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1997]

ROWINSKY V. BRYAN INDEPENDENT SCHOOL DISTRICT: DOES TITLE IX IMPOSE LIABILITY ON SCHOOLS FOR STUDENT-TO-STUDENT SEXUAL HARASSMENT?

I. INTRODUCTION

The issue of sexual harassment has flooded the courtroom in the last decade.¹ In response, the United States Supreme Court has spoken out on what is actionable as sexual harassment, specifically in the workplace.² In a landmark decision, the Court recognized both quid pro quo and hostile environment sexual harassment as actionable claims under Title VII of the Civil Rights Act of 1964.³

1. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993) (defining severe or pervasive conduct creating "abusive work environment"); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63 (1992) (alleging teacher to student sexual harassment under Title IX); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-67 (1986) (alleging sexual harassment by supervisor in violation of Title VII); *Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 770 (6th Cir. 1996) (asserting quid pro quo sexual harassment); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.) (finding no liability on school district for peer hostile environment sexual harassment under Title IX), *cert. denied*, 117 S. Ct. 165 (1996); *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1525 (9th Cir. 1995) (finding city liable for Title VII hostile work environment sexual harassment); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994) (alleging quid pro quo and hostile environment sexual harassment against employer); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 781 (1st Cir. 1990) (alleging quid pro quo sexual harassment); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 884 (1st Cir. 1988) (alleging sexual harassment during participation in medical program); *Henson v. City of Dundee*, 682 F.2d 897, 900 (11th Cir. 1982) (alleging workplace sexual harassment); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1414 (N.D. Iowa 1996) (asserting peer hostile environment sexual harassment when school district failed to take remedial action); *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 165 (N.D.N.Y. 1996) (alleging school administrators perpetuated sexually hostile learning environment created by fellow students); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1417 (N.D. Cal. 1996) (granting motion for reconsideration of Title IX peer hostile environment sexual harassment case under Title VII analysis); *Redman v. Lima City Sch. Dist. Bd. of Educ.*, 889 F. Supp. 288, 300 (N.D. Ohio 1995) (asserting hostile work environment sexual harassment); *Slaughter v. Waubensee Community College*, No. 94 C 2525, 1995 WL 579296, at *1 (N.D. Ill. Sept. 29, 1995) (asserting that teacher offered to raise course grade in exchange for sexual favors); *Saad v. Stanley St. Treatment and Resources, Inc.*, No. CIV.A 92-11434-DPW, 1994 WL 846911, at *1 (D. Mass. May 20, 1994) (asserting existence of sexual hostile work environment).

2. See *Harris*, 510 U.S. at 21-23 (defining "severe and pervasive" requirement for establishing sexual harassment action); *Meritor Savings Bank*, 477 U.S. at 64-67 (recognizing quid pro quo and hostile environment sexual harassment as actionable claims under Title VII).

3. 42 U.S.C. § 2000e (1994); see *Meritor Savings Bank*, 477 U.S. at 57. The Court stated that Title VII is not limited only to "economic" or "tangible" discrimi-

Sexual harassment claims have also increased in the education environment.⁴ These claims involve situations in which a teacher sexually harassed a student or a student sexually harassed a classmate.⁵ The latter situation, student-to-student or peer sexual harassment, is an increasingly prevalent problem in the nation's schools.⁶

nation (otherwise known as quid pro quo harassment). *See id.* The Court also recognized hostile environment sexual harassment. *See id.* at 67. The Court stated that "[f]or sexual harassment to be actionable [under a hostile environment theory], it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (citing *Henson*, 682 F.2d at 904). For a discussion of the relevant part of Title VII, see *infra* note 67 and accompanying text. For a detailed discussion of *Meritor Savings Bank* and workplace sexual harassment, see *infra* notes 74-95 and accompanying text. For a discussion of the difference between quid pro quo and hostile environment sexual harassment, see *infra* notes 61-64 and accompanying text.

4. *See, e.g., Franklin*, 503 U.S. at 63-64 (alleging teacher sexually harassed student in school); *Rowinsky*, 80 F.3d at 1010 (asserting school district perpetuated peer hostile environment sexual harassment when it failed to end harassing conduct); *Lipsett*, 864 F.2d at 884 (alleging sexual harassment in medical program); *Wright*, 940 F. Supp. at 1414 (alleging sexual harassment by peers at school creating hostile learning environment); *Bruneau*, 935 F. Supp. at 166-67 (asserting school district failed to take remedial action to prevent sexually hostile learning environment created by fellow students); *Petaluma City*, 949 F. Supp. at 1416-17 (alleging peer hostile environment sexual harassment and school district's failure to take remedial action); *Does v. Covington County Sch. Bd. of Educ.*, 930 F. Supp. 554, 572-74 (M.D. Ala. 1996) (using Title VII test to analyze school board's liability under Title IX of Education Amendments Act of 1972 for teacher-to-student sexual harassment); *Slaughter*, 1995 WL 579296, at *1 (asserting sexual discrimination and sexual harassment against community college); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1297 (N.D. Cal. 1993) (alleging sexually hostile education environment under Title IX); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1366 (E.D. Pa. 1985) (alleging abusive environment sexual harassment in educational context), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

5. *See, e.g., Franklin*, 503 U.S. at 63-65 (asserting Title IX sexual harassment claim where teacher sexually harassed student); *Rowinsky*, 80 F.3d at 1009-10 (alleging peer hostile environment sexual harassment); *Wright*, 940 F. Supp. at 1414 (same); *Bruneau*, 935 F. Supp. at 166 (alleging verbal and physical sexual harassment creating hostile learning environment); *Petaluma City*, 949 F. Supp. at 1416 (alleging peer hostile environment sexual harassment); *Slaughter*, 1995 WL 579296, at *1 (asserting teacher offered to raise course grade in exchange for sexual favors). For a detailed discussion of the development of peer sexual harassment case law, see *infra* notes 96-142 and accompanying text.

6. *See* AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 5-6 (1993) (surveying 1632 students in public school, grades eight through eleven, about school-related harassment) [hereinafter HOSTILE HALLWAYS]; 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, 554 (1996) (commenting that sexual harassment is not rare in schools); 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, 172 (1995) (stating that schools generally do not have policy to address peer sexual harassment despite its prevalence); 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, 1801 (1995) (calling sexual harassment in

"Eighty percent of public school students experience some type of sexual harassment by the time they reach the twelfth grade."⁷ The harassment can begin as early as kindergarten.⁸ Furthermore, student-to-student sexual harassment causes significant harm to the victims.⁹ Students suffer from feelings of embarrassment, fear and low self-esteem and expe-

schools "a difficult and persistent problem"); 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, 143 (1992) ("Student to student sexual harassment is a serious problem on college campuses."); Victoria E. Lovato, Note, *Doe v. Petaluma City School District: A School Counselor's Qualified Immunity, A License to Tolerate Peer Sexual Harassment?*, 28 ARIZ. ST. L.J. 381, 381 (1996) (stating that students face growing problem of sexual harassment in schools); 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, 701 (1995) (citing survey suggesting that "sexual harassment of school children has become a serious problem"); Stacey R. Rinestone, Comment, *Terrorism on the Playground: What Can Be Done?*, 32 DUQ. L. REV. 799, 800 (1994) (discussing growing number of reports of sexual harassment in schools); 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, 2167 (1993) (stating that "[peer sexual harassment] is a legitimate and pervasive problem in elementary and secondary schools"); Shelley Donald Coolidge, *In Halls of Learning, Students Get Lessons In Sexual Harassment*, CHRISTIAN SCI. MONITOR, Sept. 18, 1996, available in 1996 WL 5044305 (recognizing "prevalence of sexual harassment in America's schools"); Aaron Epstein, *Harassment Case Rejected By Justices: The Supreme Court Had Been Asked to Find School Districts Liable for Student Behavior*, PHILA. INQUIRER, Oct. 8, 1996, at A1 (commenting that nation's schools are "beset by cases of sexual harassment"); Amy Saltzman, *It's Not Just Teasing, Sexual Harassment Starts Young: Here's How Some Schools Discourage It*, U.S. NEWS & WORLD REP., Dec. 6, 1993, at 73-77 (discussing survey on prevalence of sexual harassment in schools and growing number of programs to combat peer sexual harassment).

The AAUW Survey is a widely quoted survey documenting various forms of sexual harassment experienced by students in school-related activities. See HOSTILE HALLWAYS, *supra*, at 4. Results of the study show that four out of five students (81%) are the targets of sexual harassment in school. See *id.* at 7. The harassment takes various forms from gestures, looks and comments to pinching, touching and being forced to do something sexual other than kissing. See *id.* at 8. Moreover, the majority of the harassment was student-to-student sexual harassment. See *id.* at 11. For a detailed discussion of the AAUW study, see Bodnar, *supra*, at 556-59.

In this Note, the phrases "student-to-student sexual harassment" and "peer sexual harassment" will be used interchangeably.

7. Bukoffsky, *supra* note 6, at 171.

8. See HOSTILE HALLWAYS, *supra* note 6, at 5; Bodnar, *supra* note 6, at 554; see also Ruth Shalit, *Romper Room: Sexual Harassment—By Tots*, NEW REPUBLIC, Mar. 29, 1993, at 13 (recounting story about five-year-old boy leading female classmate into room, pulling down pants and simulating sex). For a discussion of peer sexual harassment, see *infra* notes 96-142 and accompanying text.

9. See Bodnar, *supra* note 6, at 559-65 (discussing academic and physical effects of peer sexual harassment); Faber, *supra* note 6, at 87 (finding victims of student-to-student sexual harassment suffer significant harm); Sherer, *supra* note 6, at 2133-35 (discussing effects of peer sexual harassment); Bill Hewitt, *Bitter Lessons: School Days Aren't Golden Rule Days Anymore, and Some Parents Are Suing to Keep Their Kids From Being Abused*, PEOPLE, Oct. 28, 1996, at 53 (depicting how peer sexual harassment affects victims and their families); Kristina Sauerwein, *Sex Harassment Makes School Hellish for Girl*, ST. LOUIS POST-DISPATCH, Nov. 26, 1995, at 01A (describing emotional and physical effects of peer sexual harassment on victims).

rience academic and physical harm.¹⁰ In a larger context, student-to-student sexual harassment perpetuates discrimination and sexism in society.¹¹ Nevertheless, assigning liability for student-to-student sexual harassment presents a quandary.¹²

Recently, school districts have become the target of suits involving this type of sexual harassment.¹³ Victims of peer sexual harassment are filing actions under Title IX of the Education Amendments Act of 1972 (Title

10. See Sherer, *supra* note 6, at 2134. Sexual harassment affects the victim's ability to perform and causes students to transfer schools and even to move out of town. See *id.* (discussing how sexual harassment leads victims to transfer from particular courses, causes tardiness and prevents victims from pursuing certain careers). Sexual harassment can also lead to thoughts of suicide. See Bodnar, *supra* note 6, at 560-61 (discussing emotional effects of peer sexual harassment).

Researchers characterize the emotional implications of sexual harassment as "sexual harassment syndrome," which includes symptoms such as:

- general depression, as manifested by changes in eating and sleeping patterns, and vague complaints of aches and pains that prevent the student from attending class or completing work;
- undefined dissatisfaction with [classes];
- sense of powerlessness, helplessness and vulnerability;
- loss of academic self-confidence and decline in academic performance;
- feelings of isolation from other students;
- changes in attitudes or behaviors regarding sexual relationships;
- irritability with family and friends;
- fear and anxiety;
- inability to concentrate; [and]
- alcohol and drug dependency.

Bodnar, *supra* note 6, at 560-61 (citing Vita C. Rabinowitz, *Coping with Sexual Harassment*, in *IVORY POWER: SEXUAL HARASSMENT ON CAMPUS* 103, 112-113 (Michelle A. Paludi ed., 1990)).

11. See Bodnar, *supra* note 6, at 565 (stating that law must ensure equality as way of life); Sherer, *supra* note 6, at 2135 (stating that early education on this topic will teach children "respect, dignity and human decency").

12. Compare *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.) (holding school district not liable for peer hostile environment sexual harassment under Title IX absent direct discrimination by school district based on sex), *cert. denied*, 117 S. Ct. 165 (1996), with *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 177 (N.D.N.Y. 1996) (denying defendant's summary judgment motion in Title IX peer hostile environment sexual harassment claim because school district may be liable if it had actual notice of harassment and failed to take appropriate action and concluding that whether school had actual notice is question of fact), *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1419 (N.D. Cal. 1996) (applying Title VII analysis to Title IX claim to determine school district liability for peer hostile environment sexual harassment), and *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1022 (W.D. Mo. 1995) (finding Title VII analysis appropriate for holding school district liable for peer hostile environment sexual harassment under Title IX).

13. See generally *Rowinsky*, 80 F.3d at 1009-10 (filing suit against school district for failure to stop peer sexual harassment); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1414 (N.D. Iowa 1996) (alleging sexual harassment by peers at school); *Bruneau*, 935 F. Supp. at 166-67 (asserting school district failed to take remedial action to prevent hostile learning environment created by fellow students); *Petaluma City*, 949 F. Supp. at 1415 (granting motion for reconsideration in peer hostile environment sexual harassment case involving school district's failure to take remedial action); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F.

IX)¹⁴ against school districts for failing to take appropriate measures to end the harassment.¹⁵ Title IX prohibits discrimination based on sex in any federally funded education program or activity.¹⁶ Courts addressing this issue are divided on whether a school district can be liable for peer sexual harassment under Title IX.¹⁷

Supp. 1288 (N.D. Cal. 1993) (alleging sexually hostile education environment under Title IX).

14. 20 U.S.C. § 1681(a) (1994).

15. See generally *Rowinsky*, 80 F.3d at 1009-10 (alleging that school officials "condoned and caused hostile environment sexual harassment" in violation of Title IX); *Bruneau*, 935 F. Supp. at 166-67 (alleging school's insufficient response to sexual harassment by peers perpetuated hostile environment); *Petaluma City*, 949 F. Supp. at 1416 (alleging peer hostile environment sexual harassment under Title IX when school district failed to stop harassing conduct).

Plaintiffs are hesitant to bring such actions under 42 U.S.C. § 1983 because courts have repeatedly refused to apply § 1983 to a school setting. See *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 731 (8th Cir. 1993) (holding no custodial relationship between school district and victim of peer sexual harassment is created through mandated school attendance laws); *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 714 (3d Cir. 1993) (refusing to apply § 1983 analysis in school setting and finding no special relationship between victim and school official); *Bruneau*, 935 F. Supp. at 179 ("The Plaintiff cannot state a 42 U.S.C. § 1983 claim based on a Title IX right against the Defendants."); see also 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 Sexual Harassment in The Schools*, 98 DICK. L. REV. 489, 493 (discussing downfalls of sexual harassment cases under § 1983). In a § 1983 action, the plaintiff must allege that the state actor deprived the plaintiff "of a right secured by the Constitution." *Id.* at 491. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment restricts the state's power to act against private parties because nothing in the language of the clause requires a state to protect the life, liberty and property of its citizens against invasion by private actors. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). The Court, however, acknowledged that, although under certain circumstances the Constitution may impose an affirmative duty on the state to protect its citizens, such a duty does not exist in every situation. See *id.* at 200; see also *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1371 (3d Cir. 1992) (rejecting contention that school had affirmative duty to protect students from harm); William D. Valente, *Liability for Teacher's Sexual Misconduct with Students—Closing and Opening Vistas*, 74 EDUC. L. REP. 1021, 1030 (1992) (comparing relief under § 1983 and Title IX); Gant, *supra*, at 493 n.35 (citing cases that have rejected actions brought under § 1983).

16. See 20 U.S.C. § 1681(a). The statute states in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* Programs or activities excluded from this provision are religious educational institutions, military training institutions, single sex public educational institutions, Girl and Boy Scouts, Boys and Girls State, father-son or mother-daughter activities at educational institutions and beauty pageants. See *id.* § 1681(a)(3)-(9).

17. Compare *Rowinsky*, 80 F.3d at 1016 (holding Title IX does not impose liability on schools for peer hostile environment sexual harassment absent evidence that school directly discriminated based on sex), with *Bruneau*, 935 F. Supp. at 177 (allowing Title IX peer hostile environment sexual harassment action against school for failing to take remedial action to stop sexual harassment), *Petaluma City*, 949 F. Supp. at 1420-21 (rejecting *Rowinsky* approach and adopting Title VII analy-

This Note examines the propriety of holding school districts liable for peer sexual harassment under Title IX in light of *Rowinsky v. Bryan Independent School District*.¹⁸ First, Part II summarizes the facts of *Rowinsky*.¹⁹ Next, Part III discusses the development of sexual harassment case law, considers the definition of sexual harassment and addresses workplace sexual harassment under Title VII of the Civil Rights Act (Title VII).²⁰ Part III also focuses on peer sexual harassment under Title IX of the Education Amendments Act and discusses state statutes directed at sexual harassment in schools.²¹ Then, Parts IV and V focus on the analysis of the United States Court of Appeals for the Fifth Circuit in *Rowinsky*, concluding that the Fifth Circuit's decision not to impose Title IX liability on the school district was appropriate, although inadequate in addressing this issue.²² Part V also discusses what schools can do in response to peer sexual harassment.²³ Finally, Part VI addresses the effect the Fifth Circuit's holding will have on future Title IX peer sexual harassment cases.²⁴

sis to analyze school liability for peer sexual harassment), and *Bosley*, 904 F. Supp. at 1022-25 (applying Title VII analysis to determine school liability for peer hostile environment sexual harassment).

Unlike the courts that advocate applying a Title VII analysis to Title IX peer sexual harassment cases, the *Rowinsky* court reached its decision through a statutory analysis of Title IX and concluded that Title IX's intent, purpose and promulgated regulations do not favor holding school districts liable for actions of third parties other than the district's agents. See *Rowinsky*, 80 F.3d at 1006. For a discussion of the *Rowinsky* court's analysis, see *infra* notes 163-201 and accompanying text.

18. 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). This Note focuses on peer sexual harassment in elementary and secondary schools. Although colleges and universities are subject to Title IX, peer sexual harassment in higher education calls for different considerations and is beyond the scope of this article. For a discussion of peer sexual harassment on college campuses, see BILLIE W. DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* (1984); IVORY POWER: *SEXUAL HARASSMENT ON CAMPUS* (Michele A. Paludi ed. 1990); Faber, *supra* note 6; Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987).

19. For an account of the facts in *Rowinsky*, see *infra* notes 25-55 and accompanying text.

20. For a discussion of the meaning of sexual harassment, see *infra* notes 56-64 and accompanying text. For a discussion of sexual harassment case law under Title VII, see *infra* notes 65-95 and accompanying text.

21. For further discussion of peer sexual harassment cases under Title IX, see *infra* notes 96-142 and accompanying text. For a detailed discussion of state actions regarding sexual harassment in schools, see *infra* notes 143-162 and accompanying text.

22. For a discussion of the Fifth Circuit's holding, see *infra* notes 163-216 and accompanying text.

23. For a further discussion of how schools can address peer sexual harassment, see *infra* notes 217-226 and accompanying text.

24. For a discussion of the impact of *Rowinsky*, see *infra* notes 227-230 and accompanying text.

II. *ROWINSKY V. BRYAN INDEPENDENT SCHOOL DISTRICT*

Jane and Janet Doe were eighth graders at Sam Rayburn Middle School in the Bryan Independent School District ("BISD") in Texas during the 1992-93 school year.²⁵ Jane and Janet rode the BISD bus to and from school.²⁶ Boys and girls were required to sit on different sides of the bus.²⁷ In September, a male student, G.S., began to physically and verbally abuse Janet on the bus.²⁸ G.S. regularly swatted Janet's bottom when she walked down the aisle of the bus.²⁹ He directed comments to her such as "[w]hat bra size are you wearing" and called her a "whore."³⁰ Janet reported the incidents to the bus driver eight times.³¹ G.S., however, continued the sexual harassment.³²

Jane, Janet and their parents also complained about the incidents to Assistant Principal Randy Caperton.³³ As a result of the Rowinskys' complaint, Caperton suspended G.S. from riding the bus for three days and required him to sit in the second row behind the driver.³⁴ The suspension, however, did not deter G.S. and he violated the seating requirement.³⁵ Mrs. Rowinsky then called Jay Anding, Assistant Director of the district's transportation office, demanding that he restrict G.S. to the second row seat on the bus.³⁶ Meanwhile, Jane and Janet were subjected to

25. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996). Debra Rowinsky sued as next of friend for her minor children who are referred to in this case under the pseudonyms of Jane and Janet Doe. See *id.* at 1006, 1009.

26. See *id.* at 1008.

27. See *id.*

28. See *id.* The court identifies the student harassers only by their initials. See *id.*

29. See *id.*

30. See *id.* Other comments included "[w]hat size panties are you wearing" and "[w]hen are you going to let me f— you." See *id.*

31. See *id.* The bus driver merely jotted down the harasser's name on paper. Eventually, Janet stopped reporting the incidents. See *id.*

32. See *id.* In one instance, G.S. grabbed Jane's genital area and her breasts. See *id.*

33. See *id.* Caperton told the Rowinskys that he already heard about the assault from another student and that he believed the nature of the assault warranted expulsion. See *id.* The Rowinsky family also filed sexual assault charges against G.S. with the Bryan City police. See *id.* at 1008 n.2.

34. See *id.* at 1008. A week after meeting with Caperton to complain about the incidents, Mrs. Rowinsky returned to Caperton's office to complain about other girls who were also being harassed on the bus. See *id.* Caperton showed Mrs. Rowinsky a copy of the bus report documenting Jane's incident. See *id.* The report contained numerous inaccuracies such as the wrong date and length of punishment. See *id.* Moreover, the report did not name the assailant. See *id.* Caperton corrected the inaccuracies in a new report. See *id.*

35. See *id.* "[A]s a result, [the bus driver] restricted Jane and Janet to the front of the bus." *Id.*

36. See *id.* at 1008-09. Anding also told Mrs. Rowinsky that he would discuss the situation with the bus driver. See *id.* at 1009.

continued sexual harassment on the bus.³⁷ G.S. called the girls offensive names and continued to slap Janet's bottom.³⁸

Later in the year, another male student, L.H., started sexually harassing Jane and Janet.³⁹ L.H. reached up Jane's and Janet's skirts, made crude remarks and grabbed Janet's genital area.⁴⁰ Again, Mrs. Rowinsky reported the behavior to Anding and told him that other girls were also sexually assaulted.⁴¹ Anding stated he would investigate the problems and take action.⁴² Mrs. Rowinsky also contacted Dr. Tom Purifoy, BISD Director of Secondary Education, to complain about the assaults.⁴³ Dr. Purifoy referred her to C.W. Henry, Anding's assistant, who after investigating the incidents assigned a new bus driver.⁴⁴ Despite the fact that G.S. made no further assaults, Mrs. Rowinsky "removed her daughters from the bus" and requested that Dr. Purifoy remove G.S. from the bus.⁴⁵

The sexual harassment, however, did not end.⁴⁶ During class, another student, F.F., "reached under Janet's shirt and unfastened her bra."⁴⁷ The teacher sent both Janet and F.F. to the Vice Principal's office.⁴⁸ The Vice Principal suspended F.F. for the rest of the day and the next day.⁴⁹ Mrs. Rowinsky complained to the Vice Principal about F.F.'s behavior and was told that F.F.'s conduct was not considered "to be sexual."⁵⁰

In March, Mrs. Rowinsky, along with her attorney, met with Dr. Sarah Ashburn, BISD Superintendent, to complain about the students' behavior.⁵¹ Dr. Ashburn said the bus suspension was sufficient punishment and

37. *See id.*

38. *See id.* at 1009. The bus driver did nothing and the girls did not file any further complaints. *See id.*

39. *See id.* Janet complained to the bus driver, but the driver did not do anything. *See id.*

40. *See id.* Janet complained about the incidents to the bus driver, who "just stared into space" and Jane did not complain about the incident. *See id.*

41. *See id.*

42. *See id.* Mrs. Rowinsky later contacted Caperton to find out the results of the investigation. *See id.* She was told that Anding did not conduct the investigation but that L.H. was suspended for three days. *See id.* After L.H.'s suspension, he was not alleged to have further harassed the girls. *See id.* at 1009 n.3.

43. *See id.* at 1009.

44. *See id.* Henry assigned a new bus driver and the new driver assigned G.S. to sit next to Jane. *See id.*

45. *See id.* Purifoy refused to take action against G.S. "without proof of the assaults from juvenile records." *Id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.* The Vice Principal sent Janet back to class. *See id.* "F.F. is not alleged to have harassed or abused the girls further." *Id.*

50. *See id.*

51. *See id.* Dr. Ashburn also did not "inform [Mrs. Rowinsky] about the existence of [T]itle IX or any [T]itle IX grievance procedures [such as filing a complaint with the Office of Civil Rights]." *Id.*

did not take any further action.⁵² Mrs. Rowinsky then filed suit under Title IX against BISD for creating a hostile educational environment by failing to take appropriate measures to stop the peer sexual harassment.⁵³

The district court held that Rowinsky failed to state a claim under Title IX because she failed to provide evidence demonstrating that BISD discriminated against the students based on sex.⁵⁴ The Fifth Circuit affirmed the district court's judgment, holding that Title IX does not impose liability on a school district for peer hostile environment sexual harassment, if the school district itself did not discriminate based on sex.⁵⁵

52. *See id.* Mrs. Rowinsky returned to see Dr. Ashburn and complain about her failure to punish G.S. and L.H. *See id.* Dr. Ashburn did not take further action against L.H. because he was no longer a student at Bryan Independent School District (BISD). *See id.*

53. *See id.* at 1009-10. The court concluded that Mrs. Rowinsky did not have standing to assert a personal claim under Title IX. *See id.* at 1009 n.4. According to the court, however, she did have standing to assert the claims of her daughters as next of friend. *See id.* "The district court did not rule on the request for class certification." *Id.* at 1009 n.5. The plaintiffs did not complain of that failure on appeal. *See id.* The district court dismissed the claims against BISD officials, leaving the school district as the only defendant. *See id.* at 1010 n.6.

Mrs. Rowinsky also told Dr. Ashburn that she intended to file a grievance with the Department of Education, Office of Civil Rights (OCR) under Title IX. *See id.* at 1009.

54. *See id.* at 1010. The complaint asserted that "BISD and its officials condoned and caused hostile environment sexual harassment." *Id.* Specifically, the complaint stated that Janet was sexually harassed by a student at Sam Rayburn Middle School and Jane and Janet were sexually harassed by students on the BISD school bus. *See id.* Rowinsky sought declaratory and injunctive relief, along with compensatory damages and attorney's fees under Title IX. *See id.*

In holding that Rowinsky failed to state a claim under Title IX, the district court relied on a number of factors. *See id.* For example, it looked to see whether boys who assaulted other boys were punished in the same manner as boys who assaulted girls. *See id.* The district court found that because the incidents involved different levels of physical conduct, any disparity between punishments was not based on sex. *See id.* Furthermore, it concluded that the school district's failure to properly train employees would harm both females and males equally. *See id.*

55. *See id.* at 1016. The Fifth Circuit noted that "a school district might violate [T]itle IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harm boys." *Id.* The court concluded that the language of Title IX does not extend liability to those other than grant recipients or their agents. *See id.* Thus, a school district may be liable under Title IX only if it or an agent of the school district discriminated against students based on sex. *See id.*

Rowinsky filed a petition for certiorari to the Supreme Court. Rowinsky v. Bryan Indep. Sch. Dist., 65 U.S.L.W. 3033 (U.S. July 16, 1996) (No. 96-4). The Supreme Court denied certiorari on October 7, 1996. Rowinsky v. Bryan Indep. Sch. Dist., 117 S. Ct. 165 (1996); see Linda P. Campbell, *Mother's Appeal Rejected: High Court Won't Hear Girls' Harassment Case*, FORT-WORTH STAR TELEGRAM, Oct. 8, 1996, at 1 ("The justices made no comment on the merits of Rowinsky's argument."); Lyle Denniston, *High Court Refuses to Take Up Student Sexual Harassment Case; As New Term Begins, Justices Opt to Stay Out of Growing Controversy*, BALTIMORE SUN, Oct. 8, 1996, at 3A (stating that effect of Supreme Court's decision is that schools will have to look to their attorneys for advice on how to react to incidents of harassment); Epstein, *supra* note 6, at A6 ("Rowinsky's case was turned away at a

III. DEVELOPMENT OF SEXUAL HARASSMENT CASE LAW

A. *What Is Sexual Harassment?*

A precise definition of sexual harassment is difficult to formulate because the term encompasses many types of behavior.⁵⁶ Despite the lack of a uniform definition, the basis of sexual harassment entails “unwelcome conduct’ of a sexual nature” by a person in a position of power over the victim.⁵⁷ This basis originates from the Equal Employment Opportunity

time when the nation’s school districts are beset by cases of sexual harassment, and judges are divided over whether negligent districts may be forced to pay damages under federal law.”); Frank J. Murray, *High Court Limits Harassment Cases Man-to-Man, Child-to-Child Claims Rejected*, WASH. TIMES, Oct. 8, 1996, at A3 (stating that Supreme Court’s refusal to hear *Rowinsky* case means harassment by fellow students does not “trigger federal civil rights laws”); Judy Wiessler & Teri Bailey, *High Court Won’t Hear Texas Case: Bryan Schools Not Liable in Sex Harassment Suit*, HOUSTON CHRON., Oct. 8, 1996, at 1 (discussing *Rowinsky* case and Supreme Court’s denial of certiorari).

56. See Rinestone, *supra* note 6, at 804-05; see also CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 27 (1979) (arguing that traditionally women would not complain of sexual harassment because of lack of definition for such behavior); Schneider, *supra* note 18, at 533 (stating that sexual harassment can include verbal innuendos); Sherer, *supra* note 6, at 2125 (stating that there is no “clear, concise, widely accepted definition of [sexual harassment]”).

The Equal Employment Opportunity Commission (EEOC) guidelines, recognizing sexual harassment as a type of discrimination prohibited under Title VII, define sexual harassment in the workplace as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . 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.

29 C.F.R. § 1604.11(a) (1997).

In a 1981 policy memorandum, the Department of Education’s OCR defined sexual harassment as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provisions of aid, benefits, services or treatment protected under Title IX.” Sherer, *supra* note 6, at 2126 (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *SEXUAL HARASSMENT: IT’S NOT ACADEMIC* 2 (1986)).

57. Rinestone, *supra* note 6, at 805; see also MACKINNON, *supra* note 56, at 1 (describing sexual harassment as imposing sexual requirements “in the context of a relationship of unequal power”); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 870 (1993) (stating that sexual harassment is issue of power rather than issue about sex); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984) (describing sexual harassment as “abuse of power that discriminates against members of a discrete and vulnerable group”) [hereinafter Note, *Abusive Work Environment*].

The Fifth Circuit in *Rowinsky* addressed this issue of power in a lengthy footnote. See *Rowinsky*, 80 F.3d at 1011 n.11. The court stated that in an educational context, a power relationship exists between the educational institution and the student. See *id.* In contrast, no power relationship exists between two students, and the respondeat superior theory has neither logical nor precedential support.

Commission (EEOC) guidelines on sexual harassment in the workplace.⁵⁸ The EEOC guidelines state that sexual harassment violates Title VII if acquiescence to such conduct becomes a condition of one's employment or determines employee advancement or such conduct creates a hostile working environment.⁵⁹ In determining whether the conduct amounts to sexual harassment, the EEOC uses the "totality of the circumstances" test.⁶⁰

Courts have generally recognized two types of sexual harassment: quid pro quo and hostile environment.⁶¹ Quid pro quo harassment occurs when a person in a position of power conditions receipt of tangible benefits upon performance of sexual favors from the subordinate or punishes the subordinate for not complying with such conditions.⁶² Hostile environment sexual harassment occurs when the conduct of the harasser

See id. Therefore, sexual advances between students do not have the same "coercive effect or abuse of power as those made by a teacher, employer or co-worker." *Id.* In peer sexual harassment a key ingredient is missing: a "power relationship between the harasser and the victim." *Id.*

58. *See* 29 C.F.R. § 1604.11(a). Since the issuance of the EEOC guidelines, the Supreme Court has used that definition in holding that hostile environment sexual harassment is actionable under Title VII. The Court stated "these Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

59. *See* 29 C.F.R. § 1604.11(a).

60. *Id.* § 1604.11(b). Some factors the EEOC will look at include the nature of the sexual advances and the context in which such conduct occurred. *See id.* "The determination of the legality of a particular action will be made from the facts, on a case by case basis." *Id.*

61. *See* *Sherer*, *supra* note 6, at 2126. *See, e.g., Meritor Savings Bank*, 477 U.S. at 57 (describing quid pro quo harassment as conditioning of "employment benefits on sexual favors"); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993) (discussing severe or pervasive aspect of hostile environment sexual harassment); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000 (10th Cir. 1996) (recognizing quid pro quo and hostile environment sexual harassment under Title VII); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1304-05 (2d Cir. 1995) (discussing standard for hostile work environment sexual harassment); *Gary v. Long*, 59 F.3d 1391, 1395 (D.C. Cir. 1995) (discussing quid pro quo and hostile environment sexual harassment in workplace); *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995) (setting out elements for quid pro quo sexual harassment); *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1522 (9th Cir. 1995) (holding city liable for hostile environment sexual harassment under Title VII); *Nichols v. Frank*, 42 F.3d 503, 508-09 (9th Cir. 1994) (finding quid pro quo and hostile environment sexual harassment).

62. *See Meritor Savings Bank*, 477 U.S. at 65 (discussing Title VII guidelines about economic quid pro quo); *Winsor*, 79 F.3d at 1000 (recognizing quid pro quo and hostile environment sexual harassment under Title VII); *Gary*, 59 F.3d at 1395 (discussing quid pro quo and hostile environment sexual harassment in workplace); *Cram*, 49 F.3d at 473 (setting out elements for quid pro quo sexual harassment); *Nichols*, 42 F.3d at 508-09 (finding quid pro quo and hostile environment sexual harassment); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977) (alleging that academic advancement was based on compliance with professor's sexual demands); *Rinestine*, *supra* note 6, at 806 (stating that "quid pro quo harass-

is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁶³ The Supreme Court has held that both types of harassment violate Title VII.⁶⁴

B. *Workplace Sexual Harassment Under Title VII of the Civil Rights Act*

Sexual harassment was first recognized as a form of sex discrimination in the workplace.⁶⁵ As numerous workplace sexual harassment claims are filed under Title VII, courts have engaged in the process of creating and refining the standards for proving such a case.⁶⁶ Congress enacted Title

ment is uniformly accepted as cause of action under Title IX"); Sherer, *supra* note 6, at 2126 (illustrating example of quid pro quo harassment).

63. *Meritor Savings Bank*, 477 U.S. at 67. In *Meritor Savings Bank*, the Supreme Court recognized sexual harassment as actionable under the hostile environment theory. See *id.* Michelle Vinson brought an action against Sidney Taylor, manager of one of Meritor Savings Bank branch offices, under Title VII. See *id.* at 60. Vinson claimed that during the four years she worked at the bank, Taylor "made repeated demands upon her for sexual favors." *Id.* Furthermore, Vinson claimed that Taylor "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Id.* The district court concluded that Vinson did not prove a violation of Title VII. See *id.* at 62. The United States Court of Appeals for the District of Columbia Circuit reversed and held that a Title VII claim may be predicated upon quid pro quo and hostile environment sexual harassment. See *id.* The Supreme Court affirmed the court of appeals decision, recognizing an actionable claim under the hostile environment theory. See *id.* at 64; see also *Winsor*, 79 F.3d at 1000 (recognizing quid pro quo and hostile environment sexual harassment under Title VII); *Tomka*, 66 F.3d at 1304-05 (discussing standard for hostile work environment sexual harassment); *Gary*, 59 F.3d at 1395 (discussing quid pro quo and hostile environment sexual harassment in workplace); *Cram*, 49 F.3d at 473 (setting out elements for quid pro quo sexual harassment); *Fuller*, 47 F.3d at 1522 (holding city liable for hostile environment sexual harassment under Title VII); *Nichols*, 42 F.3d at 508-09 (finding quid pro quo and hostile environment sexual harassment); *Rinestine*, *supra* note 6, at 807 (defining hostile environment sexual harassment); *Sherer*, *supra* note 6, at 2126 (same); Note, *Abusive Working Environment*, *supra* note 57, at 1455 (discussing hostile working environment claims under Title VII).

64. See *Meritor Savings Bank*, 477 U.S. at 64-65 (stating that actions under Title VII are not limited to quid pro quo harassment, but also include hostile environment theory); *Winsor*, 79 F.3d at 1000 (recognizing quid pro quo and hostile environment sexual harassment under Title VII); *Gary*, 59 F.3d at 1395 (discussing quid pro quo and hostile environment sexual harassment in workplace); *Nichols*, 42 F.3d at 508-09 (finding quid pro quo and hostile environment sexual harassment).

65. See *Meritor Savings Bank*, 477 U.S. at 64-65 (recognizing quid pro quo and hostile environment sexual harassment as actionable claims under Title VII sex discrimination prohibition); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1425-26 (N.D. Cal. 1996) (stating sexual harassment is "major problem in the workplace" (citing *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991))). "Forms of sexual harassment in the workplace fall along a continuum from unsolicited flirtation to coerced sexual relations." Note, *Abusive Work Environment*, *supra* note 57, at 1451.

66. See, e.g., *Hirras v. National R.R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996) (setting out elements required for workplace sexual harassment claim under Title VII); *Winsor*, 79 F.3d at 1000 ("Sexual harassment under Title VII can be

VII to prohibit discrimination in the workplace based on sex, race, color, religion and national origin.⁶⁷ Although Title VII does not expressly address sexual harassment, the EEOC and courts have recognized sexual harassment as a legitimate cause of action under Title VII.⁶⁸

shown under one of two principal theories: quid pro quo discrimination or hostile work environment.”); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996) (finding that sexual harassment was not sufficiently severe and, thus, did not satisfy Title VII’s severe and pervasive conduct test under hostile environment theory); *Tomka*, 66 F.3d at 1304-05 (discussing standard for Title VII hostile work environment sexual harassment); *Jones v. Flagship Int’l*, 793 F.2d 714, 719-20 (5th Cir. 1986) (same); *Katz v. Dole*, 709 F.2d 251, 254-56 (4th Cir. 1983) (holding that sexual harassment violates Title VII if condoned or carried out by supervisory personnel).

Two common theories for proving a Title VII violation are the disparate treatment theory and the disparate impact theory. See *Petaluma City*, 949 F. Supp. at 1423. Disparate treatment occurs when a person is treated less favorably because of that person’s membership in a group protected under Title VII. See *id.* To prove disparate treatment, the plaintiff must prove that he or she belongs to a protected group under Title VII and was denied employment benefits because of his or her membership in the group. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) (discussing disparate treatment and disparate impact theories); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting out test for disparate treatment claim); Note, *Abusive Working Environment*, *supra* note 57, at 1454-55 (discussing *McDonnell Douglas* disparate treatment theory in context of workplace sexual harassment). Under a disparate impact theory, the plaintiff need not prove intentional discrimination on the part of the defendant. See *Teamsters*, 431 U.S. at 335-36 n.15. Rather, disparate impact occurs when a facially neutral practice adversely affects members of a protected group to a greater degree than others. See *id.*; see also Note, *Abusive Working Environment*, *supra* note 57, at 1455-56 (discussing disparate impact theory in context of hostile environment sexual harassment).

67. 42 U.S.C. § 2000e (1994). Title VII states in part:

It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1).

The Civil Rights Act of 1991 amended Title VII to allow harassment victims to recover compensatory and punitive damages from their employer under Title VII. See *Miller*, *supra* note 6, at 705 (discussing cause of action under Title VII); Note, *Abusive Working Environment*, *supra* note 57, at 1451-53 (discussing theoretical framework for claim of sexual harassment in workplace).

68. See *Williams v. Saxbe*, 413 F. Supp. 654, 655 (D.D.C. 1976) (asserting that dismissal for noncompliance with sexual demands “constitutes sex discrimination within the definitional parameters of Title VII”), *rev’d on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). See, e.g., *Meritor Savings Bank*, 477 U.S. at 62-69 (recognizing hostile environment sexual harassment as actionable claim under Title VII); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (stating that sexual harassment is actionable if “sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment”); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (stating that claim for violation of Title VII may be predicated upon quid pro quo harassment and hostile environment harassment); *Rogers v. EEOC*, 454 F.2d 234, 238-39 (5th Cir. 1971) (recognizing claim of racial hostile work environment as actionable under Title VII).

The EEOC promulgated guidelines to define sexual harassment.⁶⁹ The EEOC guidelines list the types of conduct that may be actionable and three forms of conduct that constitute sexual harassment in violation of Title VII.⁷⁰ First, the types of conduct include unwelcome sexual advances, requests for sexual favors, or verbal or physical contacts of a sexual nature.⁷¹ Second, such conduct constitutes sexual harassment if it creates (1) a condition upon one's employment, *quid pro quo*; (2) an offensive, intimidating or hostile work environment; or (3) becomes the basis of employment decisions with respect to employee advancement.⁷² Although the guidelines do not have the force of law, the courts refer to them for guidance in determining what constitutes sexual harassment under Title VII.⁷³ In the landmark case of *Meritor Savings Bank v. Vinson*,⁷⁴ the Supreme Court expressly recognized both *quid pro quo* and hostile envi-

69. 29 C.F.R. § 1604.11(a) (1997). The guidelines state in part:
Harassment on the basis of sex is a violation of section 703 of Title VII. 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 work environment.

Id.

70. *See id.* The EEOC guidelines further state that under general Title VII principles, employers are liable for their own acts and those of their agents. *See id.* § 1604.11(c).

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Id. § 1604.11(e).

71. *Id.* § 1604.11(a). For the actual text of 29 C.F.R. § 1604.11(a), see *supra* note 69.

72. 29 C.F.R. § 1604.11(a). For the actual text of 29 C.F.R. § 1604.11(a), see *supra* note 69.

73. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). The Supreme Court expressly stated that as an "administrative interpretation of the Act by the enforcing agency" [the guidelines] "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) and *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

74. 477 U.S. 57 (1986).

ronment sexual harassment as legitimate causes of action under Title VII.⁷⁵

In *Meritor Savings Bank*, the plaintiff alleged that her employer's harassing conduct created an offensive and intimidating work environment.⁷⁶ In finding that quid pro quo and hostile environment sexual harassment are actionable claims under Title VII, the Supreme Court concluded that Title VII is not limited to "economic" or "tangible" discrimination.⁷⁷ Rather, the Court determined that Title VII manifests a congressional intent to address the whole array of disparate treatment of men and women in the phrase "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with

75. *See id.* at 62-63, 73 (finding no limiting language in Title VII). The first case regarding quid pro quo harassment was *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). In *Williams*, the court held that an employer's retaliatory firing based on the employee's refusal to comply with sexual demands constitutes sex discrimination under Title VII. *See id.* A claim for a racially hostile work environment was first recognized in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). In *Rogers*, the employer allegedly created an offensive work environment when Hispanic clients were discriminatorily treated. *See id.* at 239. The Fifth Circuit held that this type of treatment threatens the "emotional and psychological stability of minority group workers" and created an unlawful work environment under Title VII. *See id.* at 238. Subsequently, the hostile environment theory has been applied to harassment based on race, religion and national origin. *See, e.g., Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (rejecting Title VII claim for discrimination based on national origin because ethnic slurs did not rise to level of Title VII violation); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (holding that Title VII arguably grants employee right to "a working environment free of racial intimidation" pursuant to EEOC guidelines); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 161-62 (S.D. Ohio 1976) (awarding nominal damages where plaintiff proved Title VII workplace hostile environment harassment on basis of religious faith and ancestry).

76. *Meritor Savings Bank*, 477 U.S. at 60. The sexual harassment continued throughout the plaintiff's four-year employment with the bank. *See id.* The harasser, a Vice President of the bank and one of its branch managers, invited the plaintiff to dinner shortly after her probationary period. *See id.* at 59-60. After dinner, he suggested they go to a motel and engage in sexual relations. *See id.* at 60. Plaintiff at first refused the offer, but out of "fear of losing her job she eventually agreed." *Id.* Thereafter, he repeatedly demanded sexual favors. *See id.* These demands occurred at the branch office during and after business hours. *See id.*

The plaintiff sought injunctive relief, compensatory and punitive damages and attorney's fees. *See id.* at 61. The district court held that the plaintiff was not a victim of sex discrimination nor of sexual harassment under Title VII during her employment at the bank. *See id.* The district court further concluded that the bank was not liable for any violations because it was without notice. *See id.* at 62.

On appeal, the United States Court of Appeals for the District of Columbia, referring to the EEOC guidelines, stated that an actionable claim under Title VII "may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment." *Id.* at 62. The court of appeals further held that the bank was absolutely liable for the conduct of its agents or supervisors with respect to sexual harassment. *See id.* at 63.

77. *See id.* at 64.

respect to his compensation, terms, conditions, or privileges of employment."⁷⁸ In further support of its conclusion, the Court stated that the EEOC considers sexual harassment a form of sex discrimination under Title VII.⁷⁹ Moreover, the Court recognized hostile environment sexual harassment as violating Title VII and stated that sexual harassment is actionable if it severely or pervasively alters the conditions of the victim's employment and creates an offensive work environment.⁸⁰ Finally, the Court cautioned that not all incidents of a sexual nature constitute a hostile work environment under Title VII, but only those that are sufficiently severe or pervasive.⁸¹

The *Meritor Savings Bank* decision left several questions unanswered, such as what types of conduct would sufficiently alter the employment condition to create a hostile environment.⁸² The Supreme Court attempted

78. *Id.* (citing *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The Court further stated that the defendant bank did not produce evidence to suggest a congressional intent to limit Title VII to "economic" or "tangible" discrimination. *See id.*

79. *See id.* at 65. The EEOC guidelines expressly recognize sexual harassment as a violation of section 703 of Title VII if submission to unwelcome sexual advances is a condition to employment, forms a basis for employee advancement or creates an offensive, hostile work environment. *See* 29 C.F.R. § 1604.11(a) (1997). For a more detailed examination of the EEOC guideline, see *supra* notes 69-71 and accompanying text.

80. *Meritor Savings Bank*, 477 U.S. at 66-67. The *Meritor Savings Bank* Court concluded that nothing in Title VII suggests that hostile environment sexual harassment should not be prohibited. *See id.* at 66. The Court reached its conclusion by relying on the EEOC guidelines and precedent. *See id.* The EEOC guidelines state that certain kinds of conduct constitute sexual harassment if, inter alia, such conduct creates an intimidating, offensive or hostile working environment. *See* 29 C.F.R. § 1604.11(a). Numerous courts had endorsed this interpretation prior to the *Meritor Savings Bank* decision. *See, e.g., Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983) (recognizing two basic types of sexual harassment: quid pro quo and hostile environment); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) ("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."); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (acknowledging that sexual harassment in work environment constitutes sex discrimination); *Rogers*, 454 F.2d at 238-39 (recognizing cause of action under discriminatory work environment theory); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 783-85 (E.D. Wis. 1984) (holding employer liable for failing to take appropriate measures to stop sexually hostile environment created by employees), *aff'd in part, rev'd in part*, 789 F.2d 540 (7th Cir. 1986).

81. *See Meritor Savings Bank*, 477 U.S. at 67 (citing *Rogers*, 454 F.2d at 238). The *Rogers* court warned that "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not create a hostile work environment actionable under Title VII. *Rogers*, 454 F.2d at 238. Rather, the Supreme Court has stated that the conduct must be severe or pervasive. *See Meritor Savings Bank*, 477 U.S. at 67. Yet, it does not need to cause psychological harm to be actionable under Title VII. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

82. *See Rineshine*, *supra* note 6, at 809.

to address this issue in *Harris v. Forklift Systems, Inc.*⁸³ The *Harris* Court held that “severe or pervasive conduct” is conduct that a reasonable person perceives as creating a hostile environment.⁸⁴ In addition, the victim must also subjectively perceive the environment as hostile.⁸⁵ The Court further stated that severe or pervasive conduct need not affect a plaintiff’s psychological well-being or cause the plaintiff to suffer tangible or physical injury.⁸⁶ Rather, “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”⁸⁷ The Court concluded that to determine whether an environment is hostile requires examination of all the factors, such as frequency and severity of the conduct.⁸⁸ Following the holdings in *Meritor Savings Bank* and *Harris*, courts have developed a three-prong test for analyzing workplace hostile environment sexual harassment claims under Title VII. The plaintiff must demonstrate that: (1) he or she was subjected to sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive as to alter the victim’s employment and create an abusive working environment.⁸⁹

83. 510 U.S. 17 (1993). In *Harris*, the plaintiff alleged that the president of the defendant company, her former employer, constantly insulted her because of her gender and directed unwanted sexual innuendos at her. *Id.* at 19. The president called the plaintiff “a dumb a— woman” and said “[y]ou’re a woman, what do you know” in front of other employees. *Id.* He regularly asked plaintiff to retrieve coins from his pocket and made sexual innuendos about plaintiff’s clothing. *See id.*

84. *See id.* at 21. At least one court advocates the use of a reasonable woman standard rather than just a reasonable person standard. *See Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (concluding that focus should be on perspective of victim in evaluating severity and pervasiveness of sexual harassment under Title VII). This court concluded that a sex-blind reasonable person standard is male-biased and does not account for the common concerns many women share that men do not necessarily share. *See id.* at 879. The court further stated that to analyze sexual harassment under a reasonable person standard would run the risk of “reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.” *Id.* at 878. Thus, applying a gender-conscious analysis of sexual harassment would “enable[] women to participate in the workplace on an equal footing with men.” *Id.* at 879.

85. *See Harris*, 510 U.S. at 21-22.

86. *See id.* at 22. Psychological harm is a relevant factor that may be taken into account; however, no single factor is required for conduct to satisfy the severe and pervasive test. *See id.* at 23. Other factors to account for are frequency of the alleged conduct, its severity, its threatening or humiliating nature and its interference with the victim’s work performance. *See id.*

87. *Id.* at 22. The Court also concluded that a hostile work environment, although it may not affect the plaintiffs’ psychological well-being, can and will affect the plaintiffs’ job performance, discourage them from remaining at the job and keep them from advancing in their professions. *See id.*

88. *See id.* at 23. For a discussion of relevant factors considered in determining when hostile environment exists, see *supra* note 86.

89. *See Meritor Savings Bank*, 477 U.S. at 65-67 (holding that it was sufficient for plaintiff to claim Title VII discrimination based on sex if plaintiff demonstrated that she was subject to unwelcome sexual conduct that was severe or pervasive enough to create abusive work environment); *EEOC v. Hacienda Hotel*, 881 F.2d

Courts have also used similar standards to analyze employer liability under Title VII.⁹⁰ Before *Meritor Savings Bank*, courts had held employers liable for any Title VII violation under the theory of respondeat superior.⁹¹ Thus, an employer would be liable for a Title VII violation if the employee, acting in the course of his or her employment, discriminated against another in violation of Title VII.⁹² Presently, courts apply a three-prong analysis to determine employer liability in Title VII hostile work environment sexual harassment claims: (1) the plaintiff must be subject to unwelcome sexual harassment based on their gender; (2) the conduct must be sufficiently pervasive or severe to create an abusive work environment; and (3) the employer must know or be on notice of the hostile environment and fail to take remedial action.⁹³ Even though employers may be liable under Title VII for an employee's harassing conduct, no definitive rule exists for employer liability; rather, the Supreme Court has stated that it wanted courts to look to agency principles for guidance in

1504, 1514-15 (9th Cir. 1989) (delineating elements for Title VII hostile environment sexual harassment claim as derived from *Meritor Savings Bank* decision); *Jordan v. Clark*, 847 F.2d 1368, 1373 (9th Cir. 1988) (same).

90. See *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (stating that employer is liable for hostile environment sexual harassment under Title VII if "employer knew or should have known of illegal conduct and failed to take prompt and adequate remedial action"); *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49 (6th Cir.) (restating and applying elements for employer liability under Title VII), *cert. denied*, 117 S. Ct. 170 (1996); *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1525 (9th Cir. 1995) (holding city liable under Title VII for hostile environment sexual harassment); *Nichols v. Frank*, 42 F.3d 503, 508-09 (9th Cir. 1994) (finding employer liable under respondeat superior theory for quid pro quo and hostile environment sexual harassment); see also, Ming K. Ayvas, Note, *The Circuit Split on Title VII Personal Supervisor Liability*, 23 *FORDHAM URB. L.J.* 797, 805-08 (1996) (discussing employer liability under Title VII).

91. See *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (stating that there is nothing in Title VII's legislative history to support congressional intent that employer should not be liable if one of its "employees, acting in the course of his employment, commits the tort" and that "[s]uch a rule would create an enormous loophole in the statute[]"); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) (concluding that employer "defendant is liable as principal for any violation of Title VII" by employee in employee's capacity as supervisor).

92. See *Miller*, 600 F.2d at 213 (stating that respondeat superior rule, under which employer is liable for torts of its employees acting in course of their employment, is "just as appropriate [in a Title VII sexual harassment case]" when actor is supervisor of wronged employee). The *Miller* court further stated that such a rule would not be a burden on an employer because an "employer whose internal procedures would have redressed the alleged discrimination can avoid litigation by employing those procedures to remedy the discrimination upon receiving notice of the complaint or during the conciliation period." *Id.* at 214.

93. See *Hacienda Hotel*, 881 F.2d at 1515-16 (discussing prevailing trend in case law that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known" (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988))); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1423 (N.D. Cal. 1996) (discussing Title VII hostile work environment sexual harassment standard for employer liability that courts have developed).

this area.⁹⁴ Some courts have imported the Title VII employer liability framework into cases involving school district liability for peer sexual harassment under Title IX of the Education Amendments Act.⁹⁵

C. *Peer Sexual Harassment Under Title IX of the Education Amendments Act*

Title IX prohibits sex discrimination in any federally funded education program or activity.⁹⁶ Specifically, Title IX states that no person, on the basis of sex, shall be excluded from participation in, denied the benefits of, or be subjected to discrimination under any federally funded education program or activity.⁹⁷

Congress enacted Title IX to accomplish two related, but distinct, objectives.⁹⁸ First, Congress endeavored to prevent the use of federal

94. See *Meritor Savings Bank*, 477 U.S. at 72 (declining to issue definitive rule on employer liability and directing courts to refer to agency principles when analyzing this issue). This is not a strict liability standard because employers are given an "opportunity to take reasonably adequate and effective action" before they can be held liable for failing to do so. *Davis v. McNea*, No. 96-5272, 1997 WL 123745, at *4 (6th Cir. Mar. 18, 1997).

The EEOC guidelines state that "[w]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d) (1997).

95. See, e.g., *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 169-70 (N.D.N.Y. 1996) (holding that Title VII legal standards apply to Title IX claims, although Title VII jurisprudence is only guide and courts should not blindly apply Title VII to determine Title IX issues, but rather should determine proper extent to which Title VII applies); *Petaluma City*, 949 F. Supp. at 1421-27 (applying Title VII analysis to Title IX peer hostile environment sexual harassment case).

96. See 20 U.S.C. § 1681(a) (1994). The pertinent part of Title IX states 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." *Id.*

97. See *id.* Title IX defines "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education." *Id.* § 1681(c). Title IX also exempts certain entities, such as boys and girls scouts. See *id.* § 1681(a)(3) (exempting religious institutions); § 1681(a)(5) (exempting traditional single sex colleges); § 1681(a)(7) (exempting Girls State and Boys State programs); § 1681(a)(9) (exempting higher education scholarship awards in beauty pageants).

98. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 n.14 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) (stating Congress modeled Title IX after Title VI and used identical language). Title VI states in part that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994). The Supreme Court held that Title VI is spending-power legislation rather than a regulatory measure. See *Guardian Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 599 (1983) ("Title VI rests on the principle that 'taxpayers money, which is collected without discrimination, shall be spent without discrimination.'") (quoting 110 CONG. REC. 7064 (1964) (comments of Senator Ribicoff)). The fact that Title IX is modeled after Title VI suggests that Title IX is also a spending-

funds to support discriminatory practices.⁹⁹ Second, Congress sought to protect individual citizens against discriminatory practices.¹⁰⁰ The federal departments and agencies that extend financial assistance to educational programs and activities are responsible for enforcement of Title IX.¹⁰¹ The Office of Civil Rights (OCR) in the Department of Education is such an agency and has promulgated regulations to enforce Title IX.¹⁰² The

power legislation. *Rowinsky*, 80 F.3d at 1012; *see also* *Grove City College v. Bell*, 465 U.S. 555, 577 (1984) (Powell, J., concurring) (stating purpose of Title IX is to make "discrimination" by recipients of federal aid unlawful); *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (comparing Title IX objectives to its model Title VI); Kelly S. Terry, Note, *Franklin v. Gwinnett County Public Schools: Reviving the Presumption of Remedies Under Implied Rights of Action*, 46 ARK. L. REV. 715, 733-34 (1993) (stating that Title IX is patterned after Title VI and shares same objective of prohibiting discrimination by institutions receiving federal aid).

Courts look to case law interpreting Title VII, rather than Title VI, to analyze Title IX claims because Title VII has generated more discrimination case law than Title VI. *See Bruneau*, 935 F. Supp. at 169-70 (using Title VII analysis in Title IX peer hostile environment sexual harassment claim against school district); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (concluding that Title VII precedent is appropriate analysis for peer hostile environment sexual harassment claim under Title IX).

99. *See Cannon*, 441 U.S. at 704. The principle education assistance bill in the Senate at that time did not contain a sex discrimination prohibition clause. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 119 (1987) (discussing draft of bill in Senate) [hereinafter REDEFINING DISCRIMINATION]. Senator Bayh, who introduced the amendment, stated that the amendment's purpose was to "wipe aside some of the discrimination that exists today, *intentionally or unintentionally*." *Id.* (citing 117 CONG. REC. 30404 (1971)). *See Grove City College*, 465 U.S. at 557 (Powell, J., concurring) (stating purpose of statute is to make "unlawful 'discrimination' by recipients of federal assistance"). In the past, courts cited the legislative sponsor's remarks as an authoritative guide to the statutory construction. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (according statements by legislative sponsor "substantial weight").

100. *See Cannon*, 441 U.S. at 704. Senator Bayh commented that "[Title IX] is a strong and comprehensive measure which . . . is needed . . . to provide women with solid legal protection as they seek education and training for later careers" *Id.* at 704 n.36 (quoting 118 CONG. REC. 5806-07 (1972)). Representative Mink stated that institutions that discriminate based on sex "should not be asking the taxpayers of this country to pay for this kind of discrimination." *Id.* (quoting 117 CONG. REC. 39252 (1971)).

101. *See* 20 U.S.C. § 1682 (1994). Section 1682 states in pertinent part: Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, [or] loan, . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute

Id.

102. 34 C.F.R. § 106.31 (1997) (setting out regulations OCR promulgated regarding Title IX). One of the implementing regulations states in part: "(b) *Specific*

OCR also has the power to impose sanctions upon recipients who fail to comply with Title IX requirements.¹⁰³

The OCR may, after a hearing, terminate the grant or refuse to grant assistance to recipients who violate the statute.¹⁰⁴ The Supreme Court ac-

prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, *a recipient shall not*, on the basis of sex: . . . (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity." *Id.* § 106.31(b)(7) (emphasis added).

The Department of Health and Human Services also promulgated regulations on Title IX. *See* 45 C.F.R. § 86.31 (1997) (setting out regulations that Department of Health and Human Services promulgated regarding Title IX). The two sets of regulations, though distinct, have minor similarities. For example, both state that the recipient shall not "limit any person in the enjoyment of any right, privilege, advantage, or opportunity." *Id.* § 86.31(b)(8); 34 C.F.R. § 106.31(b)(7) (1997).

In a Policy Memorandum, OCR stated that "[s]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient*, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX." OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service to Regional Civil Rights Directors (Aug. 31, 1981) (emphasis added), *cited in Rowinsky*, 80 F.3d at 1015. The memorandum continues by stating that "[t]he other unresolved issue relates to a recipient's responsibility for the 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." *Id.*

Recently, however, OCR promulgated under notice and comment a policy guidance for educational institutions on sexual harassment of students by school employees, other students or third parties. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (1997) [hereinafter Sexual Harassment Guidance]. In this policy guidance, OCR expressly states that schools will be liable under Title IX for peer sexual harassment if "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment and (iii) the school fails to take immediate and appropriate corrective action." *Id.* at 12039. OCR further states that the *Rowinsky* decision misinterprets Title IX. *Id.* at 12048 n.27. The policy guidance states that:

Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to take immediate and appropriate steps to remedy the hostile environment once a school official knows about it. If a student is sexually harassed by a fellow student, and a school official knows about it, but does not stop it, the school is permitting an atmosphere of sexual discrimination to permeate the educational program. The school is liable for its own action, or lack of action, in response to this discrimination.

Id. Yet, despite OCR's belief that the Fifth Circuit misinterpreted Title IX, the policy guidance states that OCR will comply with the *Rowinsky* holding when it investigates complaints involving schools in the states located in the Fifth Circuit. *See id.* The policy guidance further concludes that schools in those states, however, are not prohibited from following OCR's guidance on peer sexual harassment. *See id.* In fact, OCR encourages those schools to follow the policy guidance to ensure "students a safe and nondiscriminatory educational environment." *Id.*

103. *See* 20 U.S.C. § 1682.

104. *See id.* The pertinent part of § 1682 states:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom

knowledge that this sanction serves to accomplish the first objective of Title IX.¹⁰⁵ Nonetheless, it does not accomplish the second objective in every instance.¹⁰⁶ For example, a recipient with a one-time grant is not prevented from using the money in furtherance of future discriminatory practices.¹⁰⁷ Consequently, the Supreme Court, in *Cannon v. University of Chicago*,¹⁰⁸ held that a private cause of action exists under Title IX despite the absence of express authorization in the statute itself.¹⁰⁹ The *Cannon* Court concluded that an "individual remedy will provide effective assistance" in achieving the objectives of Title IX.¹¹⁰

After *Cannon*, Title IX sexual harassment cases were rare mainly because the *Cannon* Court did not clarify whether compensatory relief was available.¹¹¹ Thus, early Title IX cases, which generally involved students compelling schools to adopt equitable sports programs, sought only in-

there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, . . . or (2) by any other means authorized by law

Id.

105. See *Cannon*, 441 U.S. at 704-05. The Court, however, recognized that the first objective will not always be served unless a private right of action is available. See *id.* at 704 n.37; see also Sherer, *supra* note 6, at 2143-47 (outlining process for filing complaint under Title IX).

106. See *Cannon*, 441 U.S. at 705.

107. See *id.* at 704 n.37; see also 20 U.S.C. § 1682 (stating sanctions for violation of Title IX).

108. 441 U.S. 677 (1979).

109. *Id.* at 705-06, 717. The Court stated that it is not only sensible to allow a private remedy, but it is also fully consistent with enforcement of the statute. See *id.* at 706. The Supreme Court reaffirmed *Cannon* with regard to a private cause of action under Title IX in *Franklin v. Gwinnett County School District*, 503 U.S. 60, 65-66 (1992).

110. *Cannon*, 441 U.S. at 707. The Court further stated that:

When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefitted by its legislation. Title IX presents the atypical situation in which *all* of the circumstances . . . [are] supportive of an implied remedy

Id. at 717.

111. See generally *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 884 (1st Cir. 1988) (alleging sexual harassment under Title IX in medical program); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1363 (E.D. Pa. 1985) (recognizing hostile environment sexual harassment in educational context), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977) (recognizing quid pro quo sexual harassment under Title IX), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980); Bukoffsky, *supra* note 6, at 179 (discussing limitation of Title IX remedies); Rinestine, *supra* note 6, at 812 (finding that Supreme Court did not hold whether compensatory relief is available under Title IX).

junctive relief.¹¹² This dearth of Title IX sexual harassment cases ended after the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*.¹¹³

In *Franklin*, a teacher employed by the school district continually sexually harassed a high school student.¹¹⁴ The student alleged that when she reported the teacher's behavior to the school district, it took no action to remedy the situation and discouraged her from bringing charges.¹¹⁵ The *Franklin* Court concluded that, absent contrary direction by Congress, federal courts have the power to award "any appropriate relief" in a private right of action pursuant to a federal statute.¹¹⁶ Thus, the Court expressly

112. See Bukoffsky, *supra* note 6, at 179; see also *Cohen v. Brown Univ.*, 991 F.2d 888, 895-904 (1st Cir. 1993) (finding Title IX violation based on demotion of women's gymnastics and volleyball programs from varsity status); *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 655-56 (6th Cir. 1981) (applying Title IX to compel equality in sports program); *Canterino v. Barber*, 564 F. Supp. 711, 714-15 (W.D. Ky. 1983) (applying Title IX to compel equality in vocational classes); Deidre G. Duncan, Comment, *Gender Equity in Women's Athletics*, 64 U. CIN. L. REV. 1027, 1027 (1996) (attributing growth of female participation in intercollegiate athletics over last twenty years to enforcement of Title IX); Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Team Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 782-93 (1996) (discussing recent Title IX cases involving athletic departments); Denise K. Stellmach, Note, *Title IX: The Mandate for Equality in Collegiate Athletics*, 41 WAYNE L. REV. 203, 203 (1994) (stating that "[t]oday Title IX does more than prevent discrimination in college athletics" and further discussing how equality in college athletics was advanced by Title IX).

113. 503 U.S. 60 (1992). Before *Franklin*, there were only three other reported federal court cases on sexual harassment under Title IX. See *Lipsett*, 864 F.2d at 914 (finding arguable claims of quid pro quo and hostile environment sexual harassment in medical program where plaintiff was employee and student); *Alexander v. Yale Univ.*, 631 F.2d 178, 185-86 (3d Cir. 1986) (recognizing quid pro quo sexual harassment in educational context); *Moire*, 613 F. Supp. at 1362-64 (claiming sexual harassment by supervisor in psychiatric clerkship).

114. *Franklin*, 503 U.S. at 63. The student alleged that the teacher engaged her in sexually oriented conversations about her sexual experiences with her boyfriend and asked whether she would consider engaging in sexual intercourse with an older man. See *id.* The teacher constantly called the student at home and on several occasions excused her from class and took her to a private office where he subjected her to coercive intercourse. See *id.*

115. See *id.* at 64. The teacher also sexually harassed other female students. See *id.* Again, the administration and teachers discouraged the complaints and took no action. See *id.* The teacher eventually resigned on the condition that all matters pending against him be dropped. See *id.*

116. See *id.*; see also *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983) (acknowledging federal court's power to specify type of relief when right of action exists). The Court further stated that Congress did not limit nor intend to limit the remedies available in an action under Title IX, because Congress did not restrict the private right of action recognized in *Cannon*. *Franklin*, 503 U.S. at 66-73. Moreover, Congress did not attempt to restrict the availability of remedies available under a Title IX suit in the two amendments to Title IX. *Id.* at 72-73 (citing Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1845, and Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28).

held that monetary damages are available in an action brought to enforce Title IX.¹¹⁷ Moreover, the Court recognized teacher-to-student sexual harassment as actionable under Title IX.¹¹⁸ The Court stated that Gwinnett County Public Schools had a duty under Title IX not to discriminate on the basis of sex, and when a teacher sexually abuses or harasses a student, that teacher discriminates on the basis of sex.¹¹⁹ Further, the Court concluded that Congress did not intend for federal aid to be expended in support of intentional actions it sought to proscribe in a federal statute.¹²⁰

In the wake of *Franklin*, sexual harassment cases under Title IX increased. The first federal court case to affirmatively recognize quid pro quo and hostile environment sexual harassment under Title IX in an educational context was *Moire v. Temple University School of Medicine*.¹²¹ In *Moire*, the student alleged that her clerkship supervisor's conduct created a sexually harassing atmosphere, and university administrators promoted such an environment when they refused to take action.¹²² The court found that, although there was no allegation of quid pro quo harassment in this case, the EEOC guidelines on sexual hostile work environment are applicable in a Title IX context.¹²³ Thus, the court recognized both types of sexual harassment as legitimate causes of action under Title IX, even though it held that the plaintiff failed to establish her Title IX claim against the supervisor and university.¹²⁴

Following *Moire*, other courts have recognized that Title IX encompasses a claim for hostile environment sexual harassment in which the hostile environment was created by a teacher or other agent of the school.¹²⁵

117. See *Franklin*, 503 U.S. at 76; see also Sherer, *supra* note 6, at 2150 (discussing *Franklin* decision and its role in development of Title IX case law).

118. See *Franklin*, 503 U.S. at 75.

119. See *id.* The Court adopted the rule set forth in *Meritor Savings Bank*. See *id.* For a discussion of *Meritor Savings Bank*, see *supra* notes 75-81 and accompanying text.

120. See *Franklin*, 503 U.S. at 75.

121. 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

122. *Id.* at 1366; see also Rinestine, *supra* note 6, at 814 (discussing *Moire* decision and its place in development of Title IX case law).

123. See *Moire*, 613 F. Supp. at 1366-67 n.2 (stating that "[EEOC guidelines] explicitly recognize . . . [quid pro quo and hostile environment sexual harassment] . . . these guidelines seem equally applicable to Title IX") (citations omitted). For a detailed discussion of the EEOC guidelines, see *supra* notes 69-73 and accompanying text.

124. See Rinestine, *supra* note 6, at 814 (discussing in detail *Moire* decision).

125. See, e.g., *Seamons v. Snow*, 84 F.3d 1226, 1233 (10th Cir. 1996) (denying action for hostile educational environment under Title IX because plaintiff could not prove harassment was based on sex); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (stating that educational institution may be liable under Title VII standards in Title IX suit); *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 179 (N.D.N.Y. 1996) (denying school district's motion for summary judgment in Title IX hostile learning environment claim); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1427 (N.D. Cal. 1996) (analyzing hostile environment sexual harassment claim under Title VII standard); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290-93 (N.D. Cal.

The courts, however, are divided as to which analytical framework to apply in Title IX cases against the school district in which the hostile environment was created by a student upon another student: a Title VII legal standard or a statutory interpretation of Title IX.¹²⁶ Courts holding that school districts may be liable under Title IX for peer sexual harassment apply a Title VII legal standard.¹²⁷ These courts agree that a Title VII sexual harassment analysis is the closest analog to peer sexual harassment cases under Title IX and to establish a prima facie case of peer hostile environment sexual harassment, the plaintiff must prove that: (1) he or she belongs to a protected group; (2) he or she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or pervasive as to alter the conditions of his or her education, creating an abusive educational environment; and (5) there is some basis for institutional liability.¹²⁸ These courts, however,

1993) (holding that law permits plaintiffs to state claim of hostile environment sexual harassment under Title IX).

126. Compare *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.) (holding school district not liable for peer hostile environment sexual harassment), cert. denied, 117 S. Ct. 165 (1996), with *Bruneau*, 935 F. Supp. at 162 (alleging Title IX claim against school district for peer sexual harassment which created hostile learning environment), *Petaluma City*, 949 F. Supp. at 1427 (concluding that applicable standard in peer hostile environment sexual harassment claim under Title IX should be "traditional [T]itle VII hostile environment standard"), and *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1022-23 (W.D. Mo. 1995) (allowing cause of action against school board for peer hostile environment sexual harassment under Title IX).

127. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) (stating Title VII is appropriate standard for claims arising under Title IX); *Bruneau*, 935 F. Supp. at 162 (discussing application of Title VII standards to Title IX cases); *Petaluma City*, 949 F. Supp. at 1427 (concluding that Title VII hostile environment standard should be applied as matter of public policy).

One court criticized the *Rowinsky* decision as missing the "actual thrust of [a peer sexual harassment] claim." *Petaluma City*, 949 F. Supp. at 1420-21. It asserted that such claims are based "not on the harassing conduct of its students, but on the [school] district's own conduct of knowingly permitting the discriminatory hostile and abusive environment to continue. *Rowinsky* does not recognize that inaction may constitute actionable discrimination." *Id.* at 1421.

128. See, e.g., *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1416 (N.D. Iowa 1996) (stating that Supreme Court acknowledged in *Franklin* that student could state claim for monetary damages for school district's violation of Title IX by alleging that school district intentionally failed to remedy harassing conduct); *Bruneau*, 935 F. Supp. at 171 (holding that court will use legal standards from Title VII to guide its analysis in Title IX peer hostile environment sexual harassment claim because Title IX prohibits same conduct prohibited by Title VII); *Petaluma City*, 949 F. Supp. at 1426 (concluding that if school district knows of sexual harassment and fails to develop and implement policies to remedy such harassment, "it must be inferred that the [school district] intended the inevitable result of that failure, that is, a hostile environment"; thus, Title VII standard for intentional discrimination is appropriate standard); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (stating that "Supreme Court's utilization of its Title VII case law to interpret Title IX in *Franklin* strongly indicates that Title VII precedent is appropriate for analysis of hostile environment sexual harassment claims under Title IX"); *Bosley*, 904 F. Supp. at 1023 (stating that

have diverged in their analysis of the fifth prong.¹²⁹ Some courts have held that a school district may be liable under Title IX for peer hostile environment sexual harassment if it knew of the harassment and intentionally failed to take proper remedial measures because of the plaintiff's sex.¹³⁰ Another court has restricted the standard to require actual knowledge by the school district of the sexual harassment and its failure to take appropriate remedial action, regardless of intent.¹³¹ Contrarily, another court has concluded that a school district may be liable if it knew or

adapting Title VII standards to Title IX cases will further Title IX's congressional purpose of not allowing federal monies to be expended in support of intentional, invidious discrimination based on sex).

A number of commentators also support using Title VII case law to analyze a Title IX claim. *See, e.g.*, Eriksson, *supra* note 6, at 1810 ("Because courts are willing to look to Title VII for a definition of sexual harassment, logically they should employ Title VII principles to determine whether a school or school district should be liable for sexual harassment under Title IX."); Gant, *supra* note 15, at 517 (stating that courts should logically apply Title VII case law to Title IX cases); Lovato, *supra* note 6, at 393 (arguing that courts should use Title VII analysis in Title IX claims); Miller, *supra* note 6, at 720 (stating that using Title VII analysis ensures broader and more thorough application of Title IX); Sherer, *supra* note 6, at 2157 (proposing use of Title VII analysis for claims of hostile academic environment sexual harassment under Title IX).

129. *Compare Burrow*, 929 F. Supp. at 1205-06 (holding that school districts may be liable for peer hostile environment sexual harassment under Title IX if they knew of harassment and intentionally failed to take proper remedial measures because of plaintiff's sex), *and Wright*, 940 F. Supp. at 1420 (following standard in *Burrow* because it ensures that educational institution will have notice of its potential Title IX liability), *with Bruneau*, 935 F. Supp. at 173 (holding that plaintiff in Title IX peer hostile environment sexual harassment case must show that school board received *actual* notice of sexual harassing conduct and failed to take action to remedy it and concluding that showing of constructive notice only will not be enough for liability), *Petaluma City*, 949 F. Supp. at 1426 (concluding that school district may be liable under Title IX for peer hostile environment sexual harassment if it actually knew, or should have known in exercising its legal duties, of such harassment and did not take prompt, appropriate remedial action), *and Bosley*, 904 F. Supp. at 1025 (holding that school district may be liable for Title IX peer hostile environment sexual harassment violation if it had sufficient notice of its liability and failed to take appropriate remedial action and finding that no notice problem exists if school intentionally discriminates).

In its recent policy guidance on sexual harassment, OCR stated that a school district violates Title IX if it had actual or constructive notice of the hostile environment and failed to take immediate and appropriate corrective action, even if the student did not use the school's existing sexual harassment grievance procedures. *See Sexual Harassment Guidance*, *supra* note 102, at 12042.

130. *See Wright*, 940 F. Supp. at 1420 (stating that not only must school district have known of sexual harassment but it must also have intentionally failed to remedy situation because of plaintiff's sex); *Burrow*, 929 F. Supp. at 1205-06 (same); *Bosley*, 904 F. Supp. at 1025 (stating that school district must have had "sufficient notice of its potential liability" and that no notice problem exists if school intentionally discriminated based on sex).

131. *See Bruneau*, 935 F. Supp. at 173 (holding that liability will not lie on constructive notice only, rather actual notice of harassing conduct is required).

should have known of the sexual harassment and failed to take prompt remedial action.¹³²

Presently, only two federal courts of appeals have addressed the issue of school district liability for peer sexual harassment under Title IX.¹³³ The United States Court of Appeals for the Eleventh Circuit, in *Davis v. Monroe County Board of Education*,¹³⁴ held that Title IX imposed liability on the school board for peer sexual harassment, when the school board knowingly allowed the harasser to create a hostile environment.¹³⁵ The plaintiff in *Davis* alleged that the school board's failure to take action to stop the harassing conduct denied benefits of education to the plaintiff based on her sex.¹³⁶ Applying a Title VII based analysis, the Eleventh Circuit held that the plaintiff established a prima facie claim under Title IX because of the school board's failure to take appropriate action to remedy a sexually hostile environment.¹³⁷ Six months later, however, the Eleventh Circuit granted a rehearing en banc in the case and vacated its previous opinion.¹³⁸

132. See *Petaluma City*, 949 F. Supp. at 1426 (reasoning that this approach gives schools appropriate amount of discretion in determining how best to respond to harassment).

133. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.) (holding that school district is not liable for peer hostile environment sexual harassment under Title IX), *cert. denied*, 117 S. Ct. 165 (1996); *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1190 (11th Cir.) (holding school board liable under Title IX for failing to remedy hostile learning environment resulting from peer sexual harassment), *vacated*, 91 F.3d 1418 (11th Cir. 1996).

134. 74 F.3d 1186 (11th Cir.), *vacated*, 91 F.3d 1418 (11th Cir. 1996).

135. See *id.* at 1188. A male fifth-grader continually sexually harassed a female classmate. See *id.* The school district, upon learning of the harassment, took no action to remedy the situation and the "requests for protection went unfulfilled." *Id.* at 1189. As a result of the continued harassment, the female classmate suffered mental and emotional problems, and her grades dropped. See *id.* The Eleventh Circuit held that if the school board knowingly allowed the harasser to create a hostile environment, then it violated Title IX. See *id.* at 1188.

136. See *id.* Plaintiff's requests to the school for protection went unfulfilled. See *id.* at 1189. School officials never disciplined the harasser for sexually harassing the plaintiff. See *id.*

137. See *id.* at 1194-95. The court stated that the plaintiff in this type of sexual harassment case must prove:

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

Id. at 1194. The court further stated that to determine whether the environment is hostile or abusive, courts must be concerned with the frequency of the abusive conduct, its severity, "whether it is physically threatening or humiliating rather than merely offensive," and "whether it unreasonably interferes with the plaintiff's performance." *Id.* (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

138. See *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). A majority of the judges in the court voted in favor of granting a rehearing en banc and vacating the previous panel's opinion. See *id.* at 1418. At the time of this Note,

The Fifth Circuit, in *Rowinsky*, is the only other federal court of appeals to address this issue.¹³⁹ The *Rowinsky* court held that Title IX does not impose liability on a school district for peer hostile environment sexual harassment, when the school district itself did not directly discriminate based on sex.¹⁴⁰ The court stated that in a peer sexual harassment case, the plaintiff must show that the school district responded differently to claims of sexual harassment based on the plaintiff's sex.¹⁴¹ To date, the *Rowinsky* court is the only federal court of appeals holding that Title IX does not impose liability on school districts for peer sexual harassment.¹⁴²

D. State Statutes Directed at Sexual Harassment in Schools

In response to the increasingly prevalent problem of sexual harassment in schools, several states have enacted legislation to address the issue.¹⁴³ Minnesota was the first state to legislate on sexual harassment in schools.¹⁴⁴ Minnesota amended its antidiscrimination statute to expressly prohibit sexual harassment and defined it as "unwelcome sexual advances"

the rehearing had occurred but the court had not handed down an opinion. Telephone Interview with The National Women's Law Center, Attorney for Appellant (Mar. 14, 1997).

139. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1007 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996). For a discussion of the facts in *Rowinsky*, see *supra* notes 25-55 and accompanying text. For an account of the *Rowinsky* court's analysis, see *infra* notes 163-201 and accompanying text.

140. See *Rowinsky*, 80 F.3d at 1008.

141. See *id.* at 1016.

142. See *id.* at 1010-16 (holding Title IX does not impose liability on school district for peer hostile environment sexual harassment after interpreting statute's plain language, legislative history and agency promulgations).

143. See Sherer, *supra* note 6, at 2136 (discussing individual schools that have implemented sexual harassment policies and procedures). Many of the approaches include developing a specific sexual harassment policy, disseminating the policy around school and developing and disseminating grievance procedures. See *id.* Disciplinary actions include participation in a program or research project on sexual harassment, an apology to the victim, parent conference, detention, suspension, expulsion or referral to the police. See *id.* at 2136-37.

Some schools have implemented sexual harassment programs or workshops. See Shelley Donald Coolidge, *In the Halls of Learning, Students Get Lessons in Sexual Harassment*, CHRISTIAN SCI. MONITOR, Sept. 18, 1996, at 1, available in 1996 WL 5044305 (discussing local sexual harassment programs). For example, at Framingham High School in Massachusetts, the tenth-grade health class receives five lessons on sexual harassment. See *id.* Similarly, at East High School in Alaska, a day-long sexual harassment workshop is offered to students every other month. See *id.* At Stevens Point Area Senior High School in Wisconsin, students travel throughout the state and perform a play on sexual harassment called "Alice in Sexual Assault Land." *Id.* At the Minuteman Regional Vocational Technical High School in Lexington, Massachusetts, incoming freshmen attend sexual harassment training classes where they discuss genuine instances of sexual harassment and read court cases on the topic. See Saltzman, *supra* note 6, at 7377.

144. See Miller, *supra* note 6, at 712-14 (discussing state-enacted legislation regarding sexual harassment in schools); Rinestine, *supra* note 6, at 826-28 (same); Sherer, *supra* note 6, at 2139-43 (same).

or "physical conduct or communication of a sexual nature" that creates a hostile or offensive environment at work or in school.¹⁴⁵ Furthermore, Minnesota was the first state to require its school boards to adopt written sexual harassment policies that conform to the definition of sexual harassment set out in the antidiscrimination statute.¹⁴⁶ Such policies must set forth grievance procedures and disciplinary sanctions.¹⁴⁷ Each school must also develop a process for discussing the sexual harassment policy with its students and school employees.¹⁴⁸ Furthermore, the sexual harassment policies apply to all children in kindergarten and grades one through twelve.¹⁴⁹ Thus far, two cases, neither of which went to trial, have arisen involving peer sexual harassment in Minnesota.¹⁵⁰ In both cases, the Department of Human Rights, the state agency charged with enforcing sexual harassment legislation, ruled against the school district for failing to take appropriate action.¹⁵¹

145. See MINN. STAT. ANN. § 363.01.41 (West 1993). The statute states in pertinent part:

"Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when: . . . (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . educational, or housing environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Id.

146. See MINN. STAT. ANN. § 127.46 (West 1993). The statute states in part: "Each school board *shall* adopt a written sexual, . . . harassment and sexual, . . . violence policy that conforms with [the antidiscrimination statute]." *Id.* (emphasis added).

147. See *id.*

148. See *id.*

149. See Rinestone, *supra* note 6, at 826 (discussing Minnesota's sexual harassment legislation). The Minnesota Board of Education approved the use of a voluntary curriculum that uses puppets and storytelling to explain the issue of sexual harassment to children in kindergarten through third grade. See Saltzman, *supra* note 6, at 7377. Under this curriculum, children in grades four through six "analyze how television programs and advertising promote sexual stereotypes." *Id.* Children in the upper grade levels also write letters to sexual harassment offenders. See *id.*

150. See Minnesota Department of Human Rights, REF: 360 (1991) (Gorman, Enforcement Supervisor) (alleging school district failed to take adequate action regarding sexual harassment complaints thus contributing to offensive educational atmosphere) [hereinafter Chaska Case]; Minnesota Department of Human Rights, REF: 341 (1990) (Lapinsky, Director) (alleging school district failed to take timely, appropriate action to remove sexually offensive graffiti on walls of bathroom stall) [hereinafter Duluth Case]; see also JoAnn Strauss, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and An Affirmative Duty Imposed on Educational Institutions*, 10 LAW & INEQ. J. 163, 173-78 (1992) (detailing Minnesota cases and their implications); Sherer, *supra* note 6, at 2140-41 (discussing Minnesota cases).

151. See Strauss, *supra* note 150, at 173-74; Sherer, *supra* note 6, at 2140 & n.115. In the first case, the Duluth School District became the first school district in the United States to pay damages under a peer sexual harassment claim. See

California is another state to pass legislation prohibiting sexual harassment in schools.¹⁵² Similar to the Minnesota statute, the California statute defines sexual harassment as “unwanted sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature” made at work or in an educational setting.¹⁵³ Moreover, each educational institution in California must adopt a written sexual harassment policy that includes information on grievance procedures and available remedies.¹⁵⁴ The California legislation, however, does not require schools to implement programs that apply to children in kindergarten and grades one through three.¹⁵⁵ California also passed a statute allowing the principal or superintendent to suspend or expel a student if the student engages in sexual harassment as previously defined.¹⁵⁶

Contrary to the Minnesota and California statutes, Texas does not mandate its school districts to develop sexual harassment policies, rather it

Strauss, *supra* note 150, at 174-76. The victim received a \$15,000 settlement because school officials failed to remove crude graffiti about her on the bathroom wall. *See id.*

Later, the Chaska School District was held liable for peer sexual harassment when the administrators failed to respond to a complaint by a female student against male students who circulated a list of twenty-five girls they found sexually desirable. *See id.* at 176-77. The list also included graphic descriptions of the girls' bodies. *See id.*

152. *See* CAL. EDUC. CODE § 212.5 (West 1994).

153. *See id.* Section 212.5 states:

For purposes of this chapter, “sexual harassment” means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

(a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.

(b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.

(c) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

(d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

Id.

154. *See id.* § 212.6(b), (c).

155. *See id.* § 48900.2 (West 1994) (exempting children in kindergarten and grades one through three); *see also* Rinstine, *supra* note 6, at 826-27 (discussing California and Minnesota legislation regarding sexual harassment in schools); Sherer, *supra* note 6, at 2141 (discussing California legislation on sexual harassment policy in schools).

156. CAL. EDUC. CODE § 48900.2. The statute further states that the conduct must be considered “by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment.” *Id.*

makes such policies optional.¹⁵⁷ Texas enacted a statute stating that “each school district *may* develop and implement a sexual harassment policy.”¹⁵⁸ Moreover, Texas does not outline what these policies must include and what remedies are available.¹⁵⁹

Similarly, Pennsylvania adopted legislation authorizing the Pennsylvania Human Relations Commission (“Commission”) to prepare, in conjunction with the state Department of Education, a comprehensive educational program for the students of the schools in the Commonwealth.¹⁶⁰ The purposes of such a program are to “eliminate prejudice against” and to “further good will among all persons” without regard to, *inter alia*, sex.¹⁶¹ Pennsylvania, like Texas, does not mandate these programs; rather, it merely grants authorization to state agencies to implement educational programs if the agencies wish.¹⁶²

IV. THE ROWINSKY DECISION

A. *The Fifth Circuit's Analysis of Title IX*

Previously, the district court in *Rowinsky*, relying on factors such as the type of punishment given to boys who assaulted boys and to boys who assaulted girls, held that the plaintiff failed to state a claim under Title IX because she did not provide evidence that the school district treated sexual harassment toward girls less severely than that toward boys.¹⁶³ On appeal, the Fifth Circuit affirmed the district court's decision and, based on statutory interpretation, held that Title IX does not impose liability on a school district absent allegations that the school district itself directly discriminated based on sex.¹⁶⁴

157. *See id.* The statute states in part: “(b) Each school district *may* develop and implement a sexual harassment policy to be included in the district improvement plan” *Id.* (emphasis added).

158. TEX. EDUC. CODE ANN. § 37.083(b) (West 1996) (emphasis added).

159. *See id.*

160. *See* 43 PA. CONS. STAT. ANN. § 958 (West 1996). The statute states in part: “The Commission, in cooperation with the Department of Education, is authorized to prepare a comprehensive educational program, designed for the students of the schools in this Commonwealth . . . in order to eliminate prejudice against and to further good will among all persons, without regard to . . . sex” *Id.*

161. *Id.*

162. *But see* Rineshine, *supra* note 6, at 827-28 (stating that in 1993, Pennsylvania House of Representatives considered bill mandating school boards to adopt written harassment policy and sexual harassment policy) (citing Pa. H.B. 2185, 176th General Assembly, § 5.4(d)(1) (1993)); PENNSYLVANIA HISTORY OF HOUSE BILLS AND RESOLUTIONS A-297 (1993-94 Sessions), *printed by* Commonwealth of Pennsylvania (describing HB 2185 as amending Pennsylvania Human Relations Act to prohibit harassment and sexual harassment). The bill would have required that such policies outline grievance procedures and disciplinary actions. *See* Rineshine, *supra* note 6, at 828 n.184. To date, the Pennsylvania legislature has not enacted such a bill.

163. *See* *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1010 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

164. *See id.* at 1008.

The Fifth Circuit began its analysis by considering the language of Title IX.¹⁶⁵ The Fifth Circuit found that the text of Title IX states three general prohibitions.¹⁶⁶ The prohibitions are that no person: (1) shall be excluded from participation in a federally funded program; (2) shall be denied the benefits of such a program; or (3) shall be subjected to discrimination under the program.¹⁶⁷ The Fifth Circuit acknowledged that Title IX's prohibitions are not explicitly limited to grant recipients.¹⁶⁸ By examining the placement and purpose of Title IX's language in the statutory scheme, the court concluded that Title IX does not limit "who' is prohibited from discriminating against students in an educational program."¹⁶⁹ The court found that Congress drafted Title IX with a focus on identifying the benefitted class rather than on identifying who was prohibited from discriminating against persons in federally funded educational programs and activities.¹⁷⁰ Therefore, Title IX's language is driven by the nature of the right protected, not by the class of wrongdoers.¹⁷¹ The court, however, concluded that "the open-ended language of [T]itle IX does not support an inference that the statute applies to the conduct of third parties."¹⁷²

The court, then, examined three factors in favor of limiting liability under Title IX to only the acts of grant recipients.¹⁷³ First, the court examined the scope and structure of Title IX.¹⁷⁴ In so doing, the court con-

165. *See id.* at 1010. In determining the scope of Title IX, the court stated that it is important not only to consider the "bare meaning of the words but also its placement and purpose in the statutory scheme." *Id.* at 1012 (quoting *Bailey v. United States*, 116 S. Ct. 501, 506 (1995)).

166. *See id.*

167. *See id.*; *see also*, 20 U.S.C. § 1681(a) (1994) (setting out language of Title IX).

168. *See Rowinsky*, 80 F.3d at 1012.

169. *Id.*

170. *See id.* "Title IX was drafted in a way that identifies a benefitted class in order to imply a private right of action." *Id.*; *see also Cannon v. University of Chicago*, 441 U.S. 677, 690-93 (1979) (stating that Congress drafted Title IX with "unmistakable focus on the benefitted class").

In *Cannon*, the U.S. Supreme Court recognized an implied private right of action to enforce Title IX. *See id.* The Court stated that because Congress drafted Title IX focusing on a benefitted class, there was reason to "infer a private remedy in favor of individual persons." *Id.*

171. *See Rowinsky*, 80 F.3d at 1012. The Fifth Circuit draws support for this conclusion from the Supreme Court's opinion in *Cannon*. *See id.* at 1012 n.13. The *Cannon* Court stated that a statute conferring a right to be free from discrimination will almost always be phrased in terms of the benefitted class because such a right is a personal one. *See id.*

172. *Id.*

173. *See id.* Like the Fifth Circuit's opinion, this Note refers to both the grant recipient and its agents as "grant recipients." *See id.* at 1011 n.10.

174. *See id.* at 1012-13. Pursuant to Congress's spending power, Title IX grants funds to recipients in return for the "recipient's adherence to the conditions of the grant." *Id.* The U.S. Supreme Court, however, has not spoken on the issue of whether Title IX was enacted pursuant to Congress's spending power

cluded that because Congress enacted Title IX pursuant to its spending power, the statute prohibits discriminatory acts only by grant recipients.¹⁷⁵ Under Title IX, a recipient receives federal funds only upon compliance with the conditions of the grant.¹⁷⁶ The Fifth Circuit stated that to impose liability upon the grant recipient for the conduct of third parties would be inconsistent with the purpose of the spending condition.¹⁷⁷ Because grant recipients have little control over the acts of third parties, the possibility of violating the spending condition would likely induce recipients to turn down the grants.¹⁷⁸ This in turn would render the condition almost useless.¹⁷⁹

The court further stated that Title IX's structure and emphasis support the interpretation that the statute only applies to grant recipients.¹⁸⁰ The court noted that with the exception of one phrase, the statute discusses discrimination only by grant recipients.¹⁸¹ For example, there are provisions in the statute that exempt certain entities and practices from coverage, such as the girls and boys scouts, beauty pageants and Girls and Boys State.¹⁸² The court concluded that this emphasis on grant recipients

rather than section 5 of the Fourteenth Amendment. *See id.* at 1012 n.14. Precedent, however, strongly suggests that Title IX, similar to its model, Title VI, was enacted under Congress's spending power. *See id.*; *see also* *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99 (1983) (holding that Title VI was enacted pursuant to Spending Clause). Therefore, the inference that Title IX was enacted pursuant to the Spending Clause arises because Title IX was modeled after Title VI. *See Rowinsky*, 80 F.3d at 1012 n.14.

175. *See Rowinsky*, 80 F.3d at 1012. The Fifth Circuit stated:

Although the Supreme Court has reserved the issue of whether [T]itle IX was enacted under the Spending Clause rather than § 5 of the Fourteenth Amendment, precedent strongly suggests that [T]itle IX, like its model, [T]itle VI, was enacted under the former Title IX was modeled after [T]itle VI and uses identical language, giving rise to an inference that [T]itle IX also was enacted pursuant to the Spending Clause.

Id. at 1012 n.14.

176. *See id.* at 1013.

177. *See id.* The purpose of a spending condition is to induce the grant recipient to comply with the conditions in order to receive grants. *See id.* Therefore, the "likelihood of violating the prohibition cannot be too great" if the coercion is to be effective. *Id.*

178. *See id.*

179. *See id.* The court further found it unlikely that Congress would impose conditions on federal funds and make it so unattractive to potential recipients. *See id.*

180. *See id.*

181. *See id.* The phrase Rowinsky relies upon is "[n]o person shall be subjected to discrimination *under* any educational program or activities." *See id.* at 1011 (quoting 20 U.S.C. § 1681(a) (1993)) (emphasis added). The plaintiff argued that "under" means "in" not "by." *See id.* Therefore, according to Rowinsky, the statute should not be limited to only the acts of discrimination by the grant recipient. *See id.*

182. *See id.* at 1013 n.16.

supports the conclusion that the statute only applies to the practices of grant recipients.¹⁸³

The court also considered Title IX's legislative history.¹⁸⁴ Citing the Supreme Court, the Fifth Circuit concluded that the purpose of Title IX is to "prevent discrimination by grant recipients."¹⁸⁵ The court found that in the debates and numerous statements regarding the amendment, supporters and opponents of Title IX focused mainly on the conduct of grant recipients.¹⁸⁶ The court concluded that the drafters of Title IX viewed the amendment as only an "important first step" to give women an equal chance at something "rightfully theirs."¹⁸⁷ Thus, Title IX was not intended to cure *all* types of discrimination.¹⁸⁸

Finally, the court turned to the Department of Education's OCR interpretation of Title IX.¹⁸⁹ The court concluded that the implementing

183. *See id.* at 1013.

184. *See id.* at 1013-16.

185. *Id.* at 1013. In reviewing Title IX's legislative history, the Supreme Court concluded that the statute, similar to Title VI, sought to accomplish two objectives: (1) "to avoid the use of federal resources to support discriminatory practices" and (2) "to provide individual citizens effective protection against those practices." *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979); *see Grove City College v. Bell*, 465 U.S. 555, 557 (1983) (Powell, J., concurring) (stating purpose of statute is to make "unlawful 'discrimination' by recipients of federal assistance programs").

186. *See Rowinsky*, 80 F.3d at 1014. Senator Bayh, who introduced the amendment, stated that the purpose of the amendment was to ban sex discrimination in educational programs receiving federal assistance. *See* 118 CONG. REC. 5803 (1972). "[S]ex discrimination reaches into all facets of education - admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales." *Id.* The Senator further stated that there are three basic types of discrimination that the amendment was designed to remedy: (1) "discrimination in admission to an institution," (2) "discrimination of available services or studies within an institution once students are admitted" and (3) "discrimination in employment within an institution, as a member of a faculty or whatever." *Id.* at 5812.

The Fifth Circuit noted that normally the statements of a legislator would not be controlling. *See Rowinsky*, 80 F.3d at 1014 n.19. Yet, Senator Bayh's remarks, coming from the sponsor of the language that was enacted, have been treated as authoritative in interpreting the statute's construction. *See id.*; *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (according statements by legislative sponsor "substantial weight").

187. *Rowinsky*, 80 F.3d at 1014.

188. *See id.* The drafters realized that further legislation might be necessary. *See id.* In fact, the original amendment mandated a study on sex discrimination to suggest further legislative remedies. *See id.*

189. *See Rowinsky*, 80 F.3d at 1014-15. The OCR is responsible for investigating and enforcing institutional compliance with Title IX. *See* 20 U.S.C. § 3413 (1994). The Fifth Circuit noted that appreciable deference should be accorded to OCR's interpretations. *See Rowinsky*, 80 F.3d at 1014 n.20. Such deference depends on factors such as "circumstances of [the regulations'] promulgation, the consistency with which the agency has adhered to the position announced, the evident

regulations for Title IX support its refusal to impose liability on recipients for the actions of third parties.¹⁹⁰ Moreover, the court noted that, even though OCR has commented on sexual harassment by employees and agents of recipients, at the time it had not resolved the issue of peer sexual harassment.¹⁹¹ The court further stated that the “only OCR documents to apply Title IX to peer sexual harassment” are in the recent Letters of Finding, which should be accorded little weight.¹⁹²

Based upon statutory interpretation, the Fifth Circuit affirmed the district court’s judgment and held that the plaintiff in a peer sexual harassment case under Title IX must “demonstrate that the school district responded to sexual harassment claims differently based on sex.”¹⁹³ The Fifth Circuit further concluded that the recipient of federal funds cannot be liable for sexual harassment when the perpetrator is a party other than the grant recipient or its agent.¹⁹⁴

consideration which has gone into its formulation, and the nature of the agency’s expertise.” *Id.*

190. *See Rowinsky*, 80 F.3d at 1015. The implementing regulations for Title IX address only the acts of the recipients themselves. *See id.* The specific prohibition in 34 C.F.R. § 106.31(b)(7) states in part: “(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: . . . (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.” 34 C.F.R. § 106.31(b)(7) (1997) (emphasis added).

191. *See Rowinsky*, 80 F.3d at 1015. After the *Rowinsky* decision, however, OCR issued a policy guidance detailing its interpretation of peer sexual harassment under Title IX. Sexual Harassment Guidance, *supra* note 101, at 12034. For a further discussion of the OCR policy guidance on sexual harassment, see *supra* note 101.

192. *See Rowinsky*, 80 F.3d at 1015. These letters of finding were written during the OCR’s investigation of specific institutions, and their purpose is to compel voluntary compliance with Title IX by an offending institution. *See id.* The court concluded that such letters should be accorded little deference because the traditional factors of deference are not present, and the letters do not “reflect the deliberate considerations of a rulemaking proceeding.” *Id.* Moreover, any weight the letters might have are outweighed by the implementing regulations and Policy Memorandum. *See id.*

The Fifth Circuit also noted that the only agency interpretation in favor of the plaintiff’s position are those involving Title VI. *See id.* at 1016. The OCR has stated that peer hostile environment racial harassment is a violation of Title VI. *See id.* (citing 59 Fed. Reg. 11448, 11449 (1994)). Yet, neither the regulations nor commentary explain why Title VI would apply to the actions of non-recipients. *See id.* The OCR merely cites to Title VII cases to establish that hostile environments can be discriminatory. *See id.* (citing 59 Fed. Reg. 11451, 11451 (1994)). Thus, the Fifth Circuit concluded that “[a]bsent a reasoned explanation for why the statutory language supports applying [T]itle VI to peer harassment . . . OCR’s interpretation [of [T]itle VI to peer racial harassment] should not be accorded any deference.” *Id.*

193. *Id.*

194. *See id.* at 1010, 1016.

B. *Judge Dennis's Dissent*

Judge Dennis, the only dissenting judge, disagreed with the majority opinion and concluded that Title IX imposes a duty on the school district to take appropriate measures to protect its students from sexual harassment, abuse and discrimination in the education environment when the school has actual knowledge of the harassment, abuse or discrimination.¹⁹⁵ First, Judge Dennis discussed the import of Supreme Court precedents, such as *Cannon* and *Franklin*, in determining the scope of Title IX.¹⁹⁶ He concluded that Supreme Court precedent interpreted Title IX as a "broad federal protection privately enforceable by beneficiaries of the act."¹⁹⁷ Thus, if a student is harassed by another or "even a stranger" within the school environment, the school district would be liable under Title IX if it fails to take corrective measures after having actual knowledge of the sexual harassment.¹⁹⁸

Second, Judge Dennis noted that even if the school district was not receiving federal assistance, it still had a duty to protect the students from dangerous harm under the *in loco parentis* theory.¹⁹⁹ He stated that

195. *See id.* at 1025 (Dennis, J., dissenting). Judge Dennis joined the majority opinion only on the conclusion that Mrs. Rowinsky lacks standing under Title IX. *See id.* at 1017 n.2 (Dennis, J., dissenting).

196. *See id.* at 1017-18 (Dennis, J., dissenting). The dissent discussed the Supreme Court's decision in *Cannon*, in which it held that "Title IX is enforceable through an implied right of action by certain classes of private parties." *Rowinsky*, 80 F.3d at 1017 (Dennis, J., dissenting). Next, it discussed the Supreme Court's holding in *Franklin*, where it held that Title IX's implied private right of action includes the right to a claim for money damages. *See Rowinsky*, 80 F.3d at 1018 (Dennis, J., dissenting). For a further discussion of *Cannon* and *Franklin*, see *supra* notes 108-19 and accompanying text.

197. *Rowinsky*, 80 F.3d at 1017 (Dennis, J., dissenting). The dissent reasoned that *Cannon* allowed a private cause of action under Title IX and *Franklin* placed a duty on the school district not to discriminate based on sex in addition to allowing money damages. *See id.* at 1019 (Dennis, J., dissenting). Judge Dennis stated:

[Thus] in finding that a school district can be liable under Title IX for the unauthorized acts of its agents, the Court established that a federally funded program may be liable for conduct extending beyond the practices, policies and decision making directly attributable to it, even though Title IX's language is not expressly directed to conduct of the program's agents or others.

Id. at 1020 n.6 (Dennis, J., dissenting).

198. *See id.* at 1024 (Dennis, J., dissenting).

199. *See id.* at 1024-25 (Dennis, J., dissenting); see also *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 650 (1995) (allowing schools to perform urinalysis tests for drugs on athletes because school authorities act *in loco parentis*). In *Vernonia*, the Supreme Court justified its holding by stating that school authorities "'act *in loco parentis*' with the power and indeed the duty to 'inculcate the habits and manners of civility.'" *Id.* at 653 (citations omitted) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986)).

The dissent addressed this issue because it felt that the majority was unwilling to impose liability on the school district because the school had neither a duty with regard to students' safety nor power to "control educationally pernicious student conduct." *Rowinsky*, 80 F.3d at 1024 (Dennis, J., dissenting). The dissent noted

Supreme Court precedent supports the notion that schools have a degree of supervision and control over the students.²⁰⁰ Therefore, according to Judge Dennis, Title IX imposes a duty on the school district to take appropriate measures to protect its students from sexual harassment.²⁰¹

V. CRITICAL ANALYSIS

A. *What's Right and What's Wrong with Rowinsky*

The majority in *Rowinsky* correctly concluded that Title IX does not establish liability on school districts in peer hostile environment sexual harassment claims.²⁰² The Fifth Circuit appropriately held that Title IX claims for peer hostile environment sexual harassment are actionable only if the plaintiff demonstrates that the school district itself reacted differently to such complaints based on sex.²⁰³ By enacting Title IX, Congress merely intended to prevent schools from using federal monies to fund discriminatory practices, and to provide an equal opportunity for all persons in federally funded educational programs and activities.²⁰⁴ Further-

that it is this degree of control that schools have over the students that makes it sufficient to apply tort liability when the school, receiving federal assistance, knowingly fails to comply with the statutory duty to prevent sex discrimination. *See id.* at 1024 n.9 (Dennis, J., dissenting).

200. *See Rowinsky*, 80 F.3d at 1024 n.9 (Dennis, J., dissenting); *see also Vernonia*, 515 U.S. at 653 (stating that schools have tutelary duty to promote and inculcate self discipline, health and good morals in students); *New Jersey v. T.L.O.*, 469 U.S. 325, 335-36 (1985) (reasoning that school authorities act *in loco parentis* with power and duty to inculcate manners of civility); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 203 n.7 (5th Cir. 1994) (stating that school officials have obligation to protect students from at least "certain kinds of foreseeably dangerous harm during regular school hours").

201. *See Rowinsky*, 80 F.3d at 1025 (Dennis, J., dissenting). Judge Dennis concluded that the plaintiffs provided sufficient evidence to survive summary judgment and that the Fifth Circuit should remand the case for further proceedings. *See id.* (Dennis, J., dissenting).

202. *See id.* at 1016. For a discussion of the Fifth Circuit's analysis of Title IX, *see supra* notes 163-94 and accompanying text.

203. *See Rowinsky*, 80 F.3d at 1016. Other courts disagree and apply a Title VII analysis to Title IX peer sexual harassment cases. *See, e.g., Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419-20 (N.D. Iowa 1996) (stating that Title VII analysis is "appropriate test for an actionable claim of peer sexual harassment under Title IX"); *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 169-70 (N.D.N.Y. 1996) (using Title VII analysis in Title IX peer hostile environment sexual harassment claim against school district); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1418 (N.D. Cal. 1996) (discussing use of Title VII analysis to analyze school district liability for peer hostile environment sexual harassment under Title IX); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (concluding that Title VII precedent is appropriate analysis for peer hostile environment sexual harassment claim under Title IX); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1022 (W.D. Mo. 1995) (holding Title VII analysis for employer liability is appropriate for enforcing provisions of Title IX).

204. *See Cannon v. University of Chicago*, 441 U.S. 677, 704 n.36 (1979) (reviewing Senator Bayh's discussion of Title IX). Senator Bayh commented that

more, Title IX's legislative history supports the conclusion that the legislative sponsors did not contemplate that schools should be held liable for the actions of third parties.²⁰⁵ Subsequent Title IX agency regulations also focus on the actions of grant recipients by stating that a *recipient* shall not limit, on the basis of sex, a person's enjoyment of any "right, privilege, advantage or opportunity."²⁰⁶ Even though it seems as if Supreme Court precedent has adopted a broad reading of Title IX, it is doubtful the Court would allow an *overly* broad interpretation that would swallow the original objectives and purposes of Title IX.²⁰⁷ Also, because Title IX contains a spending condition, to hold grant recipients liable for third party actions would render the condition useless and possibly discourage schools from applying for federal aid, which would result in low budget public schools where the students are not receiving the quality education they could be receiving with federal assistance.²⁰⁸

On the other hand, the majority's statutory analysis of Title IX inadequately addressed the issue of peer sexual harassment. First and most important, the majority did not adequately explain why it refused to apply a Title VII legal standard to a Title IX peer sexual harassment claim.²⁰⁹ The Fifth Circuit simply dismissed this controversy in a lengthy footnote, stating its belief that "importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic" because, on a theoretical level, peer hostile environment sexual har-

"[Title IX] is a strong and comprehensive measure which . . . is needed . . . to provide women with solid legal protection as they seek education and training for later careers." *Id.* (quoting 118 CONG. REC. 5806-07 (1972)). Representative Mink stated that institutions that discriminate based on sex "should not be asking the taxpayers of this country to pay for this kind of discrimination." *Id.* at 704 n.36 (quoting 117 CONG. REC. 39252 (1971)).

205. See REDEFINING DISCRIMINATION, *supra* note 98, at 119 (illustrating legislative history of Title IX). Senator Bayh, who introduced the amendment, stated that the amendment's purpose was to "wipe aside some of the discrimination that exists today, *intentionally or unintentionally.*" *Id.*

206. See 34 C.F.R. § 106.31 (1997) (setting out regulations that OCR promulgated regarding Title IX).

207. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 50, 76 (1992) (recognizing availability of compensatory remedy under Title IX claim absent express congressional intent); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("[I]f we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."); *Cannon*, 441 U.S. at 717 (recognizing implied private right of action under Title IX absent express congressional intent).

208. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 n.14 (5th Cir.) (noting that Title IX was modeled after Title VI, which was enacted pursuant to Congress's spending power), *cert. denied*, 117 S. Ct. 165 (1996); see also *Cannon*, 441 U.S. at 704 (comparing Title IX objectives to those of its model, Title VI). The Supreme Court resolved that Title VI was spending-power legislation rather than a regulatory measure. See *Guardian Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99 (1983). Thus, the fact that Title IX is modeled after Title VI suggests that Title IX is also spending-power legislation. See *Rowinsky*, 80 F.3d at 1012.

209. See *Rowinsky*, 80 F.3d at 1011 n.11 (discussing problem of importing employment discrimination theory into education environment).

assessment is missing the key ingredient that workplace hostile environment sexual harassment has—a power relationship between the harasser and the victim.²¹⁰ Although this may be true, courts who opt to apply a Title VII-based analysis to a Title IX peer sexual harassment claim do so on the belief that it is the best means to further Title IX's purposes of eradicating sex discrimination in federally funded programs and preventing the use of federal monies in discriminatory programs.²¹¹ Rather than addressing the practical reasons advanced by other courts, the Fifth Circuit merely focused on the theoretical power relationship aspect.²¹²

Furthermore, because peer sexual harassment remains prevalent in schools, the court needed to address the policy implications of its decision.²¹³ For instance, the court did not address other avenues of relief a plaintiff alleging peer sexual harassment may pursue against a school district.²¹⁴ Moreover, the court did not address the potential financial setbacks a school may suffer if Title IX liability was imposed on the school.²¹⁵ Finally, the majority did not confront the dissenter's *in loco parentis* argument

210. *See id.*

211. *See, e.g.,* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 171 (N.D.N.Y. 1996) (applying legal standards from Title VII to guide court's analysis in Title IX peer hostile environment sexual harassment claim because Title IX prohibits same conduct prohibited by Title VII); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (stating that if school district knew of sexual harassment and failed to implement policies to remedy such harassment, "it must be inferred that the [school district] intended the inevitable result of that failure"; thus Title VII analysis for intentional discrimination is appropriate); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) ("Supreme Court's utilization of its Title VII case law to interpret Title IX in *Franklin* strongly indicates that Title VII precedent is appropriate for analysis of hostile environment sexual harassment claims under Title IX."); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995) (claiming that adaptation of Title VII standards to Title IX cases will further Title IX's congressional purpose of preventing federal monies to be expended in support of intentional discrimination based on sex).

212. *See Rowinsky*, 80 F.3d at 1011 n.11.

213. For a discussion of the AAUW's survey on the prevalence of peer sexual harassment in schools, see *supra* note 6.

214. *See Gant*, *supra* note 15, at 493, 493 n.35 (discussing downfalls of sexual harassment cases under 42 U.S.C. § 1983 and citing cases that have rejected actions brought under § 1983). Plaintiffs are hesitant to bring such an action under § 1983 because courts have repeatedly refused to apply § 1983 to a school setting. *See id.*; *see also* D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371 (3d Cir. 1992) (rejecting contention that school had affirmative duty to protect plaintiffs from harm).

215. *See generally* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (holding that monetary damages are available in action to enforce Title IX). If found liable under Title IX for peer sexual harassment, school districts would expend thousands of dollars in attorneys' fees and monetary damages. *See id.* Even if monetary damages are not available, school districts still suffer financial setbacks because if the schools violate Title IX, their federal funding is terminated. *See* 20 U.S.C. § 1682 (1994) (listing sanctions for violation of Title IX); Eriksson, *supra* note 6, at 1818 (discussing possible financial repercussions for school districts under Title IX liability).

for school liability, in which the Supreme Court expressly stated that schools have disciplinary power over students and a duty to "inculcate the habits and manners of civility."²¹⁶

Therefore, even though the Fifth Circuit's decision was appropriate, it was also inadequate because the court did not address many significant aspects of peer sexual harassment.

B. *What Schools Can Do in Response to Peer Sexual Harassment*

The first thing schools should do in response to peer sexual harassment is to develop and implement a sexual harassment policy.²¹⁷ Such a policy should specifically define what constitutes sexual harassment and explicitly state that it shall be a violation of this policy for any student or employee to harass another student or employee.²¹⁸ The sexual harassment policy should also outline a detailed grievance procedure for reporting sexual harassment complaints and establish an internal investigatory process to handle and investigate such complaints.²¹⁹ Most importantly, the sexual harassment policy must contain appropriate disciplinary measures that can range from a verbal or written warning to suspension or expulsion depending on the circumstances.²²⁰ Additionally, all parties concerned in this issue, such as students, parents, teachers and school administrators, should take part in developing the sexual harassment policy.²²¹

After a school develops a sexual harassment policy, it has to effectively communicate that policy to its teachers, administrators, students and par-

216. *Rowinsky*, 80 F.3d at 1024-25 (Dennis, J., dissenting) (arguing that school officials have duty to protect students while students are at school). The dissent noted that it is this degree of control that schools have over the students that makes it appropriate to apply tort liability when the school, receiving federal assistance, knowingly fails to comply with the statutory duty to prevent sex discrimination. See *id.* at 1024 n.9 (Dennis, J., dissenting); see also *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 650 (1995) (recognizing school's *in loco parentis* authority where school athletes were required to take urinalysis drug test); *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (stating that school authorities act *in loco parentis* with power and duty to inculcate manners of civility); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 203 n.7 (5th Cir. 1994) (stating that school officials have obligation to protect students from at least "certain kinds of foreseeably dangerous harm during regular school hours"); *Eriksson*, *supra* note 6, at 1819 (arguing that schools have duty to set limits on student behavior).

217. See *Strauss*, *supra* note 150, at 183-84 (discussing implementation of policy statement prohibiting sexual harassment in schools); Daniel B. Tukul, *Student Versus Student: School District Liability for Peer Sexual Harassment*, MICH. B.J. Nov. 1996, at 1154, 1157 (discussing adoption of antiharassment policy in schools). For a discussion of antiharassment programs that specific schools around the nation have implemented, see *supra* note 143.

218. See *Strauss*, *supra* note 150, at 183-84.

219. See *Tukul*, *supra* note 217, at 1157.

220. See *id.*

221. See *Strauss*, *supra* note 150, at 184.

ents.²²² Students should be instructed on how to respond to sexually harassing behavior and how to treat each other with courtesy and respect.²²³ Teachers and school administrators should be trained on recognizing sexually harassing behavior and how to respond appropriately.²²⁴ Finally, the school should offer counseling services and other appropriate aid to students who have been sexually harassed.²²⁵ In following these procedures, it should be the goal of the school district to provide its students with a learning environment free of sexual harassment.²²⁶

VI. CONCLUSION

In conclusion, the *Rowinsky* decision only adds to the confusion in this area of law.²²⁷ In the months after *Rowinsky*, lower federal courts have declined to follow the *Rowinsky* holding.²²⁸ Instead, these courts have opted to apply a Title VII based analysis to Title IX cases involving peer sexual harassment.²²⁹ Thus, the *Rowinsky* decision appears to have precedential value only in future Fifth Circuit cases. A circuit court confronted with a case in which this is an issue of first impression will have two analytical frameworks to choose from: a Title VII based analysis or an analysis based on a statutory interpretation of Title IX. This, in turn, creates a set of inconsistent case law regarding Title IX claims against school districts. The unfortunate result of such inconsistency is that whether a school dis-

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.* at 185.

226. *See id.*

227. For a discussion of peer sexual harassment case law, see *supra* notes 96-142 and accompanying text.

228. *See, e.g.,* *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419-20 (N.D. Iowa 1996) (finding that *Burrow's* Title VII based standard was appropriate test for actionable claim of peer sexual harassment under Title IX); *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 171 n.7 (N.D.N.Y. 1996) (recognizing Title VII legal standard as appropriate guide in peer hostile environment sexual harassment case and distinguishing case at hand with *Rowinsky* on grounds that *Rowinsky* court applied equal protection, disparate treatment analysis); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (rejecting *Rowinsky* approach because *Rowinsky* would yield extreme results inconsistent with body of discrimination law and *Rowinsky* is based on fundamental misunderstanding of nature of peer hostile environment sexual harassment claim); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (concluding that Supreme Court's use of Title VII precedent in *Franklin* is strong indication that Title VII is appropriate analysis for peer hostile environment sexual harassment claim under Title IX).

229. *See, e.g.,* *Wright*, 940 F. Supp. at 1420 (stating that Title VII analysis is "appropriate test for an actionable claim of peer sexual harassment under Title IX"); *Bruneau*, 935 F. Supp. at 169-71 (using Title VII analysis in Title IX peer hostile environment sexual harassment claim against school district); *Burrow*, 929 F. Supp. at 1205 (concluding that Title VII precedent is appropriate analysis for peer hostile environment sexual harassment claim under Title IX).

trict is liable for peer sexual harassment under Title IX depends on where the court is seated rather than on precedent.

As the problem of peer sexual harassment escalates and more Title IX cases flood the courtrooms, it is imperative to develop a uniform, analytical framework for courts to use.²³⁰ Because congressional action on this issue seems doubtful, the Supreme Court will eventually need to create a framework for analyzing future Title IX cases involving school district liability for student-to-student sexual harassment.

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230. *See generally* Epstein, *supra* note 6, at A1 (stating that U.S. Department of Education is currently investigating peer sexual harassment complaints in about 80 school districts).