iowa 1996) (distinguishing Title VII standards from a higher standard of actual knowledge).

151. *See supra* notes 105-106 and accompanying text (summarizing the *Doe* court's findings that Title VII liability standards constitute proof of intentional discrimination).

remedy. In reaching this decision, however, the *Doe* court improperly relied on several circuit court cases.

The court first relied on *Hunter v. Allis-Chalmers Corporation, Engine Division*,[152] in which the Seventh Circuit stated that a "failure to take reasonable steps to prevent" racial harassment would make the employer liable if management level employees "knew, or in the exercise of reasonable care should have known, about the campaign of harassment."[153] The Seventh Circuit indicated, however, that "knew or should have known" liability is different from intentional discrimination. The *Hunter* court consistently referred to the responsibility of the employer to exercise reasonable care under the circumstances.[154] A reasonable care standard reflects a standard based on negligence principles, not intentional discrimination. In fact, the court explicitly labeled the defendant's liability as deriving from its "negligence" in not addressing racial discrimination directed at the plaintiff by his coworkers.[155]

Furthermore, the Seventh Circuit explicitly stated that the behavior it found intentional was the racial harassment by Hunter's coworkers, not the failures of the employer. The court defined racial harassment as an intentional wrong and stated that the doctrine of respondeat superior makes "an employer liable for those intentional wrongs of his employees that are committed in furtherance of the employment." The court further noted that the "tortfeasing employee must think . . . that he is doing the employer's business in committing the wrong."[156]

Doe then relied on *Henson v. City of Dundee*,[157] an Eleventh Circuit opinion that also compels a reading contrary to the interpretation of the *Doe* court. The *Doe* court cited *Hen-*

152. 797 F.2d 1417 (7th Cir. 1986). The case addressed racial discrimination in violation of 42 U.S.C. § 1981 (1994). *Hunter*, 797 F.2d at 1420. In pertinent part, 42 U.S.C. § 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Courts have interpreted 42 U.S.C. § 1981 to forbid racial discrimination in employment. *Hunter*, 797 F.2d at 1420. Hunter also brought a claim under Title VII, but the judge declined to enter judgment on this count, stating she "would have reached the same result on the Title VII charge" as the jury did on the § 1981 charge. *Id.* at 1421.

153. *Hunter*, 797 F.2d at 1421.

154. *Id.* at 1421-22 (e.g., "in the exercise of reasonable care"; "could have prevented by reasonable care"; "[t]he employer's liability thus is not strict . . . his only duty is to act reasonably in the circumstances").

155. *Id.* at 1422 (emphasis added).

156. *Id.* at 1421-22 (emphasis added).

157. 682 F.2d 897 (11th Cir. 1982).

son's treatment of hostile environment harassment claims as disparate treatment claims that require intentional discrimination.[158] The *Doe* court, however, missed the fact that *Henson* discussed intentional discrimination in the context of the third prong of Title VII's hostile environment sexual harassment standard, which deals with harassment based on sex.[159] In so doing, the *Henson* court made clear that hostile environment sexual harassment claims are disparate treatment claims because of the harassing party's intentional decision to discriminate on the basis of sex, not the employer's failure to remedy the harassment when it "should have known" of its existence.

Finally, *Doe* relied on a Third Circuit decision that likewise defined only the act of the perpetrator as intentional discrimination.[160] The Third Circuit explained, "The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course."[161]

The holdings of these three cases reveal that while Title VII hostile environment sexual harassment claims may be a species of intentional discrimination, the "knew or should have known" standard for employer liability remains a negligence standard. The *Doe* court erred by holding that this standard met Title IX's requirement that the educational institution intentionally discriminated on the basis of sex when it "knew or should have known" of the peer sexual harassment and failed to provide a remedy.

B. THE INTENTIONAL DISCRIMINATION STANDARD IS CONSISTENT WITH LEGAL PRECEDENT

1. Title IX Is a Spending Clause Statute

Because existing legal precedent does not require Title IX to reflect Title VII liability standards, federal courts should look to Title IX's status as a Spending Clause statute to determine the appropriate standard for institutional liability. When courts determine the power under which Congress en-

158. Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1423 (N.D. Cal. 1996).

159. Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

160. Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990).

161. *Id.* at 1482 n.3.

acted legislation they choose between "Congress' power to enforce the Fourteenth Amendment and its power under the Spending Clause to place conditions on the grant of federal funds."[162] Although the Supreme Court in *Franklin* refused to determine whether Congress acted pursuant to its Spending Clause powers in enacting Title IX,[163] closer examination reveals that Title IX is a Spending Clause statute.[164]

Congress intentionally drafted Title IX after Title VI, providing in Title IX's provisions that Title VI regulations should be incorporated into Title IX.[165] Like Title VI regulations, Title IX requires federally funded institutions to conform with its prohibition on certain categories of discrimination.[166] A contractual relationship between the grant recipient and the federal government evinces that Title IX functions as a Spending Clause statute.[167] Since Title VI and Title IX function through similar contractual regulations, courts should interpret Title IX as a Spending Clause statute.

Furthermore, construing Title IX as a statute enacted pursuant to the Fourteenth Amendment would limit Title IX's scope to schools receiving state funding. The Equal Protection Clause of the Fourteenth Amendment operates exclusively as a restriction on a "[s]tate or . . . those acting under color of its authority."[168] In contrast, "actions of the Federal Government and its officers are beyond the purview" of the Fourteenth Amendment.[169] This distinction is important for assessing Title IX's applicability to private educational institutions because while the "receipt of state funding may transform a private

162. Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 15 (1981).

163. *See supra* note 117 (citing the Fifth Circuit's determination that the Supreme Court has reserved the issue of whether Title IX is a Spending Clause statute).

164. The Fifth Circuit in *Rowinsky* correctly determined that Congress enacted Title IX under the Spending Clause statute rather than § 5 of the Fourteenth Amendment. *See supra* note 117 (summarizing the grounds on which the *Rowinsky* court found that Congress passed Title IX pursuant to its Spending Clause powers).

165. *See supra* note 32 and accompanying text (stating Congress's intent that Title VI and Title IX be similarly construed).

166. *See supra* note 21 and accompanying text (quoting the operative language of Title IX).

167. *See supra* note 36 and accompanying text (stating that Spending Power statutes function as a contract between the grant recipient and the government).

168. District of Columbia v. Carter, 409 U.S. 418, 423 (1972).

169. *Id.* at 424.

school into a state actor for Fourteenth Amendment purposes, the receipt of federal funds does not make a private school a state actor."[170] Accordingly, any attempt to find Title IX liability for a private school which receives federal, but not state funds, would "push the limits of the Fourteenth Amendment."[171]

Finally, construing Title IX as a Fourteenth Amendment statute runs contrary to general norms of statutory interpretation. Courts seldom find that Congress intended to act under its authority to enforce the Fourteenth Amendment "[b]ecause such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority."[172] Because nothing in Title IX itself or its legislative history evidences a congressional intent to act under its Fourteenth Amendment powers, courts should interpret Title IX as a Spending Clause statute.[173]

2. Plaintiffs Seeking Damages Under Spending Clause Statutes Must Show Intentional Discrimination

In *Guardians Ass'n v. Civil Service Commission of New York*, the Supreme Court found that monetary remedies are available for intentional violations of a Spending Clause statute.[174] The *Franklin* Court agreed and held that a private damages remedy exists under Title IX for intentional discrimination.[175] A Title IX plaintiff, therefore, can recover monetary damages when a school district fails to remedy peer sexual harassment and the school intentionally discriminates on the basis of sex.

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170. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1012 n.14 (5th Cir. 1996).

171. *Id.*

172. *Id.* at 1012-13 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981)).

173. *Id.* at 1013 n.14.

174. *See supra* note 40 and accompanying text (summarizing the opinion of the *Guardians* Court majority that monetary remedies were available for intentional violations of Title VI). While the Supreme Court's opinion in *Guardians* lacked a majority opinion, the *Franklin* Court noted that "a clear majority [of the *Guardian* Court] expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation." Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70 (1992).

175. *See supra* notes 78-79 and accompanying text (distinguishing intentional from unintentional violations of Title IX).

The principles formulated in *Pennhurst*, *Guardians*, and *Franklin*, however, deny a plaintiff monetary damages when a school does not intentionally discriminate on the basis of sex.[176] Under *Pennhurst* and *Guardians*, judicial remedies for violations of Spending Clause statutes must allow grant recipients to comply with additional obligations found by the court or terminate its receipt of federal funds.[177] The *Franklin* Court correctly observes that a grant recipient cannot be liable for an unintentional violation of a Spending Clause statute because the grant recipient "lacks notice that it will be liable for a

176. Commentators writing on use of Title IX to combat peer sexual harassment in schools have failed to address the role of Spending Clause precedent when exploring the proper basis for institutional liability. The overwhelming majority of commentators fail to mention the relevance of Spending Clause precedent at all. *See* Bodnar, *supra* note 47, at 567 (proposing to amend Title IX to address more appropriately peer sexual harassment without addressing Spending Clause power issues); Charlie James Harris, Jr., *Message to the Judiciary: The Proper Application of Title IX May Save Our Children*, 63 UMKC L. REV. 429, 449-53 (1995) (proposing a pari materia adoption of Title VII principles without discussing Spending Clause precedent); Carrie Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 307-08 (1994) (adopting Title VII liability standards for peer sexual harassment without discussing Spending Clause principles); Gant, *supra* note 128, at 513-16 (settling on Title VII liability as a compromise between strict liability and no liability, but failing to consider intentional discrimination as an option); Sherer, *supra* note 11, at 2122 (adopting "knew or should have known" liability after failing to discuss Spending Clause power limitations on Title IX).

Commentators that have addressed Spending Clause principles have not disputed the intentional discrimination precedent set by *Pennhurst*, *Guardians*, and *Franklin*, but rather have attempted to circumvent its impact on Title IX, and in the process, ignored the contractual principles underlying the legal precedent. *See* Miller, *supra* note 27, at 717-20 (relying on agency interpretation by the OCR and lack of clear congressional intent to remedy *Guardians*' requirement of intentional discrimination); Eriksson, *supra* note 23, at 1813-17 (attempting to distinguish *Guardians* on stare decisis, implementing regulations, and public policy grounds). One commentator advocating an intentional discrimination standard cited *Guardians* and *Franklin* but failed to discuss the underlying reason why Spending Clause statutes require proof of intentional discrimination for monetary liability. *See* Rinestine, *supra* note 64, at 822-23 (summarizing the *Doe I* court's opinion that *Guardians* and *Franklin* required intentional discrimination). As of the date of this Note, the only other commentator to advocate an intentional discrimination standard relied solely on policy rationale and failed to mention controlling Spending Clause precedent. *See* Sylvia Hermann Bukoffsky, Note, *School District Liability for Student-Inflicted Sexual Harassment: School Administrators Learn a Lesson Under Title IX*, 42 WAYNE L. REV. 171, 192-93 (1995) (advocating an intentional discrimination standard for Title IX peer sexual harassment cases).

177. *See supra* note 37 and accompanying text (noting the privilege held by grant recipients).

monetary award."[178] The grant recipient lacks notice because unintentional violations do not inform the recipient that it "had been violating the federal standards."[179]

The grant recipient, however, is liable for intentional violations of the statute because it violated part of the funding requirements of which the grant recipient was aware when it contracted with Congress. When the grant recipient intentionally violates the clear requirements of the federal funding, it has full notice of the obligations it holds and, therefore, should not be accorded the opportunity to reassess its costs. The *Franklin* opinion noted that Title IX "unquestionably" placed a duty on schools not to discriminate on the basis of sex.[180] Therefore, a Title IX plaintiff must show that the school intentionally discriminated on the basis of sex in order to obtain compensatory relief.

3. Showing Intentional Discrimination Through Direct and Circumstantial Evidence Is Consistent with Title IX Precedent

While a plaintiff seeking damages for a school's failure to remedy peer sexual harassment must prove that the school intentionally discriminated against the plaintiff on the basis of sex, federal courts should allow plaintiffs to meet that burden by direct and circumstantial evidence. Several federal district courts presently allow plaintiffs to prove intentional discrimination on the basis of sex by the totality of evidence.[181] Circumstantial evidence of intent fulfills the plaintiff's burden under Title IX because the behavior used as circumstantial evidence proves intentional discrimination and public policy supports a broad understanding of intentional discrimination.

The courts that allow circumstantial evidence infer intentional discrimination if the school knew of the harassment and actively encouraged the harassment, tolerated harassing behavior, or failed to take adequate steps to deter or punish

178. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1992).

179. Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 598 (1983).

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

181. *See supra* notes 107-110 and accompanying text (discussing the *Wright*, *Burrow*, and *Oona* holdings).

known peer harassment.[182] In order to reach the issue of institutional liability, a court must first determine that the sexual harassment experienced by the plaintiff was severe enough to alter the condition of the plaintiff's education.[183] Sexual harassment of this magnitude denies the plaintiff the benefits of education on the basis of the plaintiff's sex. If a school has knowledge of sexual harassment and encourages the harassment, tolerates the harassment, or otherwise refuses to act, it makes an intentional choice to let the discrimination continue. This intentional choice sanctions discrimination based on sex. Sanctioning discrimination based on sex contradicts *Franklin*, which stated that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[184] Circumstantial evidence of intent, therefore, establishes the school's intentional decision to discriminate on the basis of sex in violation of Title IX.

Furthermore, public policy supports the use of circumstantial evidence to prove intentional discrimination. If courts required a plaintiff to show intentional discrimination apart from circumstantial evidence, the plaintiff would have to provide statements, documents or some other form of evidence which directly implicated the school in a plan to discriminate against the plaintiff on the basis of his or her sex. This burden of proof, similar to that required by the Fifth Circuit,[185] would have the effect of rendering Title IX useless for most victims of peer sexual harassment.[186] Schools could escape liability by dismissing all peer sexual harassment claims or carefully avoiding statements that indicated the school's decisions to ignore student's complaints were based on their gender. Such a policy would render students powerless to hold indifferent or

182. *See* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (stating the factors used by the court to prove intentional discrimination under the circumstantial evidence approach).

183. The severity requirement is enforced by the fourth prong of the peer hostile environment sexual harassment standard. *See supra* text accompanying note 100 (quoting the standard adopted by the Eleventh Circuit).

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

185. *See supra* note 122 and accompanying text (stating the evidence required by the Fifth Circuit).

186. *See* Eriksson, *supra* note 23, at 1816 (observing that "a traditional intent requirement would force a victim to prove that school officials intended for boys to harass girls and deliberately encouraged this result" and concluding that such a standard would "handcuff a victim of sexual harassment").

abusive schools liable and would frustrate the guiding purpose of Title IX.

Allowing circumstantial evidence of intentional discrimination also balances the competing interests of Title IX student plaintiffs and our nation's schools. Requiring proof of intent makes a Title IX claim for peer sexual harassment more difficult to prove, but allowing circumstantial evidence of intent enables students to hold accountable schools which would rather turn a deaf ear to their plight. This compromise retains Title IX's effectiveness as a means of combating peer sexual harassment without overly prejudicing either party in the court system.

C. THE INTENTIONAL DISCRIMINATION STANDARD IS PREFERABLE FOR PUBLIC POLICY REASONS

In addition to the fact that the intentional discrimination standard better conforms to the requirements of legal precedent, it also is preferable for public policy reasons. Advocates of "knew or should have known" liability often point to the public policy rationale as a primary reason for adopting Title VII standards.[187] Admittedly, the Title VII liability standard operates as a more pro-plaintiff standard than the intentional discrimination standard and better forces schools to take a proactive stance on the problem of peer sexual harassment.[188] Nonetheless, significant public policy arguments support the adoption of an intentional discrimination standard. Concerns about protecting schools from unnecessary liability, fostering supportive ties between school officials and students, and recognizing the differences between school and employment settings militate against adopting Title VII liability standards on the basis of public policy.

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187. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1189 (11th Cir.), *reh'g granted and opinion vacated*, 91 F.3d 1418 (11th Cir. 1996) (advancing four policy reasons for adopting Title VII standards); Miller, *supra* note 27, at 721-22 (arguing that the uniqueness of the educational environment supports adopting Title VII standards as a matter of public policy).

188. Because liability can attach when the school "knew or should have known" of the harassment, the Title VII standard forces schools consistently to reevaluate what conduct constitutes peer sexual harassment and to enact and enforce policies which are designed to detect and address peer sexual harassment at the earliest possible stages. The Title VII standard, therefore, forces schools proactively to address peer sexual harassment and creates a pro-plaintiff burden of proof when they do not.

The most common criticism of expanding school liability under Title IX is the potential for exposing our nation's poorly financed schools to additional litigation expenses and monetary damage awards.[189] Courts concerned about schools' financial capabilities to carry out their educational missions should adopt a liability standard which guarantees that schools will have an opportunity to address a sexual harassment problem before being found liable. Title VII liability does not absolutely guarantee this opportunity.

The Title VII "knew or should have known" standard applies an actual and constructive notice standard for determining liability. Constructive notice, the "should have known" standard, "is a substitute for actual notice and will be found to exist 'where a defective condition has existed for such a length of time that knowledge thereof should have been acquired in the exercise of reasonable care.'"[190] While most of the peer sexual harassment cases tried under Title VII "knew or should have known" liability standards involve actual notice,[191] it is possible for a student plaintiff to proceed entirely on constructive notice grounds.[192] In these few cases, the "knew or should have known" liability standard would penalize schools that may have taken steps to remedy the peer sexual harassment. In contrast, the intentional discrimination standard requires actual notice in all cases, thereby guaranteeing that schools have the opportunity to address the harassment before being found monetarily liable. As a result of its ability to limit monetary liability, the intentional discrimination standard best responds to the most persuasive criticism of expanding Title IX liability.

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189. Eriksson, *supra* note 23, at 1817-18.

190. Schofield *ex rel.* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 173 (N.D.N.Y. 1996) (quoting Fiorella v. Caleminis, 1996 WL 288471, at *3 (E.D.N.Y. Sept 12, 1996)).

191. *See, e.g.*, *Davis*, 74 F.3d at 1189 (stating that the plaintiff and her parents had continually complained to school officials before bringing suit against the school district).

192. The Supreme Court explicitly recognized this possibility when it determined that under Title VII, the "absence of notice to an employer does not necessarily insulate that employer from liability." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986). Furthermore, the efforts made by the Northern District Court of New York to limit Title IX liability to instances of actual notice after it had adopted Title VII standards would not make sense unless a plaintiff could proceed on constructive notice grounds alone. *See supra* note 88 (summarizing the holding of the *Bruneau* court).

By requiring a student victim to first notify school officials, the courts can make sure that the primary responsibility to combat peer sexual harassment stays with schools and not the courts. Allocating this duty to the schools will further encourage better relationships between schools, parents, and students. A standard that requires students to first notify the school of peer sexual harassment mandates that students use available school resources. By encouraging students to use these resources, the intentional discrimination standard helps to create a supportive academic community. Moreover, should school officials fail to respond adequately to students' reports of peer sexual harassment, students still may seek a remedy at court. Because the Title VII standard allows students in some circumstances to sue without first turning to teachers or counseling staff, it runs the risk of creating a suspicious and noncommunicative environment. School officials who know that students are relying on them to remedy the problems of peer sexual harassment may also feel increased personal accountability to students and their parents.

Finally, the intentional discrimination standard better recognizes that unlike the employment setting, agency relationships do not govern the school environment. In *Davis*, the Eleventh Circuit appropriately identified several characteristics of the school environment which support granting students at least as much protection as workplace employees.[193] The Eleventh Circuit, however, failed to recognize that employees enjoy protection under Title VII, in part, because agency principles obligate employers to address sexual harassment.[194]

In constructive notice cases, "liability for a hostile work environment created by a coworker may be imputed to an employer even though the employer possesses no knowledge of the hostile environment because the co-worker is an agent of the employer."[195] The agency relationship requirement, however, poses problems for student plaintiffs seeking to hold schools liable under constructive notice. Because agency relationships

193. *See supra* notes 96-99 and accompanying text (stating reasons why students should receive greater protection than employees).

194. *See Bruneau*, 935 F.3d at 173 (stating that employees are protected by Title VII in constructive notice situations because of "agency principles").

195. *Id.*

do not ordinarily exist between schools and their students,[196] the basis for Title VII constructive notice liability is absent. Creating quasi-agency relationships between schools and harassing students for the purposes of Title IX claims would be unwise as a matter of policy because it would create precedent for finding schools liable for the acts of their students in other, non-harassment situations. The intentional discrimination standard avoids this problem by requiring actual notice in all cases. As a result, the intentional discrimination standard better recognizes that the agency relationships which permit Title VII constructive notice claims do not exist in the school setting.

CONCLUSION

LaShonda Davis and countless other victims of peer sexual harassment exemplify the need for a judicial remedy for peer sexual harassment. While schools are certainly a place of social and sexual experimentation, schools as institutions have a responsibility to keep halls, classrooms, and grounds free from sexual harassment. The staggering numbers generated by surveys of young students underscore the reality that many schools are failing to prevent peer sexual harassment.

Title IX can provide a remedy to victims of peer sexual abuse whose schools have intentionally ignored their responsibilities to create a safe learning environment. Requiring a victim of hostile environment peer sexual harassment to prove that the school intentionally discriminated on the basis of sex is consistent with Title IX case law. Furthermore, an intentional discrimination standard reconciles the strong public policy arguments for student protection with the notice requirements associated with Spending Clause statutes. By allowing plaintiffs to establish intentional discrimination through circumstantial evidence, courts can prevent schools from ignoring the problems of peer sexual harassment and guide them to proactive methods of sexual harassment prevention.

196. *See id.* at 173-74 (finding that a student of an educational institution is not an agent of that institution unless the student was acting on "behalf of or with authority from" the institution).