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# Holding School Systems Liable for Peer Sexual Harassment

Katie Wood

# HOLDING SCHOOL SYSTEMS LIABLE FOR PEER SEXUAL HARASSMENT

## INTRODUCTION

A kiss may be just a kiss when a six-year-old boy plants one on the cheek of a first-grade classmate at her invitation.[1]

But it is sexual harassment[2] when:

- a fifth-grade boy tells the girl who sits at the desk next to his, "I want to feel your boobs" and attempts to do so;[3]
- a middle-school boy swats the buttocks of an eighth-grade girl as she walks down the aisle of a school bus, says "When are you going to let me fuck you?" and later gropes her genital area;[4] and

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1. *See* Paul Nowell, *Smooch is Heard Around the Globe*, CHARLOTTE OBSERVER, Sept. 26, 1996, at 2C (reporting international attention paid to student Johnathan Prevette of Lexington, North Carolina, disciplined for kissing a classmate). Although the discipline was widely reported as that for sexual harassment, school officials insisted that the child's action violated a general school rule which prohibits unwarranted and unwelcome touching of one student by another, *i.e.*, a keep-your-hands-to-your-self policy. *See id.; see also* John Leland, *A Kiss Isn't Just a Kiss*, NEWSWEEK, Oct. 21, 1996, at 71-72 (reporting reaction to disciplining Prevette and another child, seven-year-old De'Andre Dearinge of Queens, New York, for kissing a classmate).

2. California law defines sexual harassment as " '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 . . . .' " 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, 489 (1993) (quoting 26 CAL. EDUC. CODE § 212.5 (West Supp. 1992)). Minnesota, another state with an anti-discrimination statute, defines "sexual harassment as 'unwelcome sexual advances' or 'physical conduct or communication of a sexual nature' that creates 'an intimidating, hostile, or offensive . . . environment' at work or in school." 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, 2139 (1993) (quoting MINN. STAT. ANN. § 363.01.41 (West 1991)). A national survey of students defined sexual harassment as "unwanted and unwelcome sexual behavior which interferes with your life. Sexual harassment is not behaviors that you like or want." Stacey R. Rinestine, Comment, *Terrorism on the Playground: What Can Be Done?* 32 DUQ. L. REV. 799, 800 n.10 (1994) (quoting LOUIS HARRIS & ASSOCIATES, HOSTILE HALLWAYS, THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 6 (1993) [hereinafter HARRIS]).

3. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1189 (11th Cir.), *vacated, reh'g granted en banc*, 91 F.3d 1418 (11th Cir. 1996) [hereinafter *Davis I*].

4. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1008-09 (5th Cir.), *cert.*

- male classmates hold down an openly gay thirteen-year-old boy to subject him to a mock rape and later push him into a urinal in the boys' restroom and urinate upon him.[5]

So widespread is the problem among school children that a national survey of over 1600 public school students released in 1993 revealed that eighty-one percent had been sexually harassed, usually by their classmates, by the time they were high school seniors.[6]

The U.S. Department of Education's Office for Civil Rights now requires schools to adopt policies to address the problem.[7] Critics charge such policies are "political correctness run amok"[8] when applied to six- and seven-year-olds.[9] But when school officials fail to take steps to put an end to peer sexual harassment despite repeated complaints by victims and their parents, many students and their parents file suit.[10]

So far, cases rarely make it to a jury.[11] However, one recent

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*denied*, 117 S. Ct. 165 (1996).

5. *See* Nabozny v. Podlesny, 92 F.3d 446, 451-52 (7th Cir. 1996).

6. *See* Rinestine, *supra* note 2, at 800-01. Another survey released in 1993 questioned 4200 girls and found that eighty-nine percent had received sexually "suggestive gestures, looks, comments or jokes" and eighty-three percent reported that they had been " 'touched, pinched or grabbed.' " Stefanie H. Roth, *Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education*, 23 J.L. & EDUC. 459, 463 (1994) (quoting Nan D. Stein et al., *Secrets in Public: Sexual Harassment in Our Schools*, CENTER FOR RESEARCH ON WOMEN (1993) (reporting findings of survey in SEVENTEEN magazine)).

7. *See* Department of Education, Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997).

8. Leland, *supra* note 1, at 71.

9. *See id.*

10. School officials' fear of such suits has spawned a cottage industry of consultants offering to lead them through the harassment law maze. *See id.* at 71-72; *see also* Claire Papanstasiou Rattigan, *Flirting With Disaster; Wakefield Lawyers Give Tips in the Workplace—and in Schools—to Avert Sexual-Harassment Liability*, MASS. LAW. WKLY., Mar. 20, 1995, at B1.

11. *See California School Sex Bias Suit Settled*, NAT'L L.J., Jan. 13, 1997, at A8 (reporting that school district agreed to pay $250,000 to former student who claimed officials ignored sexual harassment complaints); *Girl Gets $500,000 for Sexual Insults, Ruling in Suit Leaves Antioch Schools Reeling*, SAN JOSE MERCURY NEWS, Oct. 3, 1996, at A1 [hereinafter *Girl Gets $500,000*] (mentioning jury verdicts in Louisiana and New York as well as recent California award that was article's subject); *see also, Gay Student Gets $900,000 for Harassment*, NEWSDAY, Nov. 21, 1996, at A18 [hereinafter *Gay Student Gets $900,000*] (reporting settlement as federal jury prepared to consider damage award after finding Ashland, Wisconsin, school officials liable for failing to protect student from gay-bashing). *But see*, Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996) (granting motion for

verdict struck fear into a school official's heart: a California jury ordered the school principal to pay $6000 of the $500,000 it awarded to a now-fifteen-year-old girl forced to endure months of sexual harassment during the 1993-94 school year when she was in sixth grade.[12]

Most students have filed suits under Title IX of the Education Amendments of 1972 (Title IX),[13] which prohibits sex discrimination at institutions receiving federal funding.[14] These suits claim that the "hostile hallways"[15] children encounter at school are no different than the "hostile environments"[16]

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judgment as a matter of law despite jury award of $5,200 in damages for student who sued school under Title IX for failing to prevent peer sexual harassment); *Jury Rejects Harassment Claim But Sympathizes With Teen's Case*, NEWSDAY, Nov. 22, 1996, at A3 (reporting defense verdict in Title IX suit against school officials who allegedly failed to stop peer harassment of sixth-grade girl).

12. *See Girl Gets $500,000, supra* note 11.

13. *See* 20 U.S.C. §§ 1681-1688 (1990) (prohibiting sex discrimination in federally funded education programs).

14. Title IX is so-called Spending Clause legislation because it is enacted pursuant to Congress's power to appropriate funds. *See* Rodney A. Smolla, *Preface* to Stephen J. Wermiel, *A Claim of Sexual Harassment, in* A YEAR IN THE LIFE OF THE SUPREME COURT, 231 (1995).

> Congress in recent decades has on a number of occasions enacted federal laws providing federal financial assistance for various social and economic programs that require, as a condition of receipt of federal funds, adherence to certain nondiscrimination principles. The principle is quite simple. State and local agencies, or private contractors who deal with the federal government, are told in effect, "We will give you federal money for your program, but in turn you must agree to abide by certain rules." Those rules often involve the protection of civil rights.

*Id.* However, the U.S. Supreme Court specifically declined to specify the authority under which Congress passed the law. *See infra* note 64.

15. HARRIS, *supra* note 2.

16. The Equal Employment Opportunity Commission defines hostile work environment harassment as "conduct [which] 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)(3) (1997); *see also* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 297-300 (1994).

> Hostile environment sexual harassment . . . occurs when an employer creates or allows others to create a pattern of conduct relating to sex that establishes an unpleasant, intolerable, or hostile environment . . . . Hostile environment sexual harassment involves subjecting employees, usually females, to "sexual advances, suggestions, jokes, or epithets without threatening the loss of tangible job benefits." Hostile environment harassment may involve supervisors, coworkers, or third parties. Employers may be held liable for the misconduct of their supervisors, coemployees, and third parties.

*Id.* at 297-98 (quoting Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC.

forbidden under federal employment law.[17] Some also have attempted to bring claims under the equal protection[18] and substantive due process[19] provisions of the Fourteenth Amendment[20] and under the First Amendment's freedom of speech provision.[21] Litigants have had limited success in attempts to establish viable causes of action under federal law.[22] Others have tried to find remedies under state tort law for negligence and intentional infliction of emotional distress[23] or state constitutional equal rights protections.[24]

This Note focuses on the difficulties litigants have experienced establishing a viable cause of action, despite the growing awareness of peer sexual harassment[25] and state and federal officials' increased efforts to force school systems to adopt policies addressing harassment problems.[26] Section I describes the scope

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CHANGE 83, 84 (1984)).

17. *See, e.g., Davis I*, 74 F.3d, 1186, 1189 (11th Cir. 1996).

18. *See* Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).

19. *See Davis I*, 74 F.3d at 1188; Spivey v. Elliott, 29 F.3d 1522, 1523-24 (11th Cir. 1994).

20. U.S. CONST. amend. XIV, § 1.

21. *Id.* amend. I; *cf.* Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996).

22. *See, e.g., Davis I*, 74 F.3d at 1186; Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); *Nabozny*, 92 F.3d at 446; *Seamons*, 84 F.3d 1226. Indeed, one litigant has compared the difficulties students are having establishing liability for peer harassment to the skepticism with which some courts greeted claims that the sexual harassment of employees is a form of sex discrimination. *See* Appellant's En Banc Brief at 34 n.15, Davis v. Monroe County Bd. of Educ. (11th Cir., filed Sept. 13, 1996) (No. 94-9121) (referring to Miller v. Bank of Am., 418 F. Supp. 233, 234 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (viewing sexual harassment as "isolated and unauthorized sex misconduct of one employee to another," and requiring proof of "an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination")).

23. *See* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1210 (N.D. Iowa 1996); *see also* Suzanne Espinosa Solis, *Price of Victory in Harass Suit, Antioch Dad Says Costs Hit $150,000*, S.F. CHRON., Oct. 3, 1996, at A17 (reporting verdict in state court negligence action that the family of an eleven-year-old girl who was sexually harassed by a sixth-grade classmate brought against the school system).

24. *See* Kathy Walt, *Reports Allege Harassment, Abuses in Bryan Schools*, HOUSTON CHRON., Oct. 10, 1996, at 1A (reporting student who filed class-action sexual harassment suit against school system under state Equal Rights Amendment after U.S. Supreme Court rejected application for review of federal appellate decision denying federal cause of action for student harassment).

25. *See* NAN D. STEIN, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN PUBLIC (AND PRIVATE) SCHOOLS, CENTER FOR RESEARCH ON WOMEN (Apr. 1993); HARRIS, *supra* note 2.

26. California and Minnesota have laws forbidding sexual harassment in public schools. *See* Gwen Florio, *Sexual Harassment Joins the 3Rs; Schools Policing "Hostile Hallways"*, NEW ORLEANS TIMES PICAYUNE, Mar. 5, 1995, at A21. The state education

of the harassment problem and examines the reasons for the recent explosion of litigation in this area. Section II analyzes plaintiffs' efforts to establish federal causes of action under Title IX and under the equal protection and substantive due process clauses of the Fourteenth Amendment. However, the primary focus of this section is on the disagreement among federal courts over the applicability of Title IX. This Note concludes that where federal causes of action are concerned, the handful of courts that have found a cause of action under Title IX and applied employment law principles to fashion a standard of liability were correct; that equal protection may be a promising legal avenue, particularly for gay students; and that courts have almost universally rejected substantive due process, despite its logical appeal. Moreover, recent state court cases, such as the one that yielded a $500,000 jury verdict in California,[27] suggest that plaintiffs should not rule out advancing causes of action when possible under state law.

## I. PERVASIVE PROBLEM SPARKS LITIGATION WHEN POTENTIAL REMEDY REVEALED

Student-on-student sexual harassment is "rampant" in American schools,[28] with four out of five students saying they have been sexually harassed at school by the time they become high school seniors.[29] Most students report that harassment begins during junior high, sometime between the sixth and ninth grades.[30] The result, particularly for girls, is not just embarrassment, but a loss of self-confidence and a lower interest in attending school.[31] Because most peer sexual harassment

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departments in New Jersey and Pennsylvania strongly recommend that local schools set up sexual harassment policies. *See id.* The Louisiana Department of Education conducts workshops to help local school districts draft specific policies and procedures to deal with sexual harassment. *See* Littice Bacon-Blood, *Schools Work on Behavior Policy*, NEW ORLEANS TIMES PICAYUNE, Mar. 2, 1995, at B2. The U.S. Office for Civil Rights distributed preliminary guidelines to schools in August 1996, which, for the first time, focused on peer sexual harassment. *See* Leland, *supra* note 1, at 71.

27. *See Girl Gets $500,000, supra* note 11, at A1.

28. Rinestine, *supra* note 2, at 799.

29. *See id.* at 800.

30. *See id.* at 801.

31. *See id.* So great is the problem of girls losing their self-esteem during their teens that feminist organizations are conducting studies and developing programs to keep girls confident. *See* Jill Vejnoska, *Feminist Duo to Promote "Girl Power" at Fund-raiser*, ATLANTA J. & CONST., Nov. 17, 1997, at B5.

takes place in front of other students in places such as school hallways and buses, public humiliation exacerbates the trauma, especially when adult witnesses fail to intervene.[32] Experts say sexual harassment has not become any more prevalent in recent years, but is simply more widely reported.[33] Some experts attribute a portion of the increase in reporting to lessons learned from litigation over sexual harassment in the workplace.[34] Experts have found that grade-school bullies become sexual harassers in high school and then graduate to take their harassing behavior to the workplace.[35]

Increased intolerance of sexual harassment is not the only cause of increased law suits against schools which fail to take effective steps to discipline harassers after students and their parents bring the problem to school officials' attention. The U.S. Supreme Court opened up the field of Title IX litigation in 1992 when it held in *Franklin v. Gwinnett County*[36] that monetary damages are available to the victims of sexual harassment in federally funded schools.[37] Until that time, the law limited students' remedies to equitable relief, which often failed to

32. *See* STEIN, *supra* note 25, at 2-3.

33. *See* Florio, *supra* note 26, at A21 (quoting Gwendolyn Gregory of the National School Boards Association) (" 'It's not that there's any more harassment' in schools. . . . 'But there's definitely a rise in reporting.' "). Indeed, the U.S. Office for Civil Rights, which investigates student complaints, now handles about 200 cases a year. *See* Leland, *supra* note 1, at 71. The number of complaints has been increasing in recent years; in 1994 the U.S. Department of Education, which logged just 27 student sexual harassment complaints in 1988, received 77 complaints. *See* Jeffrey Bils, *Sexual Harassment Graduates to High School*, CHI. TRIB. (Metro Northwest), Apr. 28, 1995, at 1.

34. *See* Florio, *supra* note 26, at A21. A six-year-old's unwanted kisses are not sexual harassment, but are a "form of bullying, and part of a continuum that includes sexual bullying at a later age." Leland, *supra* note 1, at 72.

35. *See* Florio, *supra* note 26, at A21; *cf.* STEIN, *supra* note 25, at 24 (suggesting that tolerance of sexual harassment makes schools "training grounds for the insidious cycle of domestic violence"). One member of the appeals court which heard reargument in the *Davis* case, Judge J. L. Edmondson, questioned whether there should be a cause of action for victims of sexual harassment, given its similarity to "bullying in schools [that] is long-standing and widespread." Don J. DeBenedictis, *2 Sides Grilled on Harassment of Fifth-Grader*, FULTON COUNTY DAILY REP., Oct. 24, 1996, at 7. " 'I wonder if you really think Congress thinks young women who are bullied ought to have a cause of action but that young men who are bullied get nothing,' " Edmondson told plaintiff's counsel Verna L. Williams of the National Women's Law Center, who responded by pointing out the sexual nature of severe harassment in the *Davis* case. *Id.*

36. 503 U.S. 60 (1992).

37. *See id.* at 76.

remedy the problem because the student likely would have left school to escape the harassment or would have graduated by the time the court ordered the relief.[38]

After *Franklin*, legal writers[39] and litigants[40] seized on Title IX as providing a potent vehicle for relief.[41] Because *Franklin* involved harassment by a teacher, post-*Franklin* plaintiffs have had limited success in establishing a viable cause of action under Title IX for student-on-student sexual harassment because the Supreme Court did not make clear the standard of liability in such a case.[42]

At issue is whether schools are responsible under Title IX for failing to respond to student complaints about harassment.[43] Unlike employees, students are not agents of the schools.[44]

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38. *See* Kimberly L. Limbrick, Note, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601, 612-13 (1995); Katie Wood, *Gwinnett Fireworks Defused at High Court; National Attention on Thomas as Justices Hear Harassment Case*, FULTON COUNTY DAILY REP., Dec. 12, 1991, at 1, 2; Wermiel, *supra* 14, at 243-44.

39. *See, e.g.*, Gant, *supra* note 2, at 490; 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, 700-01.

40. *See Davis I*, 74 F.3d 1186, 1190 (11th Cir. 1996) (recognizing that *Franklin*'s allowance of monetary damages increased the number of sex-discrimination suits brought under Title IX); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1417 (N.D. Cal. 1996) [hereinafter *Petaluma III*] (recognizing that key question left unanswered in *Franklin* is what standard of liability applies for damages under Title IX when students are subjected to a hostile environment at school); *see also* Thomas R. Baker, Comment, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of* Franklin v. Gwinnett County, 109 EDUC. L. REP. 519, 534 (1996) (pointing out that no peer harassment claim has been ultimately dismissed on the ground that Title IX provides no remedy at all). In *Davis I*, the Eleventh Circuit Court of Appeals reversed the trial court's outright dismissal of the Title IX claim in *Davis*. *See* Baker, *supra*, at 534 n.66. The full Eleventh Circuit Court of Appeals has since refused to extend Title IX to peer harassment. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1400 (11th Cir. 1997) (en banc) [hereinafter *Davis II*].

41. *See* Gant, *supra* note 2, at 490. The U.S. Supreme Court recently granted certiorari to consider the standard governing a school's responsibility for a sexual relationship between a teacher and a student. *See* Doe v. Lago Vista, 118 S. Ct. 595 (1997); *see also* Lyle Denniston, *High Court to Rule on Liability of Schools in Sex Abuse Cases; Texas Student Holds Local District Responsible for Teacher's Actions*, BALTIMORE MORNING SUN, Dec. 6, 1997, at A3. A broad ruling could also affect the standard of liability for student-on-student sexual harassment. *See* Denniston, *supra*.

42. *See Davis I*, 74 F.3d 1186 (11th Cir. 1996); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

43. *See, e.g., Davis II*, 120 F.3d at 1390.

44. *See id.* at 1399-1400 n.13 (arguing students are not agents of school board therefore agency principles are inapposite to peer harassment under Title IX). *But see id.* at 1416-17 (Barkett, J. dissenting) (countering that because Supreme Court did

Therefore, the liability standard developed in hostile work environment litigation under Title VII, in which a defendant can be held liable for knowingly failing to eliminate harassment, may be inappropriate.[45] One alternative is to construe Title IX as providing a cause of action only for discrimination on the basis of sex. That action lies when the student-victim can show that the school responded differently to sexual harassment claims based on the victim's sex.[46]

## II. THE QUEST FOR A FEDERAL CAUSE OF ACTION

Plaintiffs seeking to hold school systems liable for failing to remedy student-on-student sexual harassment have focused their efforts primarily on Title IX, but also have raised claims under the equal protection and substantive due process clauses of the Fourteenth Amendment.[47]

### *A. Title IX*

In 1972, Congress enacted Title IX to put an end to sex discrimination in education programs receiving federal financial assistance.[48] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation

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not transfer common law of agency to Title VII "in *all* their particulars," courts have flexibility to hold employers liable for failing to remedy a hostile environment created by third parties).

45. *See Davis I*, 74 F.3d at 1188; *see also*, ROTHSTEIN, *supra* note 16, at 297-300.

> To hold an employer liable for harassment based on hostile environment, the employer must have known or had constructive knowledge of the harassment. If an employer has actual or constructive knowledge and fails to take prompt remedial action, it may be liable for the harassment. An employer's response to alleged harassment 'must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time that the allegations are made.' The test is not whether the harassment ultimately succeeded, but whether the employers [sic] actions were reasonable. Thus, in instances in which an employer knows of harassment and takes prompt remedial action, courts may not find the employer liable.

*Id.* at 299-300 (quoting Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989)).

46. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996). The *Rowinsky* test is "an Equal Protection-like test." Baker, *supra* note 40, at 519.

47. *See* Seamons v. Snow, 84 F.3d 1226, 1237 (10th Cir. 1996). In *Seamons*, a student who claimed he was harassed after complaining about a hazing incident that had sexual overtones succeeded in pressing a First Amendment claim despite the failure of his Title IX and Due Process claims. *See id.*

48. 20 U.S.C. § 1681(a) (1990).

in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[49] The primary sponsor of the measure, Senator Birch Bayh, said it would provide "women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."[50] Bayh stressed the need for a "strong and comprehensive measure . . . to provide women with solid legal protection as they seek education and training for later careers . . . ."[51] Congress acted in 1988 to broaden Title IX to provide that its ban on sex discrimination applied not just to the program receiving federal funds, but rather to the entire institution.[52]

The U.S. Supreme Court insisted that Title IX be interpreted broadly: "[t]here is no doubt that if we are to give [it] the scope that its origins dictate, we must accord it a sweep as broad as its language."[53] The broad sweep of the statute is effectuated in two ways: sex-discrimination victims have a private right of action under Title IX;[54] and they are not limited to injunctive relief, but rather are entitled to monetary damages in actions brought to enforce Title IX.[55]

### 1. *What Does* Franklin *Require?*

In *Franklin*, a high school student brought an action under Title IX against the Gwinnett County, Georgia, school system, alleging that a teacher who also worked as a coach sexually harassed her.[56] She alleged that school officials were aware of

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49. *Id.*

50. Appellant's En Banc Brief at 12, Davis v. Monroe County Bd. of Educ. (11th Cir., filed Sept. 13, 1996) (No. 94-9121) (quoting 118 CONG. REC. 5804 (1972) (remarks of Senator Bayh)).

51. *Davis I*, 74 F.3d 1186, 1190 (11th Cir. 1996) (quoting 118 CONG. REC. 5806-07 (1972) (remarks of Senator Bayh)).

52. *See* Appellant's En Banc Brief at 14, *Davis* (No. 94-9121) (referring to Grove City College v. Bell, 465 U.S. 555, 574 (1984)). Legislators said the purpose of Title IX was to create an institution-wide environment free of sex discrimination. *See id.* (referring to Civil Rights Restoration Act of 1988, 20 U.S.C. § 1687, Pub. L. No. 92-318, Title IX, § 908, as added Pub. L. No. 100-259, § 3(a) (Mar. 22, 1988)).

53. *Davis I*, 74 F.3d at 1190 (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quotation omitted in *Davis*)).

54. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).

55. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992).

56. *See id.* at 62-63.

the harassment, but took no action to stop it.[57] The District Court dismissed the complaint, stating that damages were not an available remedy under Title IX, and the Eleventh Circuit Court of Appeals affirmed.[58]

The U.S. Supreme Court reversed and framed the issue before it broadly: "This case presents the question whether the implied right of action under Title IX of the Education Amendments of 1972 . . ., which this Court recognized in *Cannon v. University of Chicago* . . ., supports a claim for monetary damages."[59] The Court stated its holding in similarly broad terms, concluding "that a damages remedy is available for an action brought to enforce Title IX."[60]

The current battle over whether a student should be able to recover damages under Title IX for a school's failure to provide protection from peer sexual harassment does not focus on the Court's broad holding. Instead, the issue is the language used to reject the school system's argument that "the traditional presumption in favor of appropriate relief,"[61] that is, that any available remedy may be used when federal law creates a general right to sue for a violation,[62] should not apply in *Franklin*.[63] The Court rebuffed the school's contention that the plaintiff should be limited to equitable relief because monetary damages should not apply to Spending Clause legislation such as Title IX.[64] The Court pointed out that although remedies may be limited under Spending Clause laws "when the alleged violation [is] *unintentional*,"[65] that problem did not arise in *Franklin* because plaintiffs alleged intentional discrimination.[66] Then the Court, relying on a hostile work-environment case, stated:

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57. *See id.* at 64.
58. *See id.*
59. *Id.* at 62-63 (citations omitted).
60. *Id.* at 76.
61. *Id.* at 73.
62. *See id.* at 66.
63. *See id.* at 73.
64. *See id.* at 74. Despite its references to the Spending Clause, the Court specifically declined to determine whether Congress enacted Title IX under that power or under powers derived from § 5 of the Fourteenth Amendment, as the plaintiff argued. *See id.* at 75 n.8. "Because we conclude that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute, we need not decide which power Congress utilized in enacting Title IX." *Id.*
65. *Id.* at 74 (emphasis in original).
66. *See id.* at 74-75.

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." . . . We believe the same rule should apply when a teacher sexually harasses and abuses a student.[67]

The Court continued with an additional reference to the "intentional" nature of this action, adding: "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[68]

As a result, courts considering whether a school system can be held liable for student-on-student sexual harassment must grapple with what the Supreme Court meant when it used the term "intentional discrimination."[69] Several of the intentional discrimination issues that the *Franklin* Court left unresolved are discussed in *Doe v. Petaluma City School District* (*Petaluma III*),[70] in which the U.S. District Court for the Northern District of California granted reconsideration of the first post-*Franklin* peer-harassment decision, *Doe v. Petaluma City School District* (*Petaluma I*).[71] According to the *Petaluma III* court, much of the difficulty over the term "intentional discrimination" stems from the fact that the *Franklin* Court did not need to define or analyze the term because the plaintiff had specifically alleged intentional discrimination, and the lower courts characterized the claim as intentional discrimination.[72] Without definition or analysis, it is unclear how the intentional discrimination standard in *Franklin* relates to the Title VII standard for liability for sexual harassment in a hostile work environment.[73] Although the *Franklin* Court, in characterizing the claim as one of intentional discrimination, cited a hostile environment case that arose under Title VII, the Court, earlier in the *Franklin* decision, declined to

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67. *Id.* at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).
68. *Id.*
69. *Id.*
70. 949 F. Supp. 1415, 1418-19 (N.D. Cal. 1996).
71. 830 F. Supp. 1560 (N.D. Cal. 1993). A later ruling from an amended complaint was reversed by Doe v. Petaluma City Sch. Dist., 54 F.3d 1447 (9th Cir. 1995) (*Petaluma II*). *See Petaluma III*, 949 F. Supp. at 1416 n.1.
72. *See Petaluma III*, 949 F. Supp. at 1418.
73. *See id.*

address whether the anti-discrimination provisions and remedies available under Title VII should apply by analogy to Title IX.[74]

The Title VII case to which the *Franklin* court referred, *Meritor Savings Bank v. Vinson*,[75] instructed lower courts to look to common-law principles of agency in determining the extent of employer liability because Title VII defines "employer" as including any "agent" of the employer.[76] The *Meritor* court said that the definition showed Congress' intent "to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[77] But the *Franklin* Court did not mention agency principles, despite its reliance on *Meritor*, and it did not explain its connection between the teacher's act of intentional discrimination and the imposition of liability on the school district.[78] Nor did the *Franklin* Court refer to the test that appellate courts have fashioned under the *Meritor* Court's instruction that establishes liability when an employer knew or should have known of the hostile work environment, but failed to take steps to correct the problem.[79]

The analysis is further complicated because the *Franklin* Court mentioned intentional discrimination in addressing the applicability of monetary damages for violation of a Spending Clause law.[80] The Supreme Court has only impliedly defined intentional discrimination in a badly splintered Spending Clause decision that produced no majority opinion, *Guardians Ass'n v. Civil Service Commission of New York*.[81] There, the Court determined whether monetary damages should be awarded under Title VI[82] for unintentional disparate impact discrimination.[83] The *Guardians* Court implied that intentional discrimination is

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74. *See id.* (referring to Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) and Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65 n.4 (1992)).

75. 477 U.S. 57 (1986). *Meritor*, despite being a hostile environment case, involved a supervisor who harassed an underling, thus triggering agency issues such as *respondeat superior*. *See id.*

76. *Id.* at 72 (citing 42 U.S.C. § 2000e(b) (1994)).

77. *Id.*

78. *See Petaluma III*, 949 F. Supp. at 1418.

79. *See id.* (referring to EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989)).

80. *See id.*

81. 463 U.S. 582, 597 (1983).

82. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, contains language almost identical to Title IX and is used as a "gap filler" in interpreting the education law. Miller, *supra* note 39, at 704, 715.

83. *See Petaluma III*, 949 F. Supp. at 1418.

discrimination other than that based on disparate impact,[84] but it is not clear whether the *Franklin* Court was using the phrase in that context.[85]

### 2. *Circuit Courts of Appeals Divided Over Title IX Interpretation*

With so many unanswered questions over the meaning of the term "intentional discrimination," federal courts have fashioned widely divergent standards of liability for schools in peer harassment cases brought under Title IX.[86] Five U.S. circuit courts of appeals have analyzed the Title IX issue to varying degrees and with disparate results since 1996.[87] In the first of those decisions, *Davis v. Monroe County Board of Education*,[88] a panel of the Eleventh U.S. Circuit Court of Appeals voted 2-1 to use Title VII to fashion a Title IX remedy when school officials "knowingly fail to act to eliminate the [student-on-student sexual] harassment."[89] Less than two months later, a panel of the Fifth Circuit divided 2-1 in *Rowinsky v. Bryan Independent School District*,[90] specifically rejected the Eleventh Circuit's approach, and held that Title IX does not impose liability on a school district for student-on-student sexual harassment unless there is a showing that the school district actually responded differently to harassment claims based on sex.[91] The Eleventh and Fifth Circuit decisions staked out opposite poles of a continuum, with the employment-like test of *Davis I* on one end and with the equal-protection-like test of *Rowinsky* on the other.[92] Many district courts have used the employment-like

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84. *See id.* at 1418-19; *see also* ROTHSTEIN, *supra* note 16, at 128. In an employment setting, disparate impact discrimination occurs where "some hiring device . . . disproportionately disadvantages a group defined by race, color, religion, sex, or national origin." ROTHSTEIN, *supra* note 16, at 128. Unlike disparate treatment discrimination, "motive is irrelevant" in disparate impact discrimination. *Id.*

85. *See Petaluma III*, 949 F. Supp. at 1418-19.

86. *See* Baker, *supra* note 40, at 519.

87. Those decisions, listed in chronological order, are as follows: *Davis I*, 74 F.3d 1186 (11th Cir. 1996); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Oona, R.S. v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997); *Davis II*, 120 F.3d 1390 (11th Cir. 1997); Brzonkala v. Virginia Polytechnic Inst. & St. Univ., 132 F.3d. 949 (4th Cir. 1997).

88. 74 F.3d. 1186 (11th Cir. 1996).

89. *Id.* at 1193.

90. 80 F.3d 1006 (5th Cir. 1996).

91. *See id.* at 1016.

92. *See* Baker, *supra* note 40, at 534 (setting *Davis I* and *Rowinsky* decisions as

model, even after the Eleventh Circuit vacated the *Davis I* decision and granted rehearing en banc.[93]

Meanwhile, about a month after *Rowinsky*, the Tenth Circuit in *Seamons v. Snow*,[94] using the employment model, found that a student had not stated a claim under Title IX because he merely was the victim of a hostile environment, not a sexually hostile environment.[95] Another circuit court decision that does not address the Title IX issue quite as broadly as *Davis* and *Rowinsky* is *Oona, R.S. v. McCaffrey*.[96] In *Oona*, the school district did not dispute that the plaintiff had stated a claim under Title IX;[97] therefore, a unanimous panel of the Ninth Circuit held in a qualified immunity context, that the plaintiff clearly established that a school system had a duty to take reasonable steps to eliminate a sexually hostile environment.[98]

The Ninth Circuit handed its decision down in *Oona* nine days before the Eleventh Circuit issued its 7-4 en banc decision in *Davis II*. The *Davis II* majority specifically rejected the plaintiff's invitation to apply Title VII principles.[99] Instead, the majority

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two opposite poles and plotting district court decisions on that continuum).

93. *See, e.g.*, Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 171 n.7, 172 (N.D.N.Y. 1996) (declining to follow *Rowinsky* and instead agreeing with *Davis I* that students should have same protections in schools that Title VII affords employees in workplace); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1203-04 (N.D. Iowa 1996) (declining to follow *Rowinsky* and instead modifying *Davis I*'s Title VII model of liability); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1212 (E.D. Pa. 1997) (disagreeing with *Rowinsky* and, noting that *Davis I* had been vacated, relying on *Petaluma III*, which actually followed *Davis I*); *Petaluma III*, 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (rejecting *Rowinsky* as based on a "fundamental misunderstanding" of student sexual harassment claims and instead agreeing with the *Davis I* analysis that "sound public policy supports applying Title VII standards to student actions"); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 745-46 (E.D. Ky. 1996) (relying on *Rowinsky* only for a standing issue, court "opts to follow the lead of the Eleventh Circuit, as it equates sexual harassment/hostile environment in an educational setting with sexual harassment/hostile environment in the workplace"); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1376-77 (N.D. Cal. 1997) (declining to follow *Rowinsky* and instead adopting *Davis I/Petaluma III* approach that "a plaintiff may maintain a Title IX action for damages against a school district when the plaintiff alleges that the school district knew or should have known . . . that the plaintiff was being sexually harassed by other students and the school district failed to take steps reasonably calculated to end the harassment").

94. 84 F.3d 1226 (10th Cir. 1996).

95. *See id.* at 1233.

96. Oona, R.S. v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997).

97. *See id.* at 1208.

98. *See id.* at 1211. *Oona* also is distinguishable because the alleged harassment came from a student teacher as well as the girl's classmates. *See id.* at 1208.

99. *See Davis II*, 120 F.3d 1390, 1400 n.13 (11th Cir. 1997). In that footnote, the

held that there was no cause of action under Title IX because the school board was not on notice that it could be held liable for failing to remedy student-on-student sexual harassment when it accepted federal funds.[100]

Four months later in *Brzonkala v. Virginia Polytechnic Institute and State University*,[101] a Fourth Circuit panel relegated the en banc *Davis II* decision to a mere reference in a footnote[102] and found unanimously that a university could be held liable under Title IX for failing to remedy a known sexually hostile environment.[103]

The *Davis II* plaintiff filed an application for certiorari to the U.S. Supreme Court,[104] and court watchers predict that the Eleventh Circuit en banc decision is likely to be overturned if the Court grants the writ.[105] However, the Court already has granted certiorari in a teacher-student harassment case, which if decided broadly could resolve the applicability of Title IX to peer harassment claims as well.[106]

The following sections of this Note analyze the four major Title IX peer harassment decisions issued in 1996 and 1997 from the circuit courts of appeals: *Davis I*, *Rowinsky*, *Davis II*, and *Brzonkala*.

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majority acknowledged that "[a]n employer is directly liable under Title VII if it is deliberately indifferent to peer sexual harassment in the work place." *Id.* at 1399 (citing Faragher v. City of Boca Raton, 111 F.3d 1530, 1538-39 (11th Cir. 1997) (en banc)).

100. *See Davis II*, 120 F.3d at 1401.

101. 132 F.3d 949 (4th Cir. 1997).

102. *See id.* at 958 n.6.

103. *See id.* at 961. One member of the panel dissented from another portion of the decision which upheld the constitutionality of the Violence Against Women Act. *See id.* at 974.

104. 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

105. *See* Emily Heller, *Pupil Liability Issue Held 'Ripe' for High Court*, FULTON COUNTY DAILY REP., Sept. 15, 1997, at 1.

106. *See* Denniston, *supra* note 41.

> The Supreme Court's willingness to hear the Texas girl's case came as a surprise. Eight times since 1989, the court had turned aside, without comment, other cases that sought to establish a clear right for students under either the Constitution or federal law not to be sexually assaulted at school. Five of those cases involved teachers' assaults; three grew out of student assaults.

*Id.*

### *a.* Davis I: *Adapting The Employment Model*

In *Davis I*, Aurelia Davis, the mother of a fifth-grade girl who was sexually harassed for six months by a classmate, brought suit on her daughter's behalf against the school board, superintendent, and principal after they failed to take any meaningful steps to correct the problem despite repeated complaints.[107] As the *Davis I* majority pointed out in ruling for the plaintiff, "[t]he facts alleged go far beyond simple horseplay, childish vulgarities or adolescent flirting."[108] The boy, whose desk was across from that of the harassment victim, engaged in abusive conduct toward the girl on at least eight occasions that ultimately resulted in criminal charges.[109] He attempted to touch her breasts and vaginal area, saying, "I want to get in bed with you," and "I want to feel your boobs."[110] He brushed against her in a sexually suggestive manner in the school hallway,[111] and at one point, he behaved in a sexually suggestive manner toward her after placing a doorstop in his pants.[112] The boy eventually pleaded guilty to sexual battery charges.[113]

The girl reported the incidents to her teachers and her mother, who called school officials.[114] Despite these complaints and specific requests that the girl be allowed to move away from her harasser, for three months she was not even allowed to relocate her desk.[115] School officials did not ever remove or discipline the boy for his actions.[116] The harassment upset the girl to a point that her grades dropped and she wrote a suicide note.[117]

The trial court declared that "[n]ot every tort can be remedied under federal law"[118] and dismissed the complaint, which based its claims not only on Title IX, but also on the due process

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107. *See Davis I*, 74 F.3d 1186, 1188 (11th Cir. 1996).
108. *Id.* at 1195.
109. *See id.*
110. *Id.* at 1188-89.
111. *See id.*
112. *See id.* at 1189.
113. *See id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *See id.*
118. Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 368 (M.D. Ga. 1994).

provision of the Fourteenth Amendment.[119] The trial court concluded that there was no basis for the Title IX claim.[120] The court reasoned: "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus, any harm to [the girl] was not proximately caused by a federally-funded education provider."[121]

The Eleventh Circuit panel upheld the ruling on the constitutional claims without discussion, but reversed the dismissal of the Title IX issue in a 2-1 decision that has since been vacated.[122] The majority, in an opinion written by Judge Rosemary Barkett and joined by Senior Judge Albert J. Henderson, concluded

> that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when supervising authorities knowingly fail to act to eliminate the harassment.[123]

In reaching that conclusion, the majority did not discuss *Franklin*'s reference to intentional discrimination that many post-*Franklin* courts have found troubling.[124] The majority used a footnote to reject the school board's argument that Title VII case law should not be applied to Title IX because Title IX is a Spending Clause law.[125] The footnote pointed out that courts have imported Title VII standards into Title VI,[126] the Spending Clause law that prohibits racial discrimination in any program or activity receiving federal funds, so there is no reason not to do the same with Title IX.[127] The majority established a five-part

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119. *See id.*
120. *See id.* at 367.
121. *Id.* Compare the court's language to that of an early decision that rejected the notion that sexual harassment constitutes sex discrimination. *See supra* note 22 and accompanying text. In so ruling, the District Court has the distinction of being the first post-*Franklin* court to dismiss a Title IX claim outright in a peer-harassment case. *See* Baker, *supra* note 40, at 534 n.66.
122. *See Davis I*, 74 F.3d 1186 (11th Cir. 1996).
123. *Id.* at 1193.
124. *See id.* at 1193-94.
125. *See id.* at 1193 n.5.
126. 42 U.S.C. § 2000d (1994).
127. *See Davis I*, 74 F.3d at 1193 n.5.

test for determining whether a plaintiff has made out a hostile learning environment claim under Title IX,[128] utilizing the same criteria that the Eleventh Circuit fashioned in its landmark employment law decision *Henson v. Dundee*:[129]

> [A] plaintiff 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.[130]

Quickly determining that the plaintiff had established the first three elements, the *Davis* majority then turned to the hostile environment issue.[131] Again relying on hostile work environment law, the majority held that a court must consider: "(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."[132] The court added that not only must the conduct be so severe or pervasive that a reasonable person would find it hostile or abusive, but the plaintiff must also subjectively perceive the environment to be abusive.[133]

Finding that the harassment in this case met the above factors, the majority turned to the liability element, which is the fifth factor in the test.[134] It is here that the employment law

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128. *See id.* at 1194.

129. 682 F.2d 897, 903-05 (11th Cir. 1982).

130. *Davis I*, 74 F.3d at 1194. This test was used in Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996), a decision that followed *Rowinsky*'s outright rejection of the *Davis I* decision. The *Seamons* plaintiff failed on the third element—that the harassment was based on sex. *See* 84 F.3d at 1232. There were sexual overtones to a hazing incident in which he was the victim; he was bound nude to a towel rack, his genitals were taped and a girl he had dated was brought into the locker room to view him in this condition. *See id.* at 1230. But the suit centered on harassment the plaintiff suffered in retaliation for reporting the hazing incident to school officials. *See id.* Because the plaintiff failed to allege sex discrimination, it did not reach the issue of what liability the school might have. *See id.* at 1232 n.7. The court did, however, find that the plaintiff's complaints were subject to First Amendment protection. *See id.* at 1237.

131. *See Davis I*, 74 F.3d at 1194.

132. *Id.* (relying on Harris v. Forklift Sys., 510 U.S. 17, 114 S. Ct. 367, 371 (1993)).

133. *See id.*

134. *See id.* at 1194-95.

model, as utilized by the majority opinion, breaks down, giving skeptics of that approach a vehicle for criticism.[135]

The *Davis I* majority acknowledged that under Title VII, the harassment of a supervisor or co-worker is imputed to the employer under "common-law principles of agency."[136] In the *Henson* employment law decision, the Eleventh Circuit held employers liable in harassment circumstances under the agency theory of *respondeat superior* when "the employer knew or should have known of the harassment in question and failed to take prompt remedial action."[137] An employee's complaints to higher management, or a showing that the harassment was so pervasive it "gives rise to an inference of knowledge or constructive knowledge,"[138] are sufficient under *Henson* to demonstrate that an employer had such knowledge.[139]

Applying that test to *Davis I*, the majority found that the victim had told the principal, the equivalent of a higher level manager, about the harassment and that the three different teachers also had actual knowledge of the incidents.[140] Despite that knowledge, school officials failed to take prompt remedial action.[141] The majority found these allegations established a prima facie claim for sex discrimination under Title IX with no discussion of the difficulty of applying an agency principle, *respondeat superior*, to impute liability for the misdeeds of a non-employee student.[142]

The *Davis I* majority wrote at a time when other courts deciding Title VII cases were limiting the applicability of *respondeat superior* principles in hostile work environment causes of action.[143] Courts which found agency principles useful

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135. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

136. *Davis I*, 74 F.3d at 1195.

137. *Id.* (quoting Henson v. Dundee, 682 F.2d 897, 905 (11th Cir. 1982)); *see also infra* note 143 (regarding confusion over use of term *respondeat superior*).

138. *Id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See, e.g.*, Fleenor v. Hewett Soap Co., 81 F.3d 48, 50 (6th Cir. 1996) (acknowledging confusion over past use of term *respondeat superior* in co-worker harassment cases); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988) (noting that principle of holding company liable when management-level employees knew or should have known about offensive conduct is sometimes erroneously described as *respondeat superior*); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418

to impute liability to the employer in cases when supervisory personnel were accused of creating a sexually hostile work environment have found that the model fails when the harasser is merely a co-worker.[144] Instead, these courts are holding employers liable under the standard the *Davis I* majority used in the school setting—based on the failure to respond adequately to harassment that they knew about or should have known about.[145] In so doing, some of the courts continue to cast an eye toward agency law, but this time to one of its exceptions.[146] When an employer manages the workplace in a negligent or reckless fashion, it may be responsible for the acts of a non-agent.[147] In such circumstances, the employer is being held liable for its own conduct, rather than vicariously for the conduct of others.[148]

Had the *Davis I* majority been inclined to modify the Title VII harassment test along such lines to better fit a school setting it could have looked to *Bosley v. Kearney R-1 School District*,[149] an

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(10th Cir. 1987) (finding employer may be liable for co-worker harassment under RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958), which holds employer liable when its negligence allowed servant to commit tort); Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 n.5 (10th Cir. 1990) (acknowledging mislabeling of employer negligence standard as *respondeat superior* in applying *Hicks*); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 804 n.11 (6th Cir. 1994) (pointing out that *respondeat superior* "is an incorrect label for co-worker harassment cases, where the employer is directly liable for its own negligence").

144. *See, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611, 619-20 (6th Cir. 1986) (using term *respondeat superior* to describe final element of plaintiff's Title VII test) and *Pierce*, 40 F.3d at 804 n.11 (acknowledging use of term was error). *Meritor* actually started this line of cases, although it did not mandate reliance on agency principles to impute liability. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). The Circuit Court of Appeals found the employer strictly liable in *Meritor* because the alleged harasser was the victim's supervisor. *See id.* at 69-70. The Supreme Court rejected the notion that strict liability was appropriate but declined to fashion a standard because the record in that case was incomplete. *See id.* at 72-73. The Court did, however, state that "Congress wanted courts to look to agency principles for guidance" in Title VII cases. *Id.* at 72. But, the Court acknowledged that common-law principles of agency may not be entirely transferrable to Title VII. *See id.*

145. *See Davis I*, 74 F.3d 1186, 1195 (11th Cir. 1996).

146. *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418 (10th Cir. 1987) (finding employer may be liable for co-worker harassment under RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958), which holds employer liable where its negligence allowed servant to commit tort).

147. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958).

148. *See, e.g.*, Fleenor v. Hewitt Soap Co., 81 F.3d 48, 50 (6th Cir. 1996) (holding that employer is "directly not derivatively liable" under the "knew or should have known" standard).

149. 904 F. Supp. 1006 (W.D. Mo. 1995).

earlier decision from a U.S. district court in Missouri. Consolidating and modifying the five-element hostile work environment test, the *Bosley* court fashioned a four-element test.[150] To prove a claim against a school district for peer sexual harassment, there must be a showing that:

> 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.[151]

A school system must take prompt remedial action, the *Bosley* court added, "reasonably calculated to end the harassment" once it learns of the harassment.[152] By modifying the employment model, the *Bosley* court sidestepped the agency issue.

The dissent in *Davis I* does not criticize the majority for this shortcoming in the adaptability of Title VII law to Title IX.[153] Instead, Judge Stanley S. Birch, Jr., opposed finding any cause of action for peer sexual harassment under Title IX because *Franklin* involved teacher-student harassment.[154] "The student-on-student sexual harassment alleged in this case is analytically quite distinct from that in *Franklin*, and the majority makes an unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student."[155] Birch insisted that the language of Title IX gives "no indication" that the statute covers peer harassment.[156] As a result, Birch opined that "this student-on-student sexual harassment case clearly falls outside the purview of Title IX."[157]

Even if a cause of action existed, Birch argued, it should be limited to "intentional conduct on the part of the school board," not what he characterized as negligent failure to intervene to

150. *See id.* at 1022-23.
151. *Id.*
152. *See id.* at 1023.
153. *See Davis I*, 74 F.3d 1193, 1195-96 (11th Cir. 1996) (Birch, J., dissenting).
154. *See id.* at 1196.
155. *Id.*
156. *Id.*
157. *Id.*

prevent peer harassment.[158] At the very least, the dissent argues the remedy should be limited to injunctive relief.[159]

### *b.* Rowinsky: *Taking An Equal-Protection-Like Approach*

In *Rowinsky*, the Fifth Circuit explicitly rejected the Title VII approach that the Eleventh Circuit employed in *Davis* less than two months earlier.[160] The majority, in a 2-1 decision, insisted that female students do not have a cause of action under Title IX when school officials knowingly allow male students to create a hostile atmosphere through the sexual harassment of their classmates.[161]

The plaintiff, the mother of two girls, brought suit against the Bryan Independent School District for herself and on behalf of her eighth-grade daughters after several boys harassed the girls on the school bus during the 1992-1993 school year.[162] A male student regularly swatted one of the girls on the buttocks when she walked down the aisle of the bus.[163] He would make vulgar comments, such as, "When are you going to let me fuck you?" and "What bra size are you wearing?"[164] At one point the boy grabbed one of the sisters in the genital area and later grabbed her breasts.[165] The girls and their mother repeatedly reported the incidents to school officials, who suspended some of the boys for short periods of time.[166] Dissatisfied that the punishment did not resolve the harassment problem, the mother removed her daughters from the bus and filed suit.[167]

The district court dismissed the action, finding that the mother had failed to state a claim under Title IX because she had offered no evidence of sex discrimination nor any evidence that harassment of girls was treated any less severely than mistreatment of boys.[168] The appellate court affirmed the

158. *Id.*
159. *See id.*
160. *See* Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006, 1010 n.8 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).
161. *See id.* at 1016.
162. *See id.* at 1008-09.
163. *See id.*
164. *Id.* at 1008.
165. *See id.*
166. *See id.*
167. *See id.* at 1009.
168. *See id.* at 1010.

dismissal in a majority opinion written by Judge Jerry E. Smith and joined by Judge Will Garwood, holding that Title IX does not impose liability on a school district for student-on-student sexual harassment unless a claimant can produce evidence that the school district responded to complaints differently based on sex.[169] "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."[170]

The majority noted "that importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic"[171] because it viewed sexual harassment as "the unwanted imposition of sexual requirements in the context of unequal power."[172] As the majority acknowledged in *Davis I*,[173] the *Rowinsky* majority opinion pointed out that sexual harassment of co-workers is imputed to the employer under the theory of *respondeat superior*.[174] In a school setting, however, *Rowinsky* found that the power relationship in the harassment of school students does not trigger the issue of *respondeat superior*.[175] "Unwanted 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."[176] Instead of modifying the standard hostile work environment test to better fit the school setting as the court had done in *Bosley*,[177] the *Rowinsky* majority adopted the equal-protection-like test that looks to whether one sex is treated differently than the other.[178]

The majority rejected a line of Title VII cases holding employers liable for third-party harassment of their employees, such as the case of a blackjack dealer who was harassed by

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169. *See id.* at 1016.
170. *Id.*
171. *Id.* at 1011 n.11.
172. *Id.* (quoting CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979)).
173. *See Davis I*, 74 F.3d 1186, 1195 (11th Cir. 1996).
174. *See Rowinsky*, 80 F.3d at 1011 n.11.
175. *See id.*
176. *Id.*
177. *See* Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995).
178. *See Rowinsky*, 80 F.3d at 1016.

customers and the case of a supplier harassed by a manager at a dealership.[179] The majority reasoned that those cases implicated the power of the employer and, thus, are inapplicable.[180] That distinction fails to recognize that schools likely would have at least as much, if not more, control over their own students than employers would have over customers or clients.[181] Indeed, courts have long held that schools may supervise and control students more closely than the state may control adults.[182]

The *Rowinsky* majority also insisted that Title IX, as Spending Clause legislation, merely prohibits discriminatory acts committed by the recipients of federal funds and thus would not apply to student behavior.[183] "While it is plausible that the condition imposed [on the provision of federal funds] could encompass ending discriminatory behavior by third parties, the more probable inference is that the condition prohibits certain behavior by the grant recipients themselves."[184] The majority asserted that grant recipients have little control over individuals who might violate the anti-discrimination policies, using as an example parents who discouraged their daughter from studying because they do not believe education to be important to women.[185]

Judge James L. Dennis, the third member of the *Rowinsky* panel, argued in his dissent that the school system had a duty, by virtue of its acceptance of federal funds, to protect students from sexual harassment of which it had actual knowledge.[186] Stating his agreement with the *Davis I* approach,[187] Dennis

179. *See id.* at 1011 n.11 (referring to Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024 (D. Nev. 1992), and Magnuson v. Peak Technical Servs., 808 F. Supp. 500 (E.D. Va. 1992)).

180. *See id.*

181. The appellant in *Davis* labels as "somewhat baffling" the *Rowinsky* distinction over the power of the employer, and argues that schools likely would have ways of controlling their students not available to employers. Appellant's En Banc Brief at 37-38 n.16, Davis v. Monroe County Bd. of Educ. (11th Cir., filed Sept. 13, 1996) (No. 94-9121).

182. *See id.* (citing Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2392 (1995); New Jersey v. T.L.O., 469 U.S. 325, 329 (1985) (involving student drug testing); Coplin v. Conejo Valley Unified Sch. Dist., 903 F. Supp. 1377 (C.D. Cal. 1995) (holding suspension of student harasser did not violate due process rights)).

183. *See Rowinsky*, 83 F.3d at 1013.

184. *Id.*

185. *See id.* at 1013 n.15.

186. *See id.* at 1025 (Dennis, J., dissenting).

187. *See id.* at 1017 n.1.

asserted that there was no reason to address the vicarious liability issues that troubled the majority because the plaintiff had shown that the school itself was negligent for failing to correct the harassment about which it had knowledge.[188] Relying on employment law, the dissent pointed out that "employer liability for hostile environment harassment by coworkers [sic] and non-employees under Title VII is predicated on the *employer's failure* to act in accordance with its statutory duty not to discriminate in the workplace . . . ."[189] Based on the *Franklin* Court's recognition that sexual harassment in the schools is a barrier to sexual equality, Dennis predicted that the Supreme Court likely would conclude "that the knowing failure to curb student on student sexual harassment is actionable after [the Court's] holding that a knowing failure to eliminate teacher-student sexual harassment is grounds for a Title IX damage suit."[190]

The dissent responded to the majority's assertion that Dennis's reliance on *Franklin* is misplaced because it involved teacher-student harassment and thus was based on a form of vicarious liability:[191]

> It is certainly recognized under agency principles that a principal may be vicariously liable for the acts of agents under certain circumstances. Nonetheless, agency law also recognizes that direct liability is imposed on principals for *their tortious* conduct. . . . The fact that the law of agency incorporates principles of tort liability . . . does not detract from the recognition that in the context of hostile environment harassment by non-supervisors, an employer's liability is not vicarious, but is directly predicated on its own negligent conduct in breaching a duty to act imposed by Title VII.[192]

The dissent pointed out that schools exercise a degree of control over students sufficient to result in tort liability for knowingly failing to prevent sex discrimination in violation of the statutory duty created under Title IX.[193] Dennis characterized

188. *See id.* at 1020 n.7.
189. *Id.* at 1020 (emphasis in original).
190. *Id.* at 1022-23.
191. *See id.* at 1020 n.7 (responding to majority at 1011 n.11).
192. *Id.* at 1020-21 n.7 (emphasis in original).
193. *See id.* at 1024. The dissent and majority talk back and forth to each other

the majority's approach as equating the legal seriousness of the school board's abdication of its duty to take steps to protect the female students to "the situation in which a bystander witnesses the drowning of a complete stranger."[194] Instead, Dennis argued, the school's acceptance of federal funds under Title IX created "a duty to take appropriate measures to protect students from being subjected in the school environment to sexual harassment, abuse and discrimination of which the board has actual knowledge."[195]

Dennis is not alone in his criticism of the *Rowinsky* approach. Numerous courts outside the Fifth Circuit have rejected it.[196]

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through footnotes on this point. The majority suggests that the dissent's reference to a school's control over students is an attempt to "transform the relationship between school and student into an agency relationship." *Id.* at 1010-11 n.9. The dissent responds that the majority's interpretation is "inscrutable" in that it merely referred to the case

> to point out that the Supreme Court has recognized that schools maintain a degree of control over school children and that in this context such control is sufficient to apply tort liability for the knowing failure of a school receiving federal funds to act in accordance with its statutory duty to prevent sex discrimination in the school.

*Id.* at 1024 n.9.

194. *Id.* at 1025.

195. *Id.*

196. *See, e.g.*, Brzonkala v. Virginia Polytechnic Inst. & St. Univ., 132 F.3d 949 (4th Cir. 1997) (labeling *Rowinsky*'s requirement that a plaintiff demonstrate school district responded to sexual harassment claims differently based on sex "a deeply flawed analysis"); Oona v. McCaffrey, 122 F.3d 1207, 1210 (9th Cir. 1997) (rejecting *Rowinsky*'s holding "that Title IX does not impose liability on a school district for peer hostile environment sexual harassment, absent allegations that the school district itself discriminated based on sex, e.g., by correcting only harassment of boys and not of girls," because Title IX need not be interpreted so restrictively); Bruneau v. South Kortright Cent. Sch. Dst., 935 F. Supp. 162, 171 n.7 (N.D.N.Y. 1996) (declining to follow *Rowinsky* and instead finding Title VII provides appropriate model for analyzing Title IX claims); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1203-04 (N.D. Iowa 1996) (declining to follow *Rowinsky* and instead modifying *Davis I*'s Title VII model of liability); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1212 (E.D. Pa. 1977) (disagreeing with *Rowinsky* and asserting the correct inquiry is whether a school district "failed, after notice, to prevent or curtail the sexual harassment of students within its charge"); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D. N.H. 1997) (rejecting *Rowinsky*'s requirement of a showing of disparate treatment of boys' and girls' complaints to prove intent and instead holding that a showing of knowledge of harassment and failing to stop it is sufficient to show a school intended to create a hostile environment); Doe v. Oyster River Coop. Sch. Dist., 1997 WL 832794, at *9 (D. N.H. Aug. 25, 1997) (disagreeing with *Rowinsky*'s reasoning that a school would reject federal education funds if held liable for student harassment under Title IX and instead finding that the constructive notice standard's focus on the grant recipient's conduct properly holds institution liable for own misconduct for failing to remedy student harassment); *Petaluma III*, 949 F. Supp.

For example, the California court in *Petaluma III*[197] followed *Davis I* and was as disdainful of *Rowinsky* as *Rowinsky* was of *Davis I*. *Petaluma III* rejected the *Rowinsky* approach "because it yields extreme results inconsistent with the body of discrimination law."[198] There, the court reasoned that if only girls are harassed, so that there are no complaints by boys with which to compare, then the girls will be deprived of a remedy no matter how severe or pervasive the harassment.[199] Also, the *Rowinsky* court demonstrated its misunderstanding of the nature of the plaintiff's claim by focusing on the conduct of the peer harassers rather than the school district's failure to take action.[200]

> The actual thrust of this type of claim, [sic] is to impose liability on the school district based not on the harassing conduct of its students, but on the district's *own* conduct of knowingly permitting the discriminatory hostile and abusive environment to continue and to inflict an ongoing injury on its female students. *Rowinsky* does not recognize that inaction may constitute actionable discrimination.[201]

### *c.* Davis II: *Requiring Clear Indications of Funding's Strings*

In its en banc decision in *Davis II*, the full Eleventh Circuit took a contractual approach, determining that Title IX was enacted pursuant to the Spending Clause and that Congress must therefore make clear to recipients the precise strings that

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1415, 1421 (N.D. Cal. 1996) (rejecting *Rowinsky* as based on a "fundamental misunderstanding" of student sexual harassment claims and instead using Title VII law as an analogue); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741 (E.D. Ky. 1996) (relying on *Rowinsky* only for a standing issue, court rejected the Fifth Circuit's requirement that plaintiffs show the schools responded differently to male and female harassment claims and instead used the Title VII hostile work environment analogy); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1376-77 (N.D. Cal. 1997) (declining to follow *Rowinsky* and instead adopting *Davis I/Petaluma III* approach that "a plaintiff may maintain a Title IX action for damages against a school district when the plaintiff alleges that the school district knew or should have known . . . that the plaintiff was being sexually harassed by other students and the school district failed to take steps reasonably calculated to end the harassment").

197. *Petaluma III,* 949 F. Supp. 1415, 1421 (N.D. Cal. 1996).

198. *Id.*

199. *See id.*

200. *See id.*

201. *Id.* (emphasis in original).

are attached to the funds.[202] Judge Gerald B. Tjoflat wrote, "[a] spending power provision must read like a prospectus and give funding recipients a clear signal of what they are buying."[203] Although the terms of Title IX put schools on notice that they must prevent employees from "themselves engaging in intentional gender discrimination,"[204] such as denying admission due to gender or discriminating against teachers on account of sex,[205] the majority found that the Monroe County Board of Education was not on notice when it accepted federal funds under Title IX.[206] Therefore, it could not be held liable for failing to prevent student-on-student sexual harassment.[207] As a result, the majority's holding signifies that Title IX does not allow a claim based on a school's failure to remedy known peer harassment.[208]

Tjoflat's opinion continued, although no other member of the majority would join it, by asserting that school systems would become vulnerable to a form of " 'whipsaw' liability"[209] in which schools would be sued by both the perpetrator and the victim of the harassment.[210] As a result, Tjoflat argued that schools would have a financial incentive to take action against the alleged harasser to avoid liability to the alleged victim; yet the alleged harasser could bring suit against the school claiming the adverse action was the result of bias or fear of suit by the alleged victim.[211] In addition, based on the frequency with which student-on-student sexual harassment occurs, Tjoflat argued, the number of such suits would be great and thus would materially

202. *See Davis II*, 120 F.3d 1390, 1399 (11th Cir. 1997).
203. *Id.*
204. *Id.* at 1401.
205. *See id.*
206. *See id.*
207. *See id.* The majority refused even to acknowledge that a student could state a Title IX claim for sexual harassment by a teacher, pointing out that the school board in *Franklin* had conceded that teacher-student harassment was a violation. *See id.* at 1400 n.14. "Viewed in this light, the Supreme Court's suggestion that teacher-student sexual harassment gives rise to a cause of action under Title IX was arguably dicta. We assume that *Franklin* created a cause of action for teacher-student sexual harassment under Title IX, but we are wary of extending this assumed holding to student-student sexual harassment." *Id.*
208. *See id.* at 1401.
209. *Id.*
210. *See id.*
211. *See id.* at 1402.

affect the school system's decision to accept federal funding.[212] No member of the court joined Tjoflat on those two points[213] and Judge Ed Carnes wrote a separate concurring opinion disagreeing with the suggestion that school officials might be biased against harassers if the system could be held liable for failing to take corrective action.[214]

Tjoflat's Spending Clause argument would have been more plausible before the Supreme Court's 1992 decision in *Franklin* at a time when many school administrators were indeed unaware of the ramifications of Title IX.[215] The Department of Education's Office of Civil Rights (OCR) interprets the twenty-six-year-old requirement[216] that schools have both policies against sex discrimination and grievance procedures to demand that they "provide effective means for preventing and responding to sexual harassment."[217] The existence of a strong sexual harassment policy that encourages victims to report incidents to school officials "may prevent not only a lot of harm to students, but a lot of litigation as well."[218]

The *Davis II* dissent—written by Judge Barkett, the author of the majority opinion in *Davis I*—took issue with the majority, arguing it "ignore[d] the plain meaning . . . spirit and purpose" of the anti-discrimination statute.[219] Barkett argued that Title IX frames the prohibition on sexual discrimination in terms of the person who is protected, not the identity of the perpetrator.[220] "Thus," Barkett argued, "under the statute's plain language,

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212. *See id.* at 1405.

213. *See id.* at 1407 (Carnes, J., concurring).

214. *See id.* at 1408.

215. *See* David S. Doty & Susan Strauss, *"Prompt and Equitable": The Importance of Sexual Harassment Policies in the Public Schools*, 113 EDUC. L. REP. 1, 1 (1996).

216. *See* 34 C.F.R. § 106.8(b) (1995).

217. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12044 (1997).

218. Doty & Strauss, *supra* note 215, at 7. The conclusion that a strong harassment policy may prevent litigation under Title IX is based on an analogy to Title VII and Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995) (holding that when an employer actively discourages sexual harassment and establishes, advertises, and enforces "effective procedures" to deal with harassment, it will not be held liable under Title VII). *See id.* at 6-7.

219. *See Davis II*, 120 F.3d 1390, 1412 (11th Cir. 1997). In a concurring opinion, Judge Susan Black disagreed with Barkett's assertion that the majority ignored the "plain meaning" of Title IX. *Id.* at 1406 (Black, J., concurring). Black argued that the statute is ambiguous enough to permit a more narrow reading of school liability. *See id.* at 1407.

220. *See id.* at 1412.

liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination."[221] Barkett pointed out that hostile environment sexual harassment is well established as discrimination that "exposes one sex to disadvantageous terms or conditions to which members of the other sex are not exposed."[222]

Barkett took issue with the majority's Spending Clause analysis, arguing that the plain meaning of the statute imposes liability on the recipients of federal funds when they maintain an educational environment that subjects students to discrimination.[223] Under *Franklin*, Barkett added, an intentional violation satisfies the notice requirement for Spending Clause laws.[224] In this case, Barkett argued, "the alleged violation of Title IX was intentional because the school board knowingly permitted a student to be subjected to a hostile environment of sexual harassment."[225]

Because Title IX authorizes a cause of action for peer sexual harassment, Barkett continued, the Eleventh Circuit should look to Title VII as other courts have done to establish the school board's duty and the elements of a cause of action.[226] Barkett argued that "a student should have the same protection in school that an employee has in the workplace. Just 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,' 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."[227] In looking to Title VII, Barkett laid out the same five-part test in dissent that was set forth in *Davis I*.[228]

In addition to Barkett's dissent, others criticize the majority opinion in *Davis II* as " 'bad law' " and as " 'missing the general legal principle of how to look at sex harassment under Title

221. *Id.*
222. *Id.*
223. *See id.* at 1414.
224. *See id.*
225. *Id.*
226. *See id.* at 1416.
227. *Id.* at 1417 (citations omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).
228. *See id.* at 1418-19.

IX.' "[229] The majority's failure to follow OCR's policy guidance on sexual harassment threatens "fulfillment of Congress' intended protection of students" and "calls for quick corrective action."[230] "By allowing school districts to escape liability for ignoring the pleas of their pupils, the Eleventh Circuit, through its decision, and Congress and the Supreme Court, through their inaction, have relegated sexual harassment victims to the back of the classroom."[231]

### *d.* Brzonkala: *Applying Title VII to Student Harassment Without Dissent*

A panel of the Fourth U.S. Circuit Court of Appeals expressed no qualms in applying Title VII to a student-on-student sexual harassment claim brought under Title IX by a university student raped by two football players.[232] In so doing, the Fourth Circuit rejected the Fifth Circuit's "deeply flawed analysis"[233] in *Rowinsky* and relegated *Davis II* to a footnote with no mention of its Spending Clause discussion.[234]

Plaintiff Christy Brzonkala brought suit after she was gang raped at the beginning of her freshman year at Virginia Tech by two members of the football team.[235] The rapes occurred just thirty minutes after the men first met Brzonkala and after she twice refused to engage in consensual sexual intercourse.[236] Neither man used a condom and the one who raped her twice, Antonio J. Morrison, informed her when he was finished, "You

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229. Heller, *supra* note 105, at 6.

230. *Recent Case, Education Law—Title IX—Eleventh Circuit Holds That Title IX Does Not Apply to Peer Sexual Harassment in Federally Funded Schools.*—Davis v. Monroe County Board of Education, *120 F.3d 1390 (11th Cir. 1997)*, 111 HARV. L. REV. 597, 600-01 (1997) [hereinafter *Recent Case*]. Ordinarily, courts defer to agency interpretations when statutes lack clear legislative intent. *See id.* (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982)).

231. *Recent Case, supra* note 230, at 602.

232. *See* Brzonkala v. Virginia Polytechnic Inst. & St. Univ., 132 F.3d 949 (4th Cir. 1997). The panel did divide 2-1 in rejecting a defense challenge to the constitutionality of the Violence Against Women Act of 1994. *See id.* In addition, Brzonkala alleged a Title IX disparate treatment claim which the panel unanimously rejected. *See id.*

233. *Id.* at 958.

234. *See id.* at 958 n.6.

235. *See id.* at 953.

236. *See id.*

better not have any fucking diseases."[237] Morrison later publicly announced in a dining hall that he "like[d] to get girls drunk and fuck the shit out of them."[238]

Brzonkala eventually filed a complaint with school officials, but did not pursue criminal charges.[239] The school conducted a hearing into Brzonkala's charges against the two football players in which Morrison admitted having sex with her despite her twice telling him "no."[240] Although a school judicial committee found Morrison guilty of sexual assault and the university suspended him for two semesters, the findings and punishment were later set aside.[241] However, a second hearing resulted in a finding of violation of the Abusive Conduct Policy, albeit this time Morrison was found guilty of " 'using abusive language' " rather than sexual assault,[242] and he received the same punishment—a two-semester suspension.[243] But when Morrison appealed, Virginia Tech's senior vice president and provost overturned the sanction, finding that the suspension was " 'excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy.' "[244] As a result, Morrison returned the next year on a full athletic scholarship,[245] causing Brzonkala to cancel her plans to return to Virginia Tech.[246]

Because the school took only nominal action against the rapists, Brzonkala filed suit contending, among other allegations, that the university "permitted a sexually hostile environment to flourish" in violation of Title IX.[247] The trial court dismissed her Title IX action for failure to state a claim upon which relief could be granted.[248]

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237. *Id.*
238. *Id.*
239. *See id.* at 954. Student-on-student rape "is the only violent felony that Virginia Tech authorities do not automatically report to the university or town police." *Id.*
240. *See id.* The judicial committee investigating the charges found insufficient evidence against the other student who denied that he had sexual contact with Brzonkala. *See id.*
241. *See id.* at 954-55.
242. *Id.* at 955.
243. *See id.*
244. *Id.* Brzonkala learned the suspension was lifted not from school officials, but from an article in The Washington Post. *See id.*
245. *See id.*
246. *See id.*
247. *See id.* at 953.
248. *See* Brzonkala v. Virginia Polytechnic & St. Univ., 935 F. Supp. 772 (W.D. Va.

Taking a *Davis I* approach, the Fourth Circuit reversed in a decision written by Judge Diana Gribbon Motz.[249] In finding that Title IX permits a hostile environment claim, the Fourth Circuit panel declined Virginia Tech's suggestion that it look to the Fifth Circuit's decision in *Rowinsky* for guidance in rejecting the application of Title VII principles.[250] Instead, the Fourth Circuit declared *Rowinsky* "deeply flawed," adding that, in considering whether to hold the school liable for third-party acts, the Fifth Circuit misstated what a plaintiff in a sexual harassment action must prove in a hostile environment case.[251] The court pointed out that "a defendant employer is held responsible under Title VII for the employer's own actions . . . not the actions of fellow employees."[252] In a Title IX hostile environment action, the court continued, a "plaintiff is seeking to hold the school responsible for its own actions, i.e. that the school 'knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action.' "[253]

In looking to Title VII law and applying the *Davis I* factors, the Fourth Circuit pointed out that Virginia Tech conceded that Brzonkala met three of the test's five elements—"she was a member of a protected class, . . . subject to unwelcome harassment, and that this harassment was based on her sex."[254] At issue, therefore, were elements four and five of the *Davis I* test—whether the environment was sufficiently abusive and whether the school could be held liable for that environment.[255]

The Fourth Circuit rejected Virginia Tech's argument that Brzonkala did not experience a hostile environment because she did not return to school.[256] The court found that

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1996). In a separate decision, the trial court also dismissed Brzonkala's claims brought under the Violence Against Women Act, finding that the statute was unconstitutional because it exceeded Congress' power, even though the court found she had stated a cause of action under the act. *See* Brzonkala v. Virginia Polytechnic & St. Univ., 935 F. Supp. 779 (W.D. Va. 1996).

249. *See Brzonkala*, 132 F.3d at 952-53. Although the Fourth Circuit followed *Davis I*, it did so without mentioning the decision; instead the panel relied on *Seamons* and other decisions that employed the five-part analysis. *See id.* at 958-59.

250. *See id.* at 957-58.

251. *Id.* at 958.

252. *Id.*

253. *Id.*

254. *Id.* at 959.

255. *See id.*

256. *See id.* at 959-60.

> the rapes themselves created a hostile environment, and that Virginia Tech was aware of this environment and never properly remedied it. Indeed, the university Provost's rationale for overturning Morrison's immediate suspension for one school year—that this punishment was 'excessive when compared with other cases'—itself evidences an environment hostile to complaints of sexual harassment and a refusal to effectively remedy this hostile environment. Given the seriousness of the harassment acts, the total inadequacy of Virginia Tech's redress, and Brzonkala's reasonable fear of unchecked retaliation including possible violence, Brzonkala did not have to return to the campus the next year and personally experience a continued hostile environment.[257]

In determining a basis for institutional liability, the Fourth Circuit looked to whether school officials knew or should have known of the hostile environment and "failed to take prompt and adequate remedial action."[258] Because Brzonkala reported the rapes to school officials, satisfying the knew-or-should-have-known prong, the panel conducted a fact-based inquiry into whether Virginia Tech took "prompt and adequate" steps to remedy the problem after it received notice of the rapes.[259] The panel found that Brzonkala's allegations—that the school "fostered[] an environment in which male student athletes could gang rape a female student without any significant punishment to the male attackers, nor any real assistance to the female victim"[260]—if proven would be sufficient for a finder of fact to determine "Virginia Tech's response to Brzonkala's gang rape was neither prompt nor adequate."[261] The court rejected Virginia Tech's argument that it was absolved from liability because it took some action against Morrison:[262] "In light of the seriousness of Brzonkala's allegations, the long and winding disciplinary process, and the proverbial slap on the wrist as punishment, we cannot conclude at this preliminary stage that Virginia Tech's remedy was either prompt or adequate."[263]

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257. *Id.*
258. *Id.* at 960.
259. *Id.*
260. *Id.* at 960-61.
261. *Id.* at 961.
262. *See id.*
263. *Id.*

### *B. Equal Protection*

Sexual harassment may be actionable on equal protection grounds when school officials who punish male-on-female batteries fail to take action to end harassment, such as that of a gay male student beaten by other boys.[264] In *Nabozny v. Podlesny*,[265] the Seventh U.S. Circuit Court of Appeals applied a rational basis review and found itself "unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation."[266] That ruling led to a trial in which a jury found school officials liable for failing to protect the plaintiff from gay bashing; before the panel began considering a damage award, the case settled for $900,000.[267]

In *Nabozny*, plaintiff Jamie Nabozny, a male student in Ashland, Wisconsin, was beaten and tormented by male classmates during middle and high school because he was homosexual.[268] Nabozny alleged that when he sought protection from school officials, they ignored his complaints even though school policy required investigation and punishment of peer sexual harassment and student-on-student battery.[269] Principal Mary Podlesny allegedly told Nabozny "that 'boys will be boys' and . . . that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students."[270]

The principal's alleged comments followed one of many acts of violence Nabozny suffered at the hands of his then-seventh-grade classmates: a mock rape on the floor of a science classroom performed by two boys who held him down while twenty other students looked on and laughed.[271] The school did not take action against the students involved in this incident, but Nabozny was forced to speak to a school counselor because he had left school without permission after the principal had made her alleged response to his complaint about the incident.[272] The harassment continued in the eighth grade, again with the principal allegedly telling Nabozny and his parents that such

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264. *See* Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).
265. *Id.*
266. *Id.* at 458.
267. *See Gay Student Gets $900,000, supra* note 11.
268. *See Nabozny*, 92 F.3d at 449.
269. *See id.*
270. *Id.* at 451.
271. *See id.*
272. *See id.*

incidents were to be expected because he was "openly gay."[273] After a suicide attempt, Nabozny enrolled in a local parochial school.[274] Because it only offered classes through the eighth grade, and because Nabozny's parents could not afford other private schooling, he rejoined his former classmates at the local high school for ninth grade where the harassment resumed.[275]

In high school, Nabozny's tormentors knocked him into a urinal in a school restroom and urinated on him, but were not punished for their actions despite the demands of Nabozny's parents.[276] The harassment took its toll on Nabozny, who again attempted suicide and ran away from home.[277] The Department of Social Services forced Nabozny to return to the school where students called him names and pelted him with steel nuts and bolts.[278] Eventually, Nabozny suffered internal bleeding as a result of repeated kicks in the stomach during an attack outside the school library; one of the school officials to whom Nabozny reported the incident allegedly said that the teenager "deserved such treatment because he [was] gay."[279] Another school official dissuaded Nabozny from filing criminal charges against the eight boys who participated in the assault.[280]

Nabozny's suit against school officials pursuant to 42 U.S.C. § 1983 alleged, among other things, that they had violated his Fourteenth Amendment rights to equal protection and due process.[281] On motion for summary judgment, the district court ruled in favor of the defendants.[282] The Seventh U.S. Circuit Court of Appeals agreed that the evidence did not support the student's due process claims, but reversed the District Court on the equal protection claims, finding that a reasonable fact-finder could determine that Nabozny had been discriminated against based on his gender or sexual orientation.[283]

To make out an equal protection claim, the court said Nabozny had to show more than official negligence; he had to prove that

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273. *Id.*
274. *See id.* at 452.
275. *See id.*
276. *See id.*
277. *See id.*
278. *See id.*
279. *Id.*
280. *See id.*
281. *See id.* at 453.
282. *See id.*
283. *See id.* at 460-61.

school officials "acted either intentionally or with deliberate indifference" when they discriminated against him based on either his gender or his sexual orientation.[284] School officials, meanwhile, had to show either "that they did not discriminate . . . or at a bare minimum [their] discriminatory conduct . . . satisf[ies] one of two well-established standards of review: heightened scrutiny in the case of gender discrimination, or rational basis in the case of sexual orientation."[285]

The court addressed the gender issue first and found that school officials treated male and female victims differently.[286] Pointing to the principal's indifference to the mock rape, for example, the court declared, "We find it impossible to believe a female lodging a similar complaint would have received the same response."[287] The court found "simply indefensible" the defense argument that there was no evidence that school officials intentionally discriminated against Nabozny or were deliberately indifferent to his complaints given the plaintiff's showing that school officials "literally laughed at Nabozny's pleas for help."[288] The court also found that neither the school board nor the individual officials were entitled to qualified immunity despite the fact that no prior cases contained facts similar to this one.[289]

> Under the doctrine of qualified immunity, liability is not predicated upon the existence of a prior case that is directly on point. The question is whether a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful. We believe that reasonable persons standing in the defendants' shoes at the time would have reached such a conclusion.[290]

As for Nabozny's claim that he also was discriminated against based on sexual orientation, the court found that he had presented sufficient evidence to show discrimination based on the school officials' disapproval of homosexuals, "including

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284. *Id.* at 453-54.
285. *Id.*
286. *See id.* at 455. The court viewed Nabozny's evidence in the context of a summary judgment motion, in which it considered the credible version despite conflicting defense evidence, and coupled it with defense admissions. *See id.*
287. *Id.* at 454-55.
288. *Id.* at 455.
289. *See id.* at 455-56.
290. *Id.* at 456 (citations omitted).

statements by the defendants that Nabozny could expect to be harassed because he [was] gay."[291] The court subjected Nabozny's claims of discrimination and school officials' claims of qualified immunity to rational-basis review.[292] "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one."[293] The court held that a reasonable person "would have concluded that discrimination . . . based on . . . sexual orientation was unconstitutional."[294]

The court did not rely on the recent U.S. Supreme Court decision *Romer v. Evans*,[295] which struck down a state constitutional amendment that violated the equal protection rights of homosexuals in Colorado.[296] The *Nabozny* court noted that *Romer* would bolster its analysis, but reliance on it "would be . . . inappropriate in . . . rejecting the defendants' qualified immunity argument."[297]

### C. *Substantive Due Process*

In addition to Title IX claims, several peer sexual harassment cases include claims for violation of the students' substantive due process rights under the Fourteenth Amendment.[298] The plaintiffs in these cases allege that the school system's failure to protect them from sexual assault violates their liberty interest in bodily integrity.[299]

The hurdle in these cases is that the school has no duty to protect the student from the violence of private actors absent a custodial or special relationship, unless officials created the danger.[300] This type of duty arises in a prison setting, when the

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291. *Id.* at 457.
292. *See id.* at 458.
293. *Id.*
294. *Id.*
295. 116 S. Ct. 1620 (1996).
296. *See id.*
297. *Nabozny*, 92 F.3d at 458 n.12.
298. *See, e.g., id.* at 446; Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); *Davis I*, 74 F.3d 1186 (11th Cir. 1996); Spivey v. Elliott, 29 F.3d 1522 (11th Cir. 1994).
299. *See, e.g., Seamons*, 84 F.3d at 1235; *Spivey*, 29 F.3d at 1524.
300. *See, e.g., Seamons*, 84 F.3d at 1235-36. *Seamons* distinguishes a situation in which students harass a classmate from Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994) (en banc), a case in which school officials were held liable for a violation of a child's liberty interest when they failed to intervene to stop a teacher's sexual molestation. *See id.* at 1235.

state imposes limits on the freedom of inmates to protect themselves.[301] But courts reject the notion that compulsory school attendance creates an affirmative constitutional duty to protect a student.[302] For the state to be held liable for dangers it creates, the plaintiff must demonstrate that the danger was outrageous and shocking to the conscience.[303]

The reluctance to acknowledge a constitutional duty to protect school students is based on a "narrow reading"[304] of *DeShaney v. Winnebago County Department of Social Services*.[305] In that case, in which a father's physical abuse of his child resulted in permanent brain injuries after the state had returned custody to him,[306] the U.S. Supreme Court rejected the plaintiff's claim that the state's knowledge that a third party poses a danger to the victim creates a special relationship resulting in an affirmative duty to act to protect the victim.[307] Because the child was injured while in his father's custody, the *DeShaney* Court rejected the notion that the state had an affirmative duty to protect him, unlike the previously recognized duty to prisoners and involuntarily committed mental patients who were limited by the state in their ability to protect themselves from third-party violence.[308]

Courts rejecting the analogy between compulsory school attendance and incarceration in prison or commitment to a mental institution point out that parents continue to be the students' primary caretakers and that they can withdraw students from one school to attend another.[309] In addition, the students continue to reside at home, unlike prisoners and institutionalized mental patients.[310]

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301. *See Spivey*, 29 F.3d at 1524.
302. *See, e.g., Seamons*, 84 F.3d at 1236.
303. *See id.*
304. Stephanie Easland, Note, *Attacking the "Boys Will Be Boys" Attitude: School Liability Under Section 1983 for Peer Sexual Harassment*, 15 J. JUV. L. 119, 131 (1994).
305. 489 U.S. 189 (1989).
306. *See id.* at 192-93.
307. *See id.* at 197 n.4, 198.
308. *See id.* at 200-01.
309. *See* D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1371 (3d Cir. 1992) (rejecting students' claims that school had a duty based on a special relationship to protect them from being molested by their classmates).
310. *See id.* at 1372.

The residential distinction was the key factor in *Spivey v. Elliott*,[311] one of the few cases to acknowledge a special duty to protect a school student from molestation by a classmate. In finding a violation when a thirteen-year-old boy sexually assaulted an eight-year-old male classmate at a residential school for the deaf, the Eleventh U.S. Circuit Court of Appeals found that the cases that rejected a comparison between compulsory school attendance and imprisonment or institutionalization "leave open the question of whether their outcome would have been different if the school settings were residential."[312]

The *Spivey* court rejected the state's argument that the case differed from that of an institutionalized person or a foster child[313] because the parents had voluntarily placed the boy at the residential school.[314]

> Whether the plaintiff willingly enters state custody is not determinative. The question is not so much *how* the individual got into state custody, but to what extent the State exercises dominion and control over that individual.
>
> . . . .
>
> The state exercised added control over [the victim in this case] because of his young age and severe handicap. A hearing impaired boy only eight years old necessarily depends upon the adults with whom he resides for his care.[315]

Although the *Spivey* court found in its 2-1 decision that a special relationship existed, it denied liability on qualified

311. 29 F.3d 1522 (11th Cir. 1994) (holding that special relationship existed between the state and residential student at school for the deaf that imposed duty to protect him from sexual assault by classmate).

312. *Id.* at 1526.

313. Courts also have held that the involuntary placement of a child in a foster home triggers a liberty interest. *See* Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987). Some writers contend that the duty created through foster care is a closer analogy to a school setting than to institutionalization. *See, e.g.*, Easland, *supra* note 304, at 139.

314. *See Spivey*, 29 F.3d at 1526.

315. *Id.* (emphasis in original). The court notes that the Fifth U.S. Circuit Court of Appeals, in a similar case involving a deaf student sexually assaulted by a classmate, found that the plaintiff had alleged a violation of a constitutional right. *See id.* at 1526 n.1 (referring to Walton v. Alexander, 20 F.3d. 1350 (5th Cir. 1994)). But the Fifth Circuit reversed the decision after rehearing en banc, holding that the school had no constitutional duty to protect a voluntary residential student from sexual assault. *See* Walton v. Alexander, 44 F.3d 1297 (5th Cir. 1995) (en banc).

immunity grounds, and found that the duty was not clearly established at the time of the assault.[316] The dissent would have found no duty at all.[317]

## CONCLUSION

Just as Title VII litigation has helped eliminate tolerance of sexual harassment in the workplace, Title IX litigation has the potential to force school systems to take seriously students' and parents' complaints about peer sexual harassment. Despite parallels between the "hostile hallways" that students must navigate at school and the "hostile environments" that are being litigated out of existence in employment settings, courts have been reluctant to hold school officials liable for ignoring repeated complaints about harassment that would never be tolerated in the workplace.

In large part, the difficulty, at least in federal litigation, is disagreement among the courts over the standard of liability to apply to school systems in Title IX actions. Courts would be wise to use Title VII hostile environment cases as a model, particularly in addressing the concern over agency issues that arise because student harassers are not employees. Under the agency law exception making an employer liable for the acts of a non-agent in a negligently or recklessly managed workplace, schools can be held liable for failing to respond adequately to harassment about which they knew or should have known. In so doing, schools would be insulated from *respondeat superior* liability for student acts, but would be appropriately held liable for their own employees' inaction in responding to student or parental complaints about harassment.

If Title IX is so construed, there would be no need for heterosexual plaintiffs harassed by peers at non-residential schools to assert equal protection or due process claims. But equal protection would remain available when a school system treats a gay student's complaints of peer sexual harassment differently than those lodged by other students. Also, due process would remain an option for institutionalized students even though courts almost universally have rejected such claims for nonresidential students who alleged that sexual harassment or

316. *See Spivey*, 29 F.3d at 1526-27.
317. *See id.* at 1527.

assaults violated a school's duty to protect students based on a special relationship created by laws that make school attendance compulsory.

*Katie Wood*