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Peer to Peer Sexual Harassment under Title IX: A Discussion of Liability Standards from Doe v. Londonderry

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NOTE

PEER TO PEER SEXUAL HARASSMENT UNDER TITLE IX: A DISCUSSION OF LIABILITY STANDARDS FROM *DOE v. LONDONDERRY*

I. INTRODUCTION

The thought of students sexually harassing[1] each other is not a pleasant one. After all, when we think of students, we think of children. The old saying, "kids can be cruel" has taken on new meaning, a sexual meaning. Socially, this issue is becoming more prevalent and serious than ever imagined. The sad fact is that many instances of sexual harassment between peers giving rise to legal claims do involve children. Students of all ages are taking part in sexual harassment so severe and perverse that some victims see suicide as the only solution to an intolerable situation.[2] There are victims who remain in the situation, being sexually taunted, tormented and even assaulted at the hands of their peers. However, there are others who choose a different course of action, a course that leads them into court.

These victims are not just challenging the conduct of their harassers; they are challenging the conduct of their schools and school districts in failing to stop the harassment. Despite the increasing number of cases, the judicial system in this

1. The Northwest Women's Law Center and Office for Civil Rights has listed the following as types of conduct which:

> may be illegal sexual harassment: (1) comments, gestures or jokes of a sexual nature; (2) displaying sexual pictures or objects; (3) spreading rumors of a sexual nature or commenting about sexual behavior; (4) repeated pressuring for dates or unwanted sexual activity; (5) sexual notes, pictures or graffiti; (6) touching, grabbing or pinching; (7) asking for sexual favors in exchange for any educational or activity-related benefit; (8) physical sexual assault; (9) pulling your own or someone else's clothes off.

Debera Carlton Harrell, *A New School of Thought Society Is Re-Examining the Issue of Sexual Harassment Among Students*, SEATTLE POST-INTELLIGENCE, Oct. 10, 1996 at C1.

2. *See id.*

country has not given a clear ruling on what standard is to be used to determine a school district's liability in this area.[3]

This note analyzes the recent court decision in *Doe v. Londonderry ("Londonderry")*[4] regarding the applicability of Title IX, 20 U.S.C. § 1681 (a) (1994) ("Title IX") to peer harassment and the extent of school district liability. Part II is a brief history of Title IX as it applies to this issue and Part III is statement of the case, with a summary of the facts and the issues involved. Part IV discusses the status of the law in the area of sexual harassment between peers under Title IX prior to and at the time this case was decided. Part V reports on the court's decision in the case. Part VI discusses the court's reasoning and analysis. Part VII offers an alternative analysis. Finally, Part VIII offers a conclusory opinion that the court in *Londonderry* took the easy way out, the middle ground, and neglected to recognize the correct standard in these cases.

Sexual harassment should not be tolerated or condoned in any educational institution. Ignorance about the harmful effects of this type of harassment can result in "lifelong injury to its victims."[5] The obvious confusion of the courts recently caught the attention of the United States Supreme Court which granted certiorari on this issue.[6] The Supreme Court should rule that schools and school districts can be held liable for sexual harassment by peers where they knew or should have known of the unwelcome sexual harassment and failed to provide a reasonable remedy.

II. BRIEF HISTORY OF TITLE IX

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[7] Since its passage in 1972, Title IX has been the subject of much litigation. There are cases involving issues ranging from college and university admission procedures[8] and employment practices[9] to the vast array of cases involving Title IX as it applies to intercollegiate and interscholastic sports.[10] Title IX provides

3. *See* Michael S. Lee, *Harassment in Schools on Increase Students aren't Getting the Message that It's Illegal*, FORT WORTH STAR-TELEGRAM, May 19, 1997.

4. 970 F. Supp. 64 (D.N.H. 1997).

5. 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, 559 (Spring 1996).

6. The Supreme Court will rule on this issue in the spring of 1999 in Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) *cert. granted in part*, 119 S. Ct. 29 (U.S. Sept. 29, 1998) (No. 97-843).

7. 20 U.S.C. § 1681(a) (1994).

8. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

9. For a variety of these cases see North Haven Bd. Of Educ. v. Bell, 456 U.S. 512 (1982); Stanley v. University of S. Cal., 13 F.3d 1313 (9th Cir. 1994); Does v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554 (M.D. Ala. 1996); Brunswick Sch. Bd. v. Califano, 449 F. Supp 866 (D. Me. 1978); Romeo Community Schs. v. United States Dept. Of Health, Educ., and Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977).

10. For some of the more often cited intercollegiate cases, see Kelly v. Bd. of Trustees of The Univ. of Ill., 35 F.3d 265 (7th Cir. 1994); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993); Favia v. Ind. Univ. of Pa., 7 F.3d 332 (3rd Cir. 1993); Roberts v. Colorado State Board. of Agric., 998 F.2d 824 (10th Cir. 1993) *cert. denied*, 114 S. Ct. 580 (1993). For some of the more often cited interscholastic cases, *see* Franklin v. Gwinnett County Pub. Schs., 503 U.S.

an alternative to the traditional constitutional challenge used in these type cases. As Indiana Senator Evan Bayh stated, "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . ."[11]

In *Cannon v University of Chicago,*[12] the United States Supreme Court recognized a private right of action in Title IX cases. This gave individuals the right to bring Title IX actions without first exhausting administrative remedies. In *Grove City College v. Bell,*[13] the United States Supreme Court held that only specific programs within an educational institution which received federal funds directly fell under the scope of Title IX scrutiny. Congress was displeased with the Court's reasoning and, in essence, overturned that decision by passing the Civil Rights Restoration Act of 1987.[14] The Act explained that Congress intended "program or activity" as stated in Title IX to include any program or activity of an educational institution, "any part of which is extended Federal financial assistance . . . ."[15] The actions of Congress in this instance show Congress's desire for Title IX to be interpreted in a very broad manner. Even the Supreme Court itself has said, "[t]here is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'"[16]

Another important case in the history of Title IX is *Franklin v. Gwinnett County Pub. Schs. ("Franklin"),*[17] which settled the controversy over what damages are available. The United States Supreme Court held that compensatory damages are available under Title IX.[18] While the Court was unwilling to give a definitive answer on whether Title IX was passed under the spending power, it did hold that damages are proper for statutes which are passed under that power.[19]

Congress gave the United States Department of Health, Education and Welfare ("DHEW") the power to interpret Title IX,[20] and the DHEW quickly issued regulations doing just that.[21] When the United States Department of Education ("DED") separated from the DHEW, it basically adopted the regulations previously issued by DHEW as its own.[22] In addition, the Office for Civil Rights ("OCR")

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60 (1992); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 254 (6th Cir. 1994). Also, for recent articles on this subject, see Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness,* 5 SETON HALL J. SPORT L. 133 (1995); Jodi Hudson, Comment, *Complying with Title IX of the Education Amendments of 1972: The Never-Ending Race to the Finish Line,* 5 SETON HALL J. SPORT L. 575 (1995); Philip Anderson, *A Football School's Guide to Title IX Compliance,* 2 SPORTS LAW. J. 75 (1995); Andrew Richardson, *Sports Law: Cohen v. Brown University A Title IX Lesson for Colleges and Universities on Gender Equity,* 47 OKLA. L. REV. 161 (1994); Catherine Pieronek, *A Clash of Titans: College Football v. Title IX,* 20 J.C. & U.L. 351 (1994).

11. 118 CONG. REC. 5806-5807 (1972).
12. 441 U.S. 677 (1979).
13. 465 U.S. 555 (1984).
14. Pub. L. No. 100-259, 102 Stat. 28 (Mar. 2, 1988).
15. 20 U.S.C. § 1687 (1994).
16. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (original altered) (citations omitted).
17. 503 U.S. 60 (1992).
18. *See id.* at 76.
19. *See id.* at 74-75.
20. Education Amendments of 1974, Pub. L. 93-380, Title VIII, § 844, 88 Stat. 484,612 (1974).
21. 40 Fed. Reg. 24,128 (1975) (codified at 45 C.F.R. § 86 (1996)).
22. 34 C.F.R. § 106 (1996).

issued policy interpretations of Title IX and its regulations. These policy interpretations are important in Title IX cases, and the courts "must accord [OCR's] interpretation of Title IX appreciable deference."[23]

Most of the claims filed in the past alleging violations of Title IX due to sexual harassment were filed by students claiming harassment by teachers.[24] This has changed, and now many students are suffering horrifying incidences of sexual harassment at the hands of their peers.[25] Title IX has been used to help put an end to this harassment by placing some liability on the schools and school districts involved. The need for clear guidelines of school responsibility prompted the OCR to act and issue its final policy guidance in regard to peer sexual harassment as it pertains to Title IX.[26] The OCR states that "a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action."[27]

III. STATEMENT OF THE CASE

A. Facts

Jane Doe began seventh grade in September 1993 at Londonderry Junior High School ("LJHS").[28] Within three weeks Jane began experiencing harassment by three boys at the school.[29] They barked and howled at her and on one occasion gave her a dog biscuit.[30] Near the end of September, Jane told her school guidance counselor,

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23. Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993).

24. For instance, see the more recent cases of: Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992); Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997); Doe v. Claiborne County Bd of Educ., 103 F.3d 495 (6th Cir. 1996); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996); Lillard v. Shelby County Bd. Of Educ., 76 F.3d 716 (6th Cir. 1996).

25. One commentator cites an American Ass'n of Univ. Women Educ. Found. 1993 survey of 1,632 school students in 79 schools throughout the country. The survey results included the following. Seventy-six percent of the girls and 56% of the boys surveyed had been the target of "sexual comments, jokes, gestures or looks." Sixty-five percent of the girls and 42% of the boys had been touched and/or pinched "in a sexual way." Forty-two percent of the girls and 34% of the boys had been the "target of sexual rumors." Thirty-eight percent of the girls and 28% of the boys had their "clothes pulled at in a sexual way." Thirty-eight percent of the girls and 17% of the boys had been "blocked or cornered in a sexual way." Nineteen percent of the girls and the boys had been the "target of written sexual messages [or] graffiti on bathroom walls, lockers, etc." Sixteen percent of the girls and the boys had "their clothing pulled off or down." Seven percent of the girls and the boys had "been spied on while they dressed or showered at school." Of those harassed, 31% of the girls and 18% of the boys reported being targeted "often." Eighty-six percent of the girls and 71% of the boys who had been harassed were "targeted by a current or former student at school." Sixty-six percent of the boys and 52% of the girls surveyed admitted that they had harassed another student. Of these harassers, 94% claimed to have been harassed themselves. *See* Bodnar, *supra* note 5, at 556-57.

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

27. *Id.* at 12,039.

28. *See* Doe v. Londonderry, 970 F. Supp. 64, 66 (D.N.H. 1997).

29. *See id.*

30. *See id.* Also, the record indicates that she was called a "slut," a "whore," and a "fucking bitch." Others were encouraged to join in the taunting. *See id.* at 67.

Katherine Ciak, about the harassment.[31] Ciak gave Jane two alternatives: (1) Ciak would send the boys to the principal for discipline; or (2) Ciak would speak with the boys about sexual harassment and tell them to stop.[32] Jane chose the second alternative, but after Ciak spoke with the boys, the harassment escalated.[33] Jane again met with Ciak to request assistance and she was "told to 'stay away from' or 'ignore' the boys."[34] In October of 1993, Jane told her mother about the harassment and begged her not to intervene for fear it would only make matters worse.[35]

At a November meeting between the two, Ciak told Mrs. Doe she was "taking care of it."[36] By December, Jane was having a great deal of difficulty; she was deeply depressed, not eating or sleeping well, crying frequently, spending time alone in her room, losing interest in sports, and suffering academically.[37] Mr. and Mrs. Doe had a meeting with Ciak at this point and again were told that she was "staying on top of it."[38]

In January or February of 1994,[39] Jane was given a pornographic cartoon of her being anally penetrated by one of the boys which she took to Ciak.[40] Ciak told her to take it to Vice Principal Elliot, which she did.[41] When Mrs. Doe found out about the incident from Jane, she called the school and spoke with Principal Meyers who informed Mrs. Doe that Elliot had been unable to find out who was responsible for the cartoon.[42] The Principal also told Mrs. Doe that the School District Superintendent would not be informed of the incident and that the boys behavior was normal for Jane's age group.[43] On February 7, 1994, Jane, at her mother's suggestion, placed a bowl of milk in front of one of her harassers and told him if he was going to be catty, he could drink from a bowl.[44] In response, the boy threw a piece of meat covered with a sexual lubricant at Jane, hitting her in the shoulder.[45] Jane picked up the meat and the boy knocked it from her hand and into Ciak.[46] Jane was reprimanded for the incident; and she believes the boy was never reprimanded.[47] Jane tried the same thing the following day and was again disciplined when the milk

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31. *See id.*
32. *See id.*
33. *See id.* at 66. The record indicates the boys pushed Jane down stairs, knocked her into lockers and even spat on her. Also at this time, she started receiving threatening phone calls. *See id.*
34. *See* Doe v. Londonderry, 970 F. Supp. 64, 67 (D.N.H. 1997).
35. *See id.*
36. *Id.* (citing Father Aff. ¶7).
37. *See id.* Jane also got into a fight with a girl on the bus who had been calling her a "slut" and a "fucking whore." *See id.*
38. *See id.* at 68.
39. The record has a discrepancy as to when this incident took place. However, the incident itself is not disputed.
40. *See* Doe v. Londonderry, 970 F. Supp. 64, 68 (D.N.H. 1997).
41. *See id.* He was unable to find out who drew the cartoon. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See* Doe v. Londonderry, 970 F. Supp. 64, 68 (D.N.H. 1997). Ciak says that Jane threw the meat and hit her. *See id.* at n.7.
47. *See id.* Jane was unable to prove this due to the fact that the District has a policy of destroying disciplinary records at the end of the school year. *See id.*

in the bowl spilt.[48] Jane's parents contacted the school and requested that Jane not be subjected to further discipline.[49]

Next, Mrs. Doe attempted to contact Superintendent Ouillette directly, but received no reply.[50] However, Principal Meyers returned the call and suggested to Mrs. Doe that the matter be dropped.[51] Meyers again spoke with Jane about the matter and again with the boys, but the harassment continued.[52]

By February of 1994, Jane was depressed, threatening to run away from home and contemplating suicide.[53] When she refused to return to LJHS, her parents removed her and placed her in a private school.[54] Initially this helped Jane's grades but by December of 1994 her grades had dropped again and, as a result, she attempted suicide.[55]

When they removed Jane from LJHS, Mr. and Mrs. Doe filed a complaint with the New Hampshire Department of Education who referred them to the OCR.[56] The OCR investigated and, as a result, Jane received letters of apology from the boys involved.[57] They later received a letter from OCR indicating the case was being closed as they had reached a satisfactory resolution with the District.[58] The District offered to pay for counseling for Jane at District facilities in return for Mr. and Mrs. Doe releasing the District from liability.[59] They refused and have since moved away from Londonderry with Jane and her brother.[60]

In September of 1995, the plaintiffs filed a complaint against the Londonderry School District. This note discusses Count I of that complaint[61] which alleged that the District violated Title IX by condoning and failing to prevent a hostile environment of sexual harassment.

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48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See* Doe v. Londonderry, 970 F. Supp. 64, 68-9 (D.N.H. 1997).
53. *See id.* at 69.
54. *See id.* Even after she moved to the private school, Jane received threatening phone calls into the fall semester of 1994-95. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See* Doe v. Londonderry, 970 F. Supp. 64, 69 (D.N.H. 1997). Prior to the agreement, the District did not have a formal Title IX policy and procedure, a Title IX coordinator, or a Title IX grievance procedure, therefore it was not in compliance with OCR requirements. The agreement required the District to institute a Title IX sexual harassment policy and program that met with OCR's approval. *See id.*
59. *See id.* at 70.
60. *See id.* The move was due to continued harassment of the children and the family's desire to get a new start. *See id.*
61. Not discussed are Count II (requesting punitive damages), Count III (alleging the District violated 42 U.S.C. § 1983 by the conduct complained of in Count I), Count III. (alleging the District is liable for negligent supervision), Count IV (alleging the District is liable for negligent infliction of emotional distress), and Count V (alleging the District is liable for enhanced compensatory damages on the state law claims).

B. Issue

As the court itself stated, "[t]his case . . . presents an issue undecided by either the Supreme Court or this Circuit: whether and to what extent school districts can be found liable under Title IX for peer sexual harassment, i.e., the sexual harassment of one student by another."[62]

IV. LAW PRIOR TO THE CASE

The issue of sexual harassment in schools first came before the Court in *Franklin*,[63] where the plaintiff, a young female, was sexually harassed by her coach. The plaintiff was subjected to an environment of sexual harassment of which the school officials were aware.[64] In this case, the United States Supreme Court held that damages are available to plaintiffs in sexual harassment suits alleging violations of Title IX.[65] The plaintiff must show, however, that the school district knew of the harassment and did not remedy the situation.[66] Even though this case involved teacher to student harassment, it impacts the analysis of peer to peer harassment for two reasons: (1) it recognizes the availability of damages; and (2) it cites *Meritor Savings Bank, FSB v. Vinson*,[67] which recognizes an employer's responsibility to provide a non-discriminatory environment under Title VII of the Civil Rights Act of 1964.[68] Subsequent courts have interpreted this to mean the Supreme Court analogized Title IX to Title VII and that "[t]he Supreme Court in *Franklin* made plain that Congress intended to put an end to all forms of sex discrimination, including hostile environment sexual harassment, by enacting Title IX and, in so doing, sought to obligate all recipients of federal funds to maintain an environment free from sex discrimination."[69]

In 1993, the first opinion in a case involving student to student sexual harassment was published in *Doe ex. rel. Doe v. Petaluma City Sch. Dist. (Petaluma I)*.[70] This case, which involved verbal harassment of a female student by other

62. *See* Doe v. Londonderry, 970 F. Supp. 64, 71 (D.N.H. 1997).
63. 503 U.S. 60 (1992).
64. *See id.* at 63-64.
65. *See id.* at 76.
66. *See id.* at 74-75.
67. 477 U.S. 57 (1986).
68. *See Franklin*, 503 U.S. at 75.
69. Verna L. Williams & Deborah L. Brake, *When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423, 427 (Feb. 1997)
70. 830 F. Supp. 1560 (N.D. Cal. 1993). However, the first Title IX case involving peer sexual harassment was Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988). In that case, the court viewed the hospital as a place of employment and applied Title VII. For other federal court decisions on peer sexual harassment, see Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Piwonka *ex rel.* v. Tidehaven Indep. Sch. Dist., 961 F. Supp. 169 (S.D. Tex. 1997); Collier *ex rel.* Collier v. William Penn Sch. Dist., 956 F. Supp 1209 (E.D. Pa. 1997); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741 (E.D. Ky. 1996); Wright *ex rel.* Wright v. Mason City Comm. Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996); Bruneau *ex rel.* Schofield v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Burrow *ex rel.* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Kate S. *ex rel.* Oona R.S. v. Santa Rosa City Schs., 890 F. Supp. 1452 (N.D. Cal. 1995); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437 (S.D.Tex. 1994).

students over a period of two years, allowed the claim to continue but limited the school's liability to an "intentional" standard.[71] "Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was the result of an actual intent to discriminate against the student on the basis of sex . . . ."[72] In his decision, Judge Lynch interpreted the *Franklin* Court as saying that "under Title IX, damages are available only for intentional discrimination but respondeat superior liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so."[73] The obvious difference between *Franklin* and *Petaluma I* is the identity of the harasser. The teacher/coach in *Franklin* was unmistakably an agent of the school and therefore respondeat superior liability was clear. However, agency principles do not apply between a school and a student. In *Petaluma I*, the court concluded that even though agency principles were inapplicable "a student is 'surely' denied the benefits of, or subjected to discrimination under an education program on the basis of sex 'when, as alleged here, she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program.'"[74] A reconsideration of this case was granted in 1996 and, in *Petaluma II*,[75] the court adopted the OCR's "knew or should have known" standard, finding that "hostile environment sexual harassment is a *type* of intentional discrimination."[76]

What appears to be the first real set of standards for liability in a peer sexual harassment case were offered in 1995 in the decision of *Bosley v. Kearney R-1 Sch. Dist.*[77] This case involved reported sexual harassment in the form of inappropriate songs and cartoons finding their way onto the school bus. *Bosley* resulted from proceedings wherein the OCR ruled in favor of the school district. In this case, the court looked to Title VII standards for guidance but inserted the word intentional, thus finding a cause of action for peer harassment exists under Title IX when: "(1) the plaintiff was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment occurred during the plaintiff's participation in an educational program or activity receiving federal financial assistance; and (4) the school district knew of the harassment and *intentionally* failed to take proper remedial action."[78] The court goes on to explain that discriminatory intent may be proven directly or may be inferred from the circumstances.[79]

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71. *Petaluma I*, 830 F. Supp.at 1560.
72. Thomas R. Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County*, 109 ED. L. REP. 519 (West 1996) (citing *Petaluma I*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993)).
73. *Id.* (citing *Petaluma I*, 830 F. Supp. at 1577).
74. *Id.* (citing *Petaluma I*, 830 F. Supp. at 1575).
75. Doe *ex. rel.* v. Petaluma City Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996).
76. *Id.* at 1424 (emphasis added).
77. 904 F. Supp. 1006 (W.D. Mo. 1995).
78. *Id.* at 1023 (emphasis added).
79. *See id.* at 1021.

This decision also addressed the issue of notice[80] by finding that "there is no notice problem where a school intentionally discriminates."[81] The court mentions both the OCR Letters of Finding which note violations where school districts failed to take adequate measures to stop student-on-student sexual harassment, and the *Franklin* case, as giving the school districts adequate notice that they may be held liable for damages under Title IX for cases involving this type of harassment.[82]

The Eleventh Circuit Court of Appeals three-judge panel had something else in mind. In February of 1996, the judges decided *Davis v. Monroe County Bd. of Educ. ("Davis I").*[83] The district judge had dismissed the plaintiff's Title IX claim finding that Title IX does not grant a cause of action for peer sexual harassment because the offending action is not performed by the school or an employee of the school.[84] The three-judge panel reversed the district court using OCR interpretations[85] and Title VII[86] case law hostile environment standards for its analysis. The court stated:

> [j]ust as a working woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor*, 477 U.S. at 67(quotation omitted), a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.[87]

Based on this analysis, the court listed its interpretation of the elements the plaintiff must prove to succeed in this type of case as follows:

(1) that she is a member of a protected group; (2) that she was subject to

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80. The Judge in this case notes that "[b]efore a school district may be held liable for monetary damages for a violation of Title IX, the district must have had sufficient notice of its potential liability." *Bosley*, 904 F. Supp. at 1025 (citing *Franklin*, 503 U.S. at 73).

81. *Id.* at 1025 (citing *Franklin*, 503 U.S. at 73).

82. *See id.*

83. 74 F.3d 1186 (11th Cir. 1996). This decision was later vacated on rehearing in Davis v. Monroe County Board of Educ., 120 F.3d 1390 (11th Cir. 1997) ("*Davis II*") after the decision in *Londonderry*. There, the entire Eleventh Circuit Court of Appeals held that there is no cause of action for peer-to-peer sexual harassment under Title IX because the statute is ambiguous. This decision, now before the United States Supreme Court on *certiorari*, is discussed in Part VII of this note.

84. *See Davis I*, 74 F.3d at 1186.

85. The OCR has found that a student is subjected to sexual harassment when "unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct . . . has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment." *Id.* at 1192 (citing the Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992), docket No. 09-92-6002, at 2). The OCR has also found that "[w]hen individuals who are participating in a program or activity operated by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others," and "[i]f the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment." *Id.*

86. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Assoc., 51 F.3d 591 (5th Cir. 1995); Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994); Carr v. Allison Gas Turbine Div. Gen. Motors, 32 F.3d 1007 (7th Cir. 1994); Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992); Smith v. Bath Iron Works, 943 F.2d 164 (1st Cir. 1991); Levendos v. Stern Entertainment, Inc., 909 F.2d 747 (3d Cir. 1990); Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988); Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).

87. *Davis I*, 74 F.3d at 1194.

> 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.[88]

The *Davis I* court also gave a standard to follow when determining whether a plaintiff has established an environment that is hostile or abusive stating "a court must be particularly concerned with (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance."[89] The *Davis I* court adopted the "knew or should have known" standard from the OCR interpretations and from Title VII hostile environment standards which it found applicable to Title IX.[90]

In April of 1996, soon after the *Davis I* decision, the Fifth Circuit Court of Appeals decided a similar case. In *Rowinsky v. Bryan*,[91] the district court had also dismissed the Title IX claim, but the Fifth Circuit affirmed the district court's decision and "explicitly refused to follow the lead of [*Davis I*] and rejected the Eleventh Circuit's construction of Title IX and the analogy with Title VII case law."[92] The court in this case looked to the statutory language and legislative history of Title IX and practically ignored *Franklin* and the "intentional discrimination" standard.[93] The *Rowinsky* court also looked at the practicality of student discipline and concentrated on the fact that unequal power relationships exist only in the employment setting.[94] The court found that "there is no power relationship" in the context of two students and, "Title VII cases that have found liability for harassment by third parties are inapplicable... because in those cases the power of the employer was implicated."[95]

The *Rowinsky* court did not dismiss the claim outright as one might expect. Instead, it found that to maintain an action for peer sexual harassment under Title IX, a student-plaintiff must "demonstrate that the school district responded to sexual

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88. *Id.* at 1194 (citing *Meritor*, 477 U.S. at 66-73); *see also* Harris v. Forklift Sys. Inc., 510 U.S. 17; *Henson*, 682 F.2d at 903-05).

89. *Id.* (citing *Harris*, 510 U.S. at 23 (quoting *Meritor*, 477 U.S. at 64-65) (internal citations omitted)). The Court goes on to say that the "factors must be viewed both objectively and subjectively. If the conduct is not so severe or pervasive that a reasonable person would find it hostile or abusive, it is beyond Title IX's purview. Similarly, if the plaintiff does not subjectively perceive the environment to be abusive, then the conduct has not actually altered the conditions of her learning environment, and there is no Title IX violation." *Davis I*, 74 F. 3d at 1194 (citation omitted).

90. *See id.*

91. 80 F.3d 1006 (5th Cir. 1996).

92. Baker, *supra* note 72.

93. *Id.* (citation omitted).

94. *See id.* (citation omitted).

95. *Id.* (citation omitted). The Court went on to say "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer, or co-worker. This is not to say that the behavior does not harm the victim, but only that the analogy is missing a key ingredient—a power relationship between the harasser and the victim." *Id.* at n.53.

harassment claims differently based on sex."[96]

The court also found that Title IX was enacted under Congress' spending power and thus was subject to the laws governing such.[97] The Supreme Court has stated that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions . . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[98]

It should be noted, however, that one judge from the panel dissented and agreed with the *Davis I* court's Title VII employment law analogy. He also argued that "*Franklin* itself clearly holds that Title IX satisfies the *Pennhurst*[99] notice requirement in placing a duty on school boards to counteract known hostile environment sexual harassment of students. . . ." and went on to suggest that "the *Franklin* Court's discussion of *Pennhurst* was only intended to put Congress and other concerned parties on notice that statutes which do not speak as clearly as Title IX . . . might not be construed so as to afford a private right of action for their enforcement."[100]

Even with all the disagreement among the courts, a few issues have been resolved. Most, if not all, courts faced with dual claims under Title IX and the Fourteenth Amendment have dismissed the Fourteenth Amendment claims. Also, when parents have been joined as plaintiffs with their children, the courts have been very consistent in dismissing their claims outright.[101] Aside from these marginal issues, the law was uncertain and subject to interpretation when *Doe v. Londonderry* came before the court.

V. DECISION OF THE CASE

The court in *Londonberry* denied both the Defendant's Rule 12 Motion to Dismiss[102] and Motion for Summary Judgment, finding that peer sexual harassment

96. *Rowinsky*, 80 F.3d at 1016. "Thus, a school district might violate Title 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 harmed boys." *Id.* (as quoted in Baker, *supra* note72).

97. The court here acknowledges that the Supreme Court has reserved this issue but reaches its conclusion by inferring that since Title IX was modeled after Title VI, Title IX was also enacted under the Spending Clause. *See Rowinsky*, 80 F.3d at 1012.

98. Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

99. The *Pennhurst* case refers to spending clause obligations as contract terms and states that "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.*

100. *Rowinsky*, 80 F.3d 1006 (Dennis, J., dissenting at 1023).

101. Also, most courts faced with the question have determined that "a plaintiff subjected to peer harassment is not limited to naming the school district as defendant, so long as the administrators named were in a position to intervene." Baker, *supra* note 72. The confusion involves the "statutory basis for suing the individual school officials alleged to have ignored reports of peer sexual harassment." *Id.* Some courts dismiss such actions under Title IX and other dismiss them under § 1983. Therefore, it seems that ultimately plaintiffs may be limited to actions against districts alone. *See id.*

102. It should be noted, however, that the court in this case did grant the District's Rule 12 Motion to Dismiss in regard to Jane's parent's Title IX claims.

is actionable under Title IX.[103] It held that the plaintiff in this case provided evidence sufficient to "raise a genuine issue of material fact for trial on the question of whether the District's failure to stop the harassment of Jane amounted to an *intent* to create a hostile educational environment for her."[104]

VI. DISCUSSION OF THE COURT'S REASONING

A. Rule 12 Motion to Dismiss

The defendant argued "(1) that peer sexual harassment is not actionable under Title IX; and (2) that the plaintiffs have not alleged that the defendant intentionally discriminated against the plaintiff on the basis of sex."[105] It seems from these arguments that the defendant is assuming the court will use the "intentional" standard of liability.

The court itself acknowledged that "[t]he Supreme Court has provided little guidance with respect to interpreting the scope of Title IX other than the general admonition that it is to be given 'a sweep as broad as its language.'"[106] Furthermore, the court stated, "the legislative history of Title IX provides no direct guidance for applying it in the context of peer sexual harassment."[107] The court also mentioned that other courts have used Title VII principles in Title IX cases while noting that most cases involved students being harassed by school employees.[108]

The court also turned to the OCR policy interpretations for guidance acknowledging that the OCR requires school districts to "take reasonable steps to curtail peer sexual harassment" and holds those districts to a "knows or should have known" standard.[109] The word "curtail" suggests that the districts are required to prevent as well as stop sexual harassment.

The court did not discuss the policy reasons for extending Title IX to peer sexual harassment cases or for limiting the liability of school districts due to the

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103. *See Londonderry*, 970 F. Supp. 64 (D.N.H. 1997).
104. *Id.* at 75 (emphasis added).
105. *Id* at 72.
106. *Id.* (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521(1982)).
107. *Id. at* 72; *see also id.* at n.10 reading as follows:

> As one federal court considering the issue of peer sexual harassment has noted, '[g]iven the enormous social implications for students, schools, and parents, this court wishes that Congress would step in and simply tell us whether it intended to make school districts responsible for the payment of damages to students [in the peer harassment context]. Knowing that that will not occur, the court does its best to decipher Congressional intent.' Wright, 940 F. Supp. at 1414. This court urges Congress to carry out its legislative responsibilities and to address these issues squarely so that policy will be made where it should be made—in Congress—and not be default in the courts.

108. *See id.* at 72.
109. *See* Doe v. Londonderry, 970 F. Supp. 64, 72 (D.N.H. 1997) (citing Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997) (final policy guidance)).

unique problems faced in these situations.[110] However, both of these policy arguments were persuasive to the court, which ultimately "looks to Title VII principles for guidance, but adopts a flexible approach sensitive to the differences between the peer sexual harassment and employment contexts."[111]

There are three basic approaches to liability that the court considers in this case. The first, labeled "rigorous approach,"[112] is that adopted in *Rowinsky* by the Fifth Circuit. The court stated that:

> [i]n the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title 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 harmed boys.[113]

The second, labeled "moderate approach,"[114] is like that used in the *Wright v. Mason City Community Sch. Dist.*[115] where the court stated:

> [a] plaintiff must prove (1) that the plaintiff is a member of a protected group; (2) that the plaintiff was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive that it altered the conditions of the plaintiff's education and created an abusive educational environment; and (5) that the education institution knew of the harassment and intentionally failed to take the proper remedial measures because of the plaintiff's sex.[116]

The third, labeled the "expansive test,"[117] was used initially in *Davis I*, but was later vacated by the Eleventh Circuit in *Davis v. Monroe County Board of Educ.* ("*Davis II*").[118] It was similar to the standard used in *Petaluma II* where the court stated:

> [t]he standard applicable to this action is the traditional Title VII hostile environment standard. Thus, the elements which Plaintiff must prove are that Plaintiff was subjected to unwelcome harassment based on her gender, that the harassment was so severe or pervasive as to create a hostile educational environment, and that the Defendants knew, or should in the exercise of their duties have known, of the hostile environment and failed to take prompt and

110. *Id.* The court said these policy reasons were thoroughly discussed in *Rowinsky*, 80 F.3d at 1012-16 and at 1024-25 (Dennis, J., dissenting).
111. *Id.* 970 F. Supp. at 72-73.
112. *Id.* at 73.
113. *Id.* (citing Rowinsky, 80 F.3d at 1016 (5th Cir. 1996)).
114. *Id.*
115. 940 F. Supp 1412 (N.D. Iowa 1996).
116. *Londonderry*, 970 F. Supp. at 72 (citing Wright, 940 F. Supp. at 1420).
117. *Id.* at 73.
118. 120 F.3d 1390 (11th Cir. 1997).

appropriate remedial action.[119]

Intent to discriminate is not a named element of this standard.

The *Londonderry* court considered all three tests and concluded that, "under some circumstances, a school district's failure to curtail peer sexual harassment may be actionable under Title IX ."[120] It created its own set of factors required for a plaintiff to prevail on a Title IX peer sexual harassment claim. This standard, comparable to the "moderate approach" discussed above requires that:

> (1) the plaintiff was a student in an educational program or activity receiving federal financial assistance within the coverage of Title IX; (2) the plaintiff was subjected to unwelcome sexual harassment while a participant in the program; (3) the harassment was sufficiently severe or pervasive that it altered the conditions of the plaintiff's education and created a hostile or abusive educational environment; and (4) the school district knew of the harassment and intentionally failed to take proper remedial action.[121]

In explaining its decision, the court states, "such an approach best advances Congress' goal of providing a meaningful remedy for a school district's intentional failure to provide a safe, non-hostile, and non-discriminatory educational environment while not exposing the public fisc to limitless monetary liability for the uncondoned acts of students."[122] However, the court does not give an explanation of what would constitute intentional failure on the part of the school district. It only states that it is persuaded by other courts requiring that, "to be held liable, a school district must have intended to create a hostile educational environment for the plaintiff."[123] The reasoning here seems completely circular. In essence, the court is saying that to be guilty of intentional failure to take proper action the district must have intended to do so. It is defining a concept with the very concept itself.

B. Summary Judgment Motion

In deciding the summary judgment motion, the court had to determine whether or not Jane had presented enough evidence to allow the jury to find the district intended to discriminate against her. The District argued that its action or inaction

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119. *Londonderry*, 970 F. Supp. at 73-74. (citing *Petaluma II*, 949 F. Supp. 1427). The court also mentions that the *Davis I* court is the only Circuit court to use the constructive notice standard and that since the defendant in that case had actual notice, "the part of the opinion referring to constructive notice is dicta." The court finds no need to address the constructive notice issue in this case "because the plaintiffs claim that the District had actual notice and have not argued that any events prior to Jane informing Ciak of the harassment served to give the District constructive notice." *Id.* at n.11.

120. *Id.* at 74.

121. *Id.* (citations omitted).

122. *Id.* at 75.

123. *Id.* at 74.

could, at worst, be considered negligent.[124] In response, Jane argued that she had informed the school of the harassment and that nothing was done to adequately discourage and stop the harassment.[125] In fact, it was Jane who was disciplined on more than one occasion.[126] The court found that Jane had produced enough evidence to raise a genuine issue of material fact regarding whether the district intentionally discriminated against her which should be allowed to go to a jury.[127]

VII. ALTERNATIVE ANALYSIS

It is obvious the court in this case is trying to strike what it believes to be a balance between an individual student's right to a safe and harassment free environment in an educational institution and the district's exposure to liability for acts of third party students. The need for this balance was illustrated by an incident involving a 6 year old boy who gave a female classmate a kiss on the cheek and was disciplined for the alleged sexually harassing behavior. Many found this to be over-reaction on the part of a school district trying to be "politically and legally correct."[128] Certainly, this is not the type of conduct that should raise a claim under Title IX, and no school district should be held liable for damages relating to such "innocent" childhood behavior. But, this is hardly the conduct complained of in *Doe v. Londonderry* or in many of the other cases recently filed. Students are suffering assaults, name calling, lewd pictures, lewd remarks, obscene graffiti, cat calls, threats, skirt flipping, bullying, etc. Others have been stripped or tied up by their peers. Some have been raped.

"Everyone pays a price when adults fail to respond properly," says one journalist. "Failure to respond also compounds victims' suffering" and "[n]ot being taken seriously adds to the stress, anger, depression, frustration and loss of self-esteem that many victims suffer. Grades fall. Some kids quit school. Entire families are shaken and uprooted, often moving to other districts. Many kids turn to counseling, drugs or alcohol. Some have killed themselves."[129] These are the cases that cry out for justice. But justice cannot be achieved on a widespread basis when the courts reach such diverse and confusing decisions as those discussed above. Victims of peer-to-peer sexual harassment have limited choices. Julie Goldscheid, a National Organization of Women Legal Defense Fund lawyer in New York, has said

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124. *See id.* at 75.

125. *See* Doe v. Londonderry, 970 F. Supp. 64, 75 (D.N.H. 1997).

126. *See id.*

127. The evidence showing that (1) Ciak knew in September about the harassment and by February had still failed to stop the harassment; (2) Ciak failed to understand the seriousness of the harassment and to pass on the information to superiors; (3) Jane was disciplined for trying her own ways to stop the harassment; (4) the attitude was expressed that "boys will be boys" and such conduct was somewhat normal; and (5) the district was not in compliance with the OCR's Title IX requirements was all construed as being in support of Jane's claim and of the possibility the district was acting with intent to discriminate. *See id.*

128. Harrell, *supra* note 1.

129. *Id.* Harrell goes on to instruct readers on ways to aid in the prevention of sexual harassment. She suggests (1) know your rights and get familiar with school policy; (2) notify school officials at once if your child suffers sexual harassment; (3) keep good lines of communication with your children; and (4) take your child's allegations seriously.

"[w]e'll just keep litigating the issue. If women in the workplace should not have to endure sexual harassment, why should young girls have to endure it at school[?]"[130]

While schools should not be held liable for simple flirtatious behavior, such as innocent childhood kisses, they should be held accountable for tolerating and condoning what constitutes peer-to-peer sexual harassment. "There is a difference between flirting and hurting."[131]

The question is what standard the courts should use in determining when schools and school districts are liable for sexual harassment of students by other students. The *Londonderry* court chose the wrong standard based on what seems to be a "middle of the road" compromise. The following analysis shows that a Title VII hostile environment standard best satisfies the spirit of Title IX.

A. Liability and the Correct Standard

Only by implementing a "broad interpretation of Title IX's intent requirement" along with the "known or should have known" standard, will courts offer students the "protection they deserve."[132] Therefore, a Title VII standard should be used, and plaintiffs should be required to prove that (1) they were subjected to unwelcome harassment based on gender; (2) that the harassment was so severe or pervasive as to create a hostile educational environment; and (3) that the defendants knew, or should in the exercise of their duties have known, of the hostile environment and failed to take prompt and appropriate remedial action.[133]

The *Davis I* decision was the first and only where a circuit court recognized a Title VII hostile environment standard in a peer-to-peer sexual harassment case. However, in August of 1997, the *Davis I* decision was vacated on rehearing.[134] The *Davis II* court, relying on the *Pennhurst* notice requirement, held that there is no cause of action against schools or school districts for peer-to-peer sexual harassment under Title IX because it is a Spending Clause statute and "Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX."[135] However, in *Franklin*, the Supreme Court addressed this problem and noted that while *Pennhurst* did limit remedies for unintentional violations of Spending Clause Statutes, the same did not

130. *Sex Harassment Case in Texas is Turned Down*, STAR-TRIBUNE (Minneapolis-St. Paul) 1996, at 4A.

131. *Teen's Sex Harassment Suit Could Set National Precedent*, SAN ANTONIO EXPRESS-NEWS, Nov. 3, 1996 (pg. unavailable), *available* in WL 11503488 (citing Lawyer Brooks Burdette).

132. Chantal N. Senatus, Note, *Peer Harassment Under Title IX of the Education Amendments of 1972: Where's the Intent?*, 24 FORDHAM URB. L.J. 379, 408 (Winter 1997).

133. *See Davis I*, 74 F.3d at 1193 and *Petaluma II*, 949 F. Supp. at 1426. It should be noted here that the *Davis I* decision by the 11th Circuit applying this standard was later reversed on rehearing in *Davis II* and that the *Petaluma II* decision was reached on reconsideration from *Petaluma I* which used the more stringent actual notice and intent standard. This shows the obvious confusion of the courts on all levels.

134. Davis v. Monroe County Bd. of Educ. 91 F.3d 1418 (11th Cir. 1996). This is the case currently before the Supreme Court with a decision expected in Summer 1999.

135. *Davis II*, 120 F.3d 1390, 1406 (11th Cir. 1997).

apply to *intentional* violations.[136] So the correct analysis turns on what the *Franklin* Court meant by "intentional." The Court did not give a definition of "intentional discrimination." Therefore, "it is not clear how the Court meant the 'intentional discrimination' standard it set . . . to relate to the standard for liability for hostile work environment sexual harassment under Title VII."[137] But, when characterizing the plaintiff's cause of action as one for "intentional discrimination," the Court cited to *Meritor*, which was a hostile environment case arising under Title VII.[138]

Pursuant to the decision in *Meritor*, a test was developed for Title VII employer liability. Employers are held liable for "the existence of a hostile environment in its workplace only if the employer failed to take prompt remedial action after the employer actually knew or should have known of the existence of the hostile environment."[139] Obviously, the Court in *Franklin* knew about this test, however, it never referred to or expressly relied "upon that knowledge and inaction when characterizing the plaintiff's claim as one for intentional discrimination."[140]

It is also important to note the context in which the *Franklin* Court was discussing "intentional discrimination." The discussion was in reference to whether the district had sufficient notice of potential liability as required for Spending Clause Statutes.[141] Previously, in *Guardians Ass'n v. Civil Service Commission of New York*,[142] the Supreme Court held that monetary damages should not be awarded under Title VI for unintentional *disparate impact* discrimination.[143] This decision left open the question of whether monetary damages could be awarded in cases of "intentional discrimination." So, although not specifically defining "intentional discrimination," the *Guardians* Court "implied that [intentional discrimination] is discrimination other than that based on disparate impact."[144] It is unclear, however, whether the *Franklin* Court intended to use that same intentional discrimination/disparate impact dichotomy. The Court's ambiguous use of the term "intentional discrimination" in *Franklin* has been clarified by its use of that phrase in Title VII cases involving hostile environment discrimination.[145]

In *Landgraf v. USI Film Products*[146] a Title VII case involving a peer co-worker's sexual harassment and a supervisor's failure to remedy, the Court examined the 1991 amendments to Title VII allowing compensatory damages against

136. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 (1992) (emphasis added).
137. *Petaluma II*, 949 F. Supp. at 1418.
138. *See Franklin*, 503 U.S. at 75.
139. *Petaluma* II, 949 F. Supp. at 1418 (citing EEOC v. Hacienda Hotel, 881 F. 2d 1504, 1515-16 (9th Cir. 1989)).
140. *Id.*
141. *See id.*
142. 463 U.S. 582 (1983) (holding that layoffs based on facially neutral "last-hired, first-fired" policy, which had disparate impact due to facially neutral entry examinations did not support money damages under Title VI).
143. *See id.* at 598 (emphasis added). Disparate impact occurs "when a facially neutral employment practice affects more harshly a group protected by Title VII than on others and cannot be justified by a business necessity." *Petaluma II*, 949 F. Supp. at 1422. Disparate treatment occurs "when an employee treats an employee or employees less favorably than others because of the employee's membership in a group protected by Title VII." *Id. See also* International Bhd. Of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15.
144. *Petaluma II*, 949 F. Supp. at 1419.
145. *See id.* at 1422.
146. 512 U.S. 244 (1994).

employers. Those amendments set up "the same dichotomy as did the Supreme Court in *Franklin* and *Guardians*"[147] because the amendments also limited monetary damages to cases involving "intentional discrimination." The *Landgraf* Court states that the amendment

> confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged. 114 S. Ct. at 1506. The Court's discussion demonstrates that it assumes that the term 'intentional discrimination' as used in the statute includes hostile environment sexual harassment. This is a persuasive indication that the Court's reference to 'intentional discrimination' in *Franklin* was similarly intended to include sexual harassment.[148]

Based on this, it seems that the hostile work environment cause of action developed as a species of intentional discrimination. Under Title VII, there are two commonly used theories for proving violations of that statute. "*Disparate treatment* occurs when an employee treats an employee or employees less favorably than others because of the employee's membership in a group protected by Title VII."[149] In contrast, "*disparate impact* occurs when a facially neutral employment practice affects more harshly a group protected by Title VII than on others and cannot be justified by a business necessity."[150] A plaintiff must prove intentional discrimination in order to show disparate treatment but not to show disparate impact.[151]

The Title VII standard for hostile environment liability is: (1) that the plaintiff was subject to unwelcome harassment because of gender; (2) that the harassment was sufficiently severe or pervasive to create an abusive work environment, and (3) that there is a basis for employer liability.[152] This standard falls more closely within the definition of *disparate treatment* since the harassing behavior can not be considered "facially neutral." Disparate treatment seemed, by implication, to be included within the *Guardians* Court's definition of "intentional discrimination." Employer liability in Title VII cases is based on the employer's failure to remedy or prevent a hostile environment if management knew, or in the exercise of reasonable care, should have known, of the existence of the hostile environment.[153] In *EEOC v. Hacienda Hotel*,[154] the Ninth Circuit showed its intent for this standard to be construed as an intentional discrimination standard as opposed to a negligence standard by its reliance on the decision in *Hunter v. Allis-Chalmers Corp., Engine Division*.[155]

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147. *Petaluma II*, 949 F. Supp. at 1422.
148. *Id.* (citations omitted).
149. *Id.* (citing International Bd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (emphasis added)).
150. *Id.*
151. *See id.*
152. *See, e.g.*, EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514-15 (9th Cir. 1989).
153. *See id.* at 1515-16.
154. 881 F.2d 1504 (9th Cir. 1989).
155. 797 F.2d 1417 (7th Cir. 1986) as cited in *Petaluma II*, 949 F. Supp. at 1423.

The *Hunter* case was decided under 42 U.S.C. § 1981, which required proof of intentional discrimination.[156] However, the court found that "failure to take reasonable steps to prevent a barrage of racist acts, epithets, and threats can make an employer liable if management-level employees *knew, or in the exercise of reasonable care should have known*, about the campaign of harassment."[157] The court goes on to make it clear that liability was not based on respondeat superior, but was based on the employer's failure to use reasonable care to prevent harassment when there was *reason to know of the harassment.*[158] Obviously, this court recognized that the "knew or had reason to know" disparate treatment standard was included within the meaning of "intentional discrimination." Other cases have reached similar results.[159]

Based on the above analysis,[160] "hostile environment sexual harassment is a type of intentional discrimination, but the intent is established by proof of the elements required to prove the cause of action and needs no additional proof."[161] Based on the statistics listed in note 25 of this article, the court in *Petaluma II* was correct in finding that:

> it appears that school districts are on notice that student-to-student sexual harassment is very likely in their schools, particularly in junior high school. In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment. Thus the Title VII standard for *intentional* discrimination, which imposes liability where the entity knows or should have known of the hostile environment and fails to take remedial action, is the appropriate standard.[162]

Since the *Franklin* court explained that the notice requirement for damage actions under the Spending Clause in Title IX cases was satisfied when the violations are intentional, this analysis shows that the recent *Davis II* decision in August of 1997 denying that a peer-to-peer sexual harassment cause of action exists under Title IX is incorrect. The dissent in that case states that "there is no ambiguity" in the language of the statute which reads "[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

156. *See e.g.*, Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985); Vasquez v. McAllen Bag & Supply Co., 660 F.2d 686 (5th Cir. 1981); Craig v. Los Angeles County, 626 F.2d 659 (9th Cir. 1980) (*cited in Petaluma II*, 949 F. Supp. at 1423).

157. *Petaluma II*, 949 F. Supp. at 1423 (citing *Hunter*, 797 F.2d at 1421) (emphasis added).

158. *See id.* (citing *Hunter*, 797 F.2d at 1422).

159. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982) (holding that although the "essence of a disparate treatment claim" is a showing of intent, that "intent need not be proved under ... prima facie case framework because, cases of sexual harassment creating a hostile environment do 'not present a factual question of intentional discrimination which is at all elusive.'") (*cited* in *Petaluma II*, 949 F. Supp. at 1423).

160. This analysis follows closely that used by the court in *Petaluma II* reaching the conclusion that the Title VII standard should apply to peer-to peer sexual harassment cases under Title IX.

161. *Petaluma II*, 949 F. Supp. at 1424.

162. *Id.* at 1426 (emphasis added).

subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[163] The dissent agrees with the above analysis and states that "it is also well established that hostile environment sexual harassment is a form of *intentional* discrimination which exposes one sex to disadvantageous terms or conditions to which members of the other sex are not exposed."[164]

B. Policy Reasons for a Broad Based Cause of Action

Those opposed to using the Title VII standard for Title IX peer-to-peer sexual harassment argue that under that standard schools are required to maintain a harassment-free environment, "a task which is impossible in any population, and particularly in a population of adolescents."[165] Their concern is unwarranted. The Title VII standard is not a strict liability standard where the school district is held liable for every instance of harassment within the school environment.[166] Based on the Title VII standard, the plaintiff must first prove that the harassment was gender based and so severe or pervasive as to create a hostile environment which adversely affects the plaintiff's ability to function in the environment.[167] This keeps the entity from being held liable for isolated or minor incidents.[168] The plaintiff then must "prove that the entity knew, or should in the exercise of its legal duties have known, of the harassment."[169] Lastly, if the entity takes prompt, appropriate remedial action, there is no liability, even where a hostile environment exists and the entity had actual or constructive notice of its existence.[170] "[T]his standard leaves room, therefore, for the court to allow schools an appropriate amount of discretion in determining how best to respond to harassment."[171] Public policy supports a duty for schools to take reasonable steps to prevent or stop peer-to-peer sexual harassment. In its agency interpretation, the OCR recognized the special duty of care imposed on educational institutions stating, "in addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students."[172] Public policy supports the use of the traditional Title VII hostile environment standard in peer-to-peer sexual harassment cases to determine the liability of schools and school districts.

The OCR's new interpretations of hostile environment sexual harassment set forth a good definition of the types of behavior which give rise to a cause of action

163. *Davis II*, 120 F.3d 1390, 1412 (11th Cir. 1997) (Barkett, J., dissenting).
164. *Id.* (emphasis added).
165. *Petaluma II*, 949 F. Supp. at 1426.
166. *See id.*
167. *See id.*
168. *See id.*
169. *Id.*
170. *See id.* at 1426.
171. Doe *ex. rel.* v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996).
172. *Id.* at 1427 (quoting Dep't of Educ., Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11,448 (Mar. 10, 1994)).

under Title IX. The guidance policy defines such conduct as sexually harassing conduct, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature that is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment."[173] From this definition, it is easy to see that for a one time incident to give rise to a cause of action against a school district it would have to be very severe indeed. Therefore, school districts will not be held liable for innocent or isolated incidences of harassing conduct. But, they should be held liable for not providing prompt and appropriate remedial action to end peer-to-peer sexual harassment suffered by students when they had actual or constructive notice of such harassment. Judge Barkett says it best in *Davis I*:

> Indeed, where there are distinctions between the school environment and the workplace, they 'serve only to emphasize the need for zealous protection against sex discrimination in the schools.' The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as acceptable behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, "[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program."[174]

These words eloquently explain the strong public policy reasons for protecting school students at least as much as workers.

VIII. CONCLUSION

In this country, citizens seek justice through our court system, sometimes successfully. However, many young sexual harassment victims seek justice to no avail. Currently, there are vast differences in the outcomes of similar cases based solely on which federal court is hearing the case. As the courts struggle with how to handle these peer-to-peer sexual harassment claims, innocent lives are being permanently affected. While concern for school districts and for taxpayer's dollars is a noble one, public policy demands justice for students who are placed in

173. Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (1997).
174. *Davis I*, 74 F.3d at 1193 (citation omitted).

intolerable situations by school districts who show little or no concern for their emotional and/or physical well being when they are subjected to sexual harassment at the hands of their peers.

The Supreme Court's decision to review this issue will hopefully end the discrepancy among the various jurisdictions regarding the viability of a cause of action for peer-to-peer sexual harassment under Title IX and which liability standard to apply. Based on the above analysis, the Supreme Court should rule that schools and school districts are liable for peer-to-peer sexual harassment where they knew, or should in the exercise of their duties have known, of the harassment and failed to take prompt and appropriate remedial action. School officials should look to the recent OCR policy guidance[175] for help in implementing procedures and practices to insure Title IX compliance and in facilitating the prompt and appropriate remedial action required to avoid liability. Only when schools, courts and the OCR are working from the same "road map" can there be true justice for students who are victims of peer-to-peer sexual harassment.

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175. Bodnar, *supra* note 5.