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Peer Sexual Harassment: Holding Educational Institutions to a Higher Standard

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INTRODUCTION

Over the past two decades, judicial treatment of sexual harassment has undergone a dramatic transformation. What was once judicially unrecognized behavior that devastated an individual's mental, physical, and financial well-being is now a form of intolerable conduct punishable by a court of law. The major change came in 1986 when the United States Supreme Court, following the lead of several circuit courts of appeal,[1] addressed the injustice of sexual harassment by recognizing claims for both quid pro quo[2] and hostile environment[3] sexual harassment in the employment arena. Since then, the Court has expanded liability for sexual harassment by refusing to require psychological injury for recovery in "hostile environment" sexual harassment claims[4] and by recognizing claims for same-sex sexual harassment.[5]

The Supreme Court's interpretation of sexual harassment in the employment arena has received much attention from both the media and

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1. *See* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977).

2. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). The Court stated that, under Title VII, 42 U.S.C. § 2000e (1994), "when a supervisor sexually harasses a subordinate because of the subordinate's sex [quid pro quo sexual harassment], that supervisor 'discriminates' on the basis of sex." *Meritor*, 477 U.S. at 64.

3. *Meritor*, 477 U.S. at 66. "[A] plaintiff may [also] establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment [hostile environment sexual harassment]." *Id.*

4. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (holding that the harassment need not seriously affect an employee's psychological well-being or cause the plaintiff to suffer injury to recover under a hostile work environment sexual harassment claim). *Id.* at 22.

5. Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998). The issue was whether workplace harassment can violate Title VII's prohibition against "discrimination . . . because of . . . sex" when the harasser and the harassed employee are of the same sex. *Id.* at 1000. In this case, Oncale was forcibly subjected to sex-related, humiliating actions by his coworkers, physically assaulted in a sexual manner, and threatened with rape. *Id.* at 1001. The Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant are of the same sex." *Id.* at 1002.

judicial scholars. This attention, however, had the effect of drawing the focus away from another arena in which sexual harassment is highly prevalent—the schools of the United States. Not until June of 1998 did the Supreme Court address the issue of teacher-student sexual harassment.[6] However, students, parents, and the educational system had to wait an additional year before the Court would examine peer sexual harassment, a much more frequent and serious type of educational sexual harassment.[7] Prior to the Supreme Court's recent *Davis* decision, the circuit courts had been unable to agree as to whether this type of harassment was actionable, and, if so, what standard should be applied in determining when an educational institution should be held liable. The *Davis* Court ended this controversy in a five-to-four decision holding that educational institutions can be held liable for peer sexual harassment. In doing so, however, the majority adopted a controversial standard of liability that will promote inefficiency and ignorance with respect to peer sexual harassment claims within the educational system.

This comment explores the evolution of the controversy involving peer sexual harassment under Title IX of the Educational Amendments of 1972 ("Title IX").[8] Part I discusses the problem of peer sexual harassment in the educational setting. Part II examines Title IX, the statute governing sex discrimination claims in educational programs. This examination is followed, in Part III, by an analysis of the case law expressly recognizing educational sexual harassment as an actionable claim under Title IX, and, In Part IV, by a discussion of existing standards of liability under Title IX. Part V addresses the split treatment of peer sexual harassment standards by the circuit courts and Part VI discusses the standard set forth by the Supreme Court in *Davis*. Part VII advances the argument that Title IX demands a more stringent standard for institutional liability than that provided by *Davis* and addresses the appropriate standard for imposing such liability.

I. THE PROBLEM OF PEER SEXUAL HARASSMENT

In 1993, The American Association of University Women

6. *See* Gebser v. Lago Vista Indep. School Dist., 118 S. Ct. 1989 (1998) (concluding that damages are unavailable under Title IX in circumstances involving the sexual harassment of a student by a teacher unless an official of the school district, who, at a minimum, has authority to institute corrective measures on the district's behalf, has actual notice of, and is deliberately indifferent to, the teacher's misconduct).

7. *See* Davis v. Monroe County Bd. of Educ., No. 97-843, 1999 WL 320808 (U.S. May 24, 1999), *rev'g* 120 F.3d 1390 (11th Cir. 1997).

8. 20 U.S.C. §§ 1681-1688 (1994).

("AAUW") undertook an in-depth study to examine the problem of sexual harassment in the public schools of the United States.[9] The findings of the study confirmed that peer sexual harassment is a serious problem for both girls and boys in the educational environment.[10] The AAUW survey revealed that sexual harassment is a common experience: four of five students (eighty-one percent) in grades eight through eleven reported that they had been the target of some form of sexual harassment in school.[11] The harassment was most likely to have begun while the students were in grades six through nine.[12] The harassment complained of included being subjected to sexual jokes and comments (sixty-six percent), being touched or grabbed (fifty-three percent), being flashed (forty-nine percent), being forced to kiss someone (eighteen percent), being forced to do something other than kissing (eleven percent), being called gay or lesbian (seventeen percent), and being spied on while dressing or showering (seven percent).[13]

Of the eighty-one percent of students who reported being the target of sexual harassment, eighteen percent were harassed by a school employee.[14] However, the overwhelming majority of the ongoing harassment in schools is perpetrated by peers.[15] Nearly four of five students (seventy-nine percent) who reported harassment had been targeted by a current or former student.[16] The bulk of this harassment takes place in halls, classrooms, or right outside the schools.[17] Other common places included gymnasiums or pools, cafeterias, locker rooms, and rest rooms.[18]

The AAUW survey found that the impact of this harassment is significant, causing students to suffer not only educationally, but also emo-

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9. LOUIS HARRIS AND ASSOCIATES, HOSTILE HALLWAYS, THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993). The AAUW study consisted of 1,632 questionnaires completed by public school students in grades eight through eleven from 79 schools across the continental United States. *Id.* at 5. The survey addressed sexual harassment with regard to a multitude of factors. *Id.* at 3.

10. *Id.*

11. *Id.* at 7. The gender gap is relatively narrow within this 81%, with 85% of girls and 75% of boys experiencing unwanted sexual behavior. *Id.*

12. *Id.* Forty-seven percent of the students surveyed who had been harassed were in grades six through nine. Thirty-two percent of the students had been harassed prior to seventh grade and six percent had been harassed prior to third grade. *Id.*

13. HARRIS, *supra* note 8, at 8-10. The number in parenthesis reflects the percentage of students who have reported being the target of that particular harassment.

14. *Id.* at 10.

15. *Id.* at 11.

16. *Id.* Eighty-six percent of the girls and seventy-one percent of the boys reported being sexually harassed by a current or former student at school. *Id.*

17. *Id.* at 13.

18. HARRIS, *supra* note 8, at 13-14.

tionally and behaviorally.[19] The educational impact includes students not wanting to go to school or participate in class, receiving lower grades, and finding it more difficult to study.[20] The emotional and behavioral repercussions are even more alarming. Students not only suffered embarrassment, fear, and feelings of inadequacy, but were affected in such a way that caused many to change their seats or their route to and from school, to stop attending certain activities, and to refrain from going to certain areas within the school.[21] In some instances, the harassment was so severe that it caused students to become emotionally withdrawn or to transfer to different schools.[22]

While all students suffer from the negative effects of sexual harassment, the AAUW study makes it clear that young girls suffer disproportionately.[23] Girls are far more likely to experience the adverse consequences associated with peer sexual harassment. In each of the study's impact categories, the percentage of girls reporting a particular reaction far outnumbered the percentage of boys reporting that reaction.[24] For instance, twenty-three percent of the students who were harassed felt that they did not want to go to school; this number includes a mere twelve percent of all boys responding to the survey, whereas it represents thirty-three percent of all girls.[25] In addition, twenty-four percent of students reported feeling afraid as a result of the harassment; only eight percent of the boys are represented, whereas thirty-nine percent of the girls are included in this number.[26] It is clear from the disparity between these percentages that, although sexual harassment has serious implications for both girls and boys, it is, by far, a greater problem for girls than for boys. It was imperative that some action be taken to prevent this type of conduct from continuing. The remedy was clear: the courts must assume the responsibility of protecting these children by allowing Title IX actions to proceed under the theory of peer sexual harassment.

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19. *Id.* at 15.

20. *Id.* Nearly one in every four students (23%) who had been harassed reported that the outcome was not wanting to attend school. *Id.*

21. *Id.* at 16-18.

22. *Id.* at 16. Three percent of students had actually changed schools as a result of sexual harassment. *Id.*

23. HARRIS, *supra* note 8, at 15.

24. *Id.* at 15-18.

25. *Id.* at 15.

26. *Id.* at 17.

II. TITLE IX

Through Title IX, the United States Congress seeks to prevent discrimination on the basis of sex in federally funded educational programs by withholding federal financial support from those institutions engaged in discriminatory practices.[27] The language of the act provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[28]

The enactment of Title IX "was the culmination of efforts over several years to ban gender discrimination in the field of education."[29] The act was intended to fill the gender gap that had been promulgated in anti-discrimination legislation in the early 1960s.[30] It was to fulfill this goal by closing "loopholes in existing legislation relating to general education programs and employment . . . ."[31] The loopholes were found in sections 601 ("Title VI")[32] and 703 ("Title VII")[33] of the Civil Rights Act of 1964. Title VI prohibited racial discrimination by all recipients of federal funding, including educational institutions, but did not ban gender discrimination by recipients of these federal funds.[34] Title VII prohibited discrimination on the basis of sex, but did not apply to educational insti-

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27. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). The court concluded that "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Id.* *See also* 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh) ("the heart of this amendment is a provision banning sex discrimination in educational programs receiving federal funds").

28. 20 U.S.C. § 1681(a) (1994).

29. Grove City College v. Bell, 687 F.2d 684, 691 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984).

30. *See* 117 CONG. REC. 30,411 (1971) (statement of Sen. Cook) ("There is a gap in the laws protecting women from biased educational policies.").

31. 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh).

32. 42 U.S.C. § 2000d. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." *Id.*

33. 42 U.S.C. § 2000e-2(a)(1). Title VII provides as follows:

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

Id.

34. *See* 42 U.S.C. § 2000d.

tutions.[35]

To close these gaps, Congress undertook several attempts in the early 1970s to enact legislation banning discrimination against women in the field of education.[36] In 1970, a special House Subcommittee on Education, chaired by Representative Edith Green, held hearings concerning gender discrimination in education. The subcommittee drafted an amendment that would have extended the prohibitions of Title VI of the Civil Rights Act of 1964 to discrimination on the basis of gender by adding the word "sex" to section 601.[37] The amendment would have also made Title VII of the Civil Rights Act of 1964 applicable to public school employees and education employees generally.[38] This amendment, however, never reached the floor of the House of Representatives.

One year later, in 1971, Senator Birch Bayh introduced an amendment to the Education Amendments of 1971 that would have prohibited recipients of federal education funds from discriminating against women.[39] Although this amendment was rejected as non-germane by the United States Senate in 1971,[40] the anti-discrimination provision was later included in a 1972 joint bill that is now known as Title IX.[41] Thus, Congress seemed to have bridged the gap between Title VI and Title VII by prohibiting sex discrimination in any education program receiving federal funds. Unfortunately, Title IX failed to specify either the criteria needed to establish a sex discrimination claim or the method, if any, by which a person could bring suit to challenge such discrimination.[42] This responsibility was left to the courts.

III. THE COURT'S RECOGNITION OF SEXUAL HARASSMENT AS ACTIONABLE SEX DISCRIMINATION UNDER TITLE IX

Under Title IX, the express statutory means of enforcement are ad-

35. *See* 42 U.S.C. § 2000e-1. This section states that the Act "shall not apply . . . to a[n] . . . educational institution . . . ." *Id.*

36. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n.13 (1982).

37. *See id.*

38. *Id.*

39. *See* 117 CONG. REC. 30,156 (1971). This amendment, like that of Representative Green's subcommittee proposal in 1970, extended the provisions of Title VI to include gender. 117 CONG. REC. 30,156. Senator Bayh urged the Senate to adopt the amendment because it would be an "effective remedy designed to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education." 118 CONG. REC. 5804 (1972).

40. *See* 117 CONG. REC. 30,415 (1971).

41. *See* 118 CONG. REC. 22,702 (1972).

42. *See* 20 U.S.C. § 1681 (1994). This section provides no guidance as to how a private claim should be brought under the statute.

ministrative. The statute directs federal agencies that distribute educational funding to establish requirements by which the anti-discrimination provisions of the act are to be achieved.[43] The agencies are permitted to enforce these requirements through any lawful means, including the termination of federal funding.[44] The act does not expressly authorize a private cause of action for sex discrimination.

Seven years after Title IX's enactment, the United States Supreme Court addressed the absence of such a right in *Cannon v. University of Chicago*.[45] In *Cannon*, a female who had been denied admission to medical schools at two private universities that received federal financial assistance brought suit under Title IX, alleging discrimination on the basis of sex.[46] The Court recognized that Title IX did not expressly authorize a private cause of action[47] and noted that not every violation of a federal statute automatically gives rise to such right.[48] Rather, the Court determined that, before it could decisively conclude that Congress intended to establish a private remedy, it must examine several factors that would be indicative of such intent.[49]

The Court first examined whether the statute was enacted for the

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43. *Id.* at § 1682. This section provides the following:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Id.

44. *Id.* The Act provides for enforcement as follows:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law . . . .

Id.

45. 441 U.S. 677 (1979).

46. *Cannon*, 441 U.S. at 680. Plaintiff alleged that she was denied enrollment into these institutions despite the fact that males with less impressive objective qualifications were being admitted. *Id.* at n.2. Moreover, it was alleged that the schools' admission policies operated to exclude women from consideration even though the criteria were not valid predictors of performance in medical school. *Id.* The United States Supreme Court granted certiorari after both the district court and court of appeals ruled in favor of the defendants' motion to dismiss the complaints for failure to state a cause of action. *Id.* at n.2. *See* Cannon v. University of Chicago, 406 F.Supp. 1257 (N.D. Ill. 1976); Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976).

47. *Cannon*, 441 U.S. at 683.

48. *Id.* at 688. *See also* Cort v. Ash, 422 U.S. 66 (1975).

49. *Cannon*, 441 U.S. at 688.

benefit of a special class of which the plaintiff is a member. After focusing on the language of the statute, the Court found that Title IX "explicitly confers a benefit on persons discriminated against on the basis of sex."[50] Second, the Court looked to the legislative history to see whether Congress had expressed a legislative intent to either create or deny a remedy. The Court concluded that, although it is unnecessary to show such an intent once it is clear that the language of the statute provides for a remedy, the history of Title IX clearly indicates that Congress did intend such a remedy.[51] Third, the Court considered whether the remedy was helpful to the accomplishment of the statutory purpose. In concluding that a private action was helpful, the majority explained that, in some instances, individuals could not be provided effective protection against discriminatory practices absent a private remedy.[52] Finally, the Court examined whether this subject matter was of the type normally relegated to the states. Justice Stevens, writing for the majority, noted that the federal courts have long been the primary source of protection for citizens against discrimination of all sorts.[53] Therefore, the Court concluded that "[n]ot only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."[54]

Although the *Cannon* Court expressly recognized a private cause of action for violations of Title IX, subsequent sexual harassment claims by students were not brought under Title IX because the only available remedy was equitable relief. Instead, most Title IX claims were brought by students pursuing equitable gender funding in scholastic sports programs.[55] Then, in 1992, the Supreme Court altered the future of Title IX claims with its decision in *Franklin v. Gwinnett County Public Schools*.[56]

In *Franklin*, the plaintiff, a high school student, brought a Title IX

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50. *Id.* at 693-94. The Court found support for this reasoning in the fact that Congress could have limited the language of Title IX to simply ban discriminatory conduct by recipients of federal funds but, instead, drafted the statute with an "unmistakable focus on the benefitted class." *Id.* at 691.

51. *Id.* at 694. The Court determined that Title IX was clearly patterned after Title VI and that the drafters of Title IX assumed that it would be interpreted and applied as Title VI had been since 1964. *Id.* at 696 n.19. When Title IX was passed in 1972, Title IV had already been construed as creating a private remedy. *Id.* at 696.

52. *Id.* at 706 n.37. For example, institutions that received federal funds in a single grant would not worry about violations of Title IX if the only remedy were to terminate funds because they would not be entitled to further disbursements in any event.

53. *Id.* at 708.

54. *Cannon*, 441 U.S. at 709.

55. *See*, e.g., Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).

56. 503 U.S. 60 (1992).

claim alleging that a teacher had subjected her to continual sexual harassment and abuse.[57] Franklin alleged that her teachers and administrators knew of the harassment, did nothing to stop it, and even discouraged her from pressing charges.[58] The teacher accused of the abuse subsequently resigned on the condition that all complaints against him be dropped.[59] Franklin filed a complaint with the Office for Civil Rights of the United States Department of Education ("OCR"), which subsequently terminated its investigation after concluding that the school instituted a grievance procedure that brought it into compliance with Title IX.[60] Unsatisfied with the result, Franklin filed suit in district court seeking money damages for the school's violation of Title IX. The district court dismissed the complaint on the ground that Title IX did not authorize an award of money damages.[61] The court of appeals[62] affirmed and the Supreme Court granted certiorari to answer the sole question of "whether the implied right of action under Title IX . . . supports a claim for monetary damages."[63]

In examining this issue, the Court stated that the "question . . . [as to] what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." Thus, the Court determined that, under normal circumstances, it would need to examine the text and history of Title IX to determine whether Congress intended to create a monetary damages remedy. In doing so, The Court concluded that, unless Congress had expressly indicated otherwise, it would presume the availability of all appropriate remedies.[64] However, because the private cause of action was inferred by the *Cannon* Court, the usual textual and historical examination of Title IX would provide no insight as to the available remedies.[65] Therefore, to determine whether Congress intended to limit the application of all available remedies, the Court was forced to evaluate the state

57. *Franklin*, 503 U.S. at 63.

58. *Id.*

59. *Id.*

60. *Id.* at 64 n.3.

61. *Id.* at 64.

62. Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990).

63. *Franklin*, 503 U.S. at 62.

64. *Id.* at 65. *See* Bell v. Hood, 327 U.S. 678 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

65. *Franklin*, 503 U.S. at 71. Given that the *Cannon* Court held that there was no express right of action provided for by the statute, this Court found no surprise in the fact that Congress was silent as to any applicable remedies for an implied right of action. *Id.*

of the law when Title IX was enacted.[66] The Court found that, in the years before and after Congress enacted Title IX, the Supreme Court "follow[ed] a common-law tradition [and] regarded the denial of a remedy as the exception rather than the rule."[67] The Court concluded that the state of the law at the time of enactment amply demonstrated the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies. Therefore, the majority held that money damages are available when a private action is brought to enforce Title IX.[68]

The significance of the *Franklin* opinion, however, goes beyond its holding: it expressly expands the reach of Title IX to include sexual harassment as a violation thereunder. The Court noted that "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 discriminates on the basis of sex."[69] Therefore, the effect of the *Franklin* opinion is not only to allow monetary damages in a Title IX private action, but also to expressly recognize the existence of a sexual harassment claim under Title IX.

IV. STANDARDS OF LIABILITY UNDER TITLE IX

Although the *Franklin* Court recognized the existence of a Title IX sexual harassment claim, it failed to establish any guidelines under which a school could be held liable. Thus, federal courts continued to lack Supreme Court guidance concerning claims for both teacher-student and student-student sexual harassment. In cases in which students asserted that they had been sexually harassed by teachers, federal court decisions differed as to the standard of notice that was needed before a school would be held liable. Some courts concluded that Title VII standards should apply, holding schools liable if they "knew or should have known" that the sexual harassment was taking place,[70] whereas other courts found that the school could be held liable even if the victim of the harassment failed to notify the proper officials.[71] The Supreme Court finally

66. *Id.*

67. *Id.* (citing Merrill Lynch v. Curran, 456 U.S. 353, 375 (1982)).

68. *Franklin*, 503 U.S. at 76.

69. *Id.* at 7 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

70. *See* Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1528 (M.D. Ala. 1994); Kinman v. Omaha Public School Dist., 94 F.3d 463, 469 (8th Cir. 1996).

71. *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 900-01 (1st Cir. 1988).

addressed this issue in *Gebser v. Lago Vista Independent School District.*[72]

In *Gebser*, a student became intimately involved with one of her teachers. The relationship began with Mr. Waldrop, Gebser's teacher, making suggestive comments.[73] This conduct eventually led to kissing, fondling, and intercourse.[74] Gebser did not report the relationship to school officials because she felt uncertain about how to react.[75] The relationship continued for approximately a year and a half until a police officer discovered Waldrop and Gebser having intercourse and arrested Waldrop.[76] The school then terminated Waldrop.[77]

Gebser subsequently brought suit under Title IX seeking compensatory and punitive damages. The district court and the appellate court[78] dismissed her claim, holding that the school could not be held liable unless it actually knew of the harassment.[79] The Supreme Court granted certiorari to decide "when a school district may be held liable in damages in an implied right of action under Title IX" for teacher-student sexual harassment. [80] The Court rejected Gebser's argument that schools should be held liable under a theory of either respondeat superior or constructive notice.[81] Instead, the Court held that a damages remedy will not lie under Title IX "unless an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of the discrimination in the re-

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72. 118 S. Ct. 1989 (1998).

73. *Gebser*, 118 S. Ct. at 1993.

74. *Id.*

75. *Id.*

76. *Id.* Just three months before Waldrop's arrest, two students had complained to their principal about his suggestive comments in class. The principal cautioned Waldrop about his behavior but did not report the incident to the superintendent, who was the district's Title IX coordinator. *Id.* The district had neither instituted a grievance policy for reporting sexual harasssment claims nor issued a formal anti-harassment policy. *Id.*

77. *Id.*

78. Doe v. Lago Vista Independent School Dist., 106 F.3d 1223, 1226 (5th Cir. 1997)

79. *Gebser*, 118 S. Ct. at 1994 (citing Doe v. Lago Vista Independent School Dist., 106 F.3d 1223, 1226 (5th Cir. 1997) ("[S]chool districts are not liable in tort for teacher-student sexual harassment under Title IX unless an employee who had been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.").

80. *Gebser*, 118 S. Ct. at 1993.

81. *Id.* at 1995. Under the doctrine of respondeat superior, a school would be held liable when a teacher uses his or her position of authority to carry out sexual harassment irrespective of whether school officials had knowledge of or took action to eliminate it. Under the doctrine of constructive notice, a school would be held liable if it knew or should have known about the harassment but failed to uncover and stop it. *Id.* The Court rejected these doctrines arguing that Title IX, unlike Title VII, contains no comparable reference to "agents" and thus does not call for application of agency principles. *Id.* at 1996.

cipient's programs" and acts with "deliberate indifference" in failing to respond to the alleged discrimination.[82]

Although the Supreme Court set a standard of institutional liability for claims of teacher-student sexual harassment in *Gebser*, it did not set a standard of institutional liability for claims of the more pervasive student-student sexual harassment.[83] Without guidance from the Supreme Court on this issue, the circuit courts were unable to agree on whether schools can be held liable under Title IX for peer sexual harassment, and, if so, under what standard of liability.

V. APPELLATE CONFLICT OVER PEER SEXUAL HARASSMENT

A. *No Liability under Title IX*

In *Davis v. Monroe County Board of Education*,[84] the Court of Appeals for the Eleventh Circuit, in a five-four decision, held that no cause of action existed for a student against a school board or its officials under Title IX for failure to prevent student-student sexual harassment of which the board or its members had knowledge. LaShonda Davis, a fifth-grade student, was subjected to eight separate instances of sexual harassment from a fellow student over a six-month period.[85] The harassment included vulgarities and suggestive comments, as well as the touching of her body.[86] As a result of the harassment, Davis suffered mental anguish that ultimately resulted in lowered grades and suicidal tendencies.[87] During this period, school officials were made aware of the harassment but failed to take any significant remedial action.[88] As a result, Davis brought an action claiming that the school board's deliberate indifference to the sexual offenses amounted to a violation of Title IX.[89]

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82. *Id.* at 1999-2000. The Court explained that "it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student . . . without actual notice to a school district official." *Id.* at 1997.

83. *See* HARRIS, *supra* note 8, at 11.

84. 120 F.3d 1390 (11th Cir. 1997, *rev'd*, No. 97-843, 1999 WL 320808 (U.S. May 24, 1999).

85. *Davis*, 120 F.3d at 1394.

86. *Id.* at 1393. The harassing student's conduct included statements such as "I want to get in bed with you" and "I want to feel your boobs." *Id.*

87. *Id.* at 1394.

88. *Id.* at 1393-94.

89. *Id.* at 1394. The district court dismissed the complaint in its entirety for failure to state a claim upon which relief could be granted. *See* Aurelia D. v. Monroe County Bd. of Educ., 862 F.Supp. 363, 368 (M.D. Ga. 1994).

The circuit court framed the issue as "whether Title IX allows a claim against a school board based on a school official's failure to remedy a known hostile environment caused by the sexual harassment of one student by another."[90] The Eleventh Circuit acknowledged that, although ten district courts have allowed a Title IX action in a peer sexual harassment scenario, there was no binding authority because, at that point, the Supreme Court had not yet squarely addressed the issue of student-student sexual harassment.[91] The court began its analysis by examining the legislative history of Title IX. The majority found that although the Act's history does not explicitly mention student-student sexual harassment, it does show that Title IX was enacted under the Spending Clause of Article I of the Constitution.[92]

The court explained that when Congress enacts legislation pursuant to the Spending Clause, a contract is, in essence, formed between the federal government and the recipient of the funds.[93] As a result, Congress must give recipients unambiguous notice of the conditions that they are agree to when they accept federal funding.[94] In this case, the court concluded that Congress did not give "clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX."[95] Although the court declined to recognize a Title IX action, it suggested that state tort law may provide redress for the harm.[96]

B. *When Schools Can Be Held Liable under Title IX*

In *Davis*, the Eleventh Circuit refused to find schools liable for peer sexual harassment under any circumstances; In contrast, other circuit courts have interpreted Title IX to encompass institutional liability for such harassment. However, these circuits have not agreed upon a single standard under which Title IX liability should be imposed for student-student sexual harassment. The various circuits have developed three

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90. *Davis*, 120 F.3d at 1394.

91. *Id.* at 1395.

92. *Id.* at 1397.

93. *Id.* at 1399.

94. *Id.* at 1406. ("An enactment under the spending clause must read like a prospectus . . . [and] must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding."). *Id.*

95. *Davis*, 120 F.3d at 1406.

96. *Id.*

separate theories of liability: the "knew or should have known" standard; the "response to claims differing on basis of sex" standard; and the "actual knowledge" standard.

1. The "Knew or Should Have Known" Standard

In Brzonkala v. Virginia Polytechnic Institute & State University,[97] two members of the Virginia Polytechnic Institute ("VPI") football team raped the plaintiff, a freshman at the university.[98] Seven months after the incident, she filed a complaint under VPI's sexual assault policy.[99] However, as a result of VPI's alleged negligence in dealing with the matter, Brzonkala filed suit in district court alleging that VPI's handling of her rape claims and failure to punish the rapists in any meaningful manner, violated Title IX.[100] The district court dismissed the Title IX claim against VPI for failure to state a claim upon which relief could be granted.[101] The Court of Appeals for the Fourth Circuit reversed, finding that Brzonkala had sufficiently established a Title IX hostile environment sexual harassment claim against VPI.[102]

In analyzing the claim, the court first looked to what legal standard should be applied to a hostile environment claim under Title IX.[103] The majority concluded that, because of Title IX's "short historical parentage," it would need to "look to the extensive jurisprudence developed in the Title VII context."[104] The court explained that Title IX is similar to Title VII because, in a Title IX action, the plaintiff seeks not to hold the

97. 132 F.3d 949 (4th Cir. 1997).

98. *Brzonkala*, 132 F.3d at 953. The football players took turns raping the plaintiff, using their arms to pin down her elbows and their knees to spread apart her legs. *Id.* The players did not use condoms and threatened her by saying "[y]ou better not have any . . . diseases." *Id.*

99. *Id.*

100. *Id.* at 956. The university judicial committee found one of the players guilty of sexual assault and immediately suspended him for two semesters. *Id.* at 955. However, on appeal, the university provost concluded that the sanction was excessive and deferred the suspension until graduation. *Id.*

101. *Id.* at 956. *See also* Brzonkala v. Virginia Polytechnic Institute & State Univ., 935 F.Supp. 772 (W.D. Va. 1996).

102. *Brzonkala*, 132 F.3d at 961.

103. *Id.* at 957.

104. *Id.* A*See* Preston v. Virginia *ex rel.* New River Community College, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) ("Title VII . . . is the most appropriate analogue when defining Title IX's substantive standards . . ."); Lipsett v. University of P.R., 864 F.2d 881, 896 (1st Cir. 1988) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination," Title VII is "the most appropriate analogue when defining Title IX=s substantive standards . . ."). *Id.*

school responsible for the acts of third parties but, rather, to hold the school responsible for its own actions in failing to take prompt and remedial action.[105]

The court then looked to Title VII for guidance and concluded that, for a plaintiff to prevail on a Title IX hostile environment sexual harassment claim, he or she must show:

> (1) that she [or he] belongs to a protected group; (2) that she [or he] 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 his [or her] education and create an abusive educational environment; and, (5) that some basis for institutional liability has been established.[106]

VPI did not contest the first three elements but contended that the fourth and fifth were not satisfied.

Applying the facts of this case to the last two elements, the court first concluded that rape "is not only pervasive harassment but also criminal conduct of the most serious nature that is plainly sufficient to state a claim for hostile environment sexual harassment."[107] The court then addressed the final element. Applying Title VII standards, the majority determined that VPI would be liable if it "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action."[108] The court concluded that VPI knew of the rapes once Brzonkala informed the appropriate official, and that it failed to take prompt and remedial action by refusing to provide significant punishment to the offenders or any real assistance to the victim.[109]

2. *The "Response to Claims Differing on Basis of Sex" Standard*

In *Rowinsky v. Bryan Independent School District*,[110] the Fifth Circuit held that Title IX does not impose liability on a school district for peer sexual harassment, absent allegations that the school district itself di-

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105. *Brzonkala*, 132 F.3d at 958. Similarly, under a Title VII action, a plaintiff cannot recover from her employer simply because she was harassed by a fellow employee; she may only recover if the "employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." *Id.*

106. *Id.*

107. *Id.* at 959. The court also reasoned that there was no doubt that "even a single incident of sexual assault sufficiently alters the conditions" of the victim's education to create an abusive educational environment. *Id.*

108. *Id.* at 960.

109. *Id.* at 961.

110. 80 F.3d 1006 (5th Cir. 1996).

rectly discriminated by responding differently to sexual harassment claims on the basis of sex.[111] The plaintiffs in *Rowinsky*, two sisters in the eighth grade, were subjected to both physical and verbal abuse from fellow students during the 1992-93 school year.[112] The principal and superintendent were informed of the harassment on several different occasions, which led to the three-day suspension of one of the harassing students.[113] However, because the suspension did not deter the harassment and because the district refused to take further action against any of the other boys, Mrs. Rowinsky brought a Title IX action on behalf of her daughters alleging that the Bryan Independent School District ("BISD") and its employees condoned and caused hostile environment sexual harassment.[114]

The district court dismissed the case, holding that Rowinsky had failed to state a claim under Title IX because there was no evidence that BISD had discriminated against students on the basis of sex.[115] In particular, Rowinsky had failed to show that sexual harassment was treated less severely when its victims were girls than when they were boys.[116] On appeal, the Fifth Circuit framed the issue as "whether a school district may be liable under Title IX when one student sexually harasses another."[117] In its analysis, the court focused on "who" is prohibited from discriminating against students in an educational program. The majority concluded that the scope and structure of the act itself, the legislative history, and agency interpretations of the statute all support the imposition of liability under Title IX for the acts of federal fund recipients and not for the acts of third parties.[118]

The court reasoned that, because Title IX was enacted pursuant to Congress' spending power, Congress could not have intended a condition that imposes liability for acts of third parties; such a condition would de-

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111. Rowinsky, 80 F.3d at 1016.

112. *Id.* at 1008-09. The abuse included fellow students reaching up the sisters' skirts, grabbing their genitals, unlatching their bras, swatting their bottoms whenever they walked down the bus aisle, and making comments such as, "When are you going to let me fuck you" and "What bra size are you wearing." *Id.*

113. *Id.* at 1008.

114. *Id.* at 1009-10. Mrs. Rowinsky sought declaratory and injunctive relief as well as compensatory damages and attorney's fees. *Id.* at 1010.

115. *Id.* at 1010.

116. Rowinsky, 80 F.3d at 1010. The district court found that boys who assaulted boys were punished in the same fashion as were boys who assaulted girls. *Id.*

117. *Id.* In more general terms, the court noted that "we are asked to decide whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents." *Id.*

118. *Id.* at 1012.

ter acceptance of federal funds.[119] The majority also determined that Title IX's legislative history focuses solely on the acts of grant recipients, with the intent to end discrimination by educational institutions.[120] Finally, the court concluded that the OCR's interpretation of Title IX was also consistent with the refusal to impose liability for acts of third parties.[121]

In light of these factors, the court held that, in a case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently on the basis of sex.[122] The majority noted that this standard would be satisfied if a "school treated sexual harassment of boys more seriously than [it treated] sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys."[123]

3. *The "Actual Knowledge" Standard*

In *Doe v. University of Illinois*,[124] Jane Doe, a female student, brought a Title IX claim against the University of Illinois in the United States District Court for the Central District of Illinois claiming that school officials took little or no meaningful action to punish or prevent the sexual harassment to which she was victim.[125] The harassment included unwanted touching, epithets, and the intentional exposure of one of the harasser's genitals to Doe.[126] Rather than protecting Doe or punishing her harasser, some administrators insisted that the harassment was Doe's fault and that she should change her behavior to prevent further occurrences.[127] The district court dismissed the Title IX action for failure to state a cause of action.[128]

On appeal, the Seventh Circuit addressed the issue of whether a

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119. *Id.* at 1013.

120. *Id* at 1014.

121. *Rowinsky*, 80 F.3d at 1014. The court explained that the agency's interpretation of Title IX is devoted entirely to acts of the recipients themselves. *Id.* at 1015.

122. *Id.* at 1016.

123. *Id.*

124. 138 F.3d 653 (7th Cir. 1998).

125. *Doe*, 138 F.3d at 655. "Doe was the victim of an ongoing campaign of verbal and physical sexual harassment perpetrated by a group of male students at the school." *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 655-56. The district court found that the university could not be held liable because Doe had not alleged that the school officials' failure to respond resulted from intentional discrimination against her. *Id.*

school can be held liable for failing to take prompt, appropriate action to remedy known sexual harassment of one student by other students.[129] The court held that a school could, indeed, be held for failing to take prompt action in response to student-student sexual harassment, provided that the school's officials actually knew that the harassment was taking place.[130]

In its analysis, the court rejected the Fifth Circuit's reasoning in *Rowinsky*, holding that the Fifth Circuit improperly concluded that Title IX does not impose liability on schools for the acts of third persons.[131] The majority echoed *Brzonkala*, explaining that, in peer sexual harassment cases, the plaintiffs seek not to hold the schools liable for the acts of the harassing students but, rather, to hold schools and school officials liable for their own actions or inaction once they knew the harassment existed.[132] The court also rejected the Eleventh Circuit's Spending Clause analysis as set forth in *Davis*.[133] The majority found that the Eleventh Circuit relied on a "lack of notice" theory to find that schools could not be held liable under Title IX for peer sexual harassment.[134] However, the court explained that the notice problem does not arise when the discrimination is intentional and held that a failure to take prompt and immediate action to remedy known sexual harassment constitutes intentional sex discrimination.[135]

In determining the proper standard of notice for school liability, the court recognized that many courts have used Title VII precedent in analyzing Title IX suits. The majority, however, refused to apply the Title VII "knew or should have known" standard of liability because of the existence of Seventh Circuit precedent that rejects this standard in favor of an "actual knowledge" standard.[136] The court found that this standard "does not place too severe a burden on potential plaintiffs" by requiring them to report the harassment to school officials, thereby giving a school the chance to respond before being sued in court.[137]

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129. *Id.* at 660.

130. *Doe*, 138 F.3d at 661.

131. *Id.* at 662.

132. *Id.*

133. *Id.*

134. *Id.* at 663.

135. *Doe*, 138 F.3d at 663.

136. *Id.* at 667-68. The Court relied on the reasoning of *Smith v. Metropolitan School Dist. Perry Township*, 128 F.3d 1014, 1028-29 (7th Cir. 1997), which in turn borrowed the rationale of *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648, 658 (1997) (recognizing the validity and applicability of the "knew or should have known" standard as set forth by the OCR in its proposed guidelines but refusing to apply the guidelines retroactively).

137. *Doe*, 138 F.3d at 668.

VI. THE SUPREME COURT SETS THE STANDARD FOR PEER SEXUAL HARASSMENT

In May of 1999, the Supreme Court laid to rest the debate that had been raging within the circuit courts of appeal. In *Davis v. Monroe County Board of Education*,[138] the Court held that educational institutions can be held liable for peer sexual harassment.[139] In doing so, the Court applied the standard as set forth in its earlier *Gebser* decision and concluded that schools can only be held liable for peer sexual harassment when its officials are deliberately indifferent to known acts of student-student sexual harassment.[140] Thus, for liability to attach, school officials must act in clear violation of Title IX by remaining deliberately indifferent to acts of student-student sexual harassment of which they had actual knowledge.

Relying on *Gebser*, the Court explained that any entity that receives federal funds is entitled to notice that it will be liable for a monetary award prior to it being subjected to damages liability.[141] Therefore, the majority agreed with *Gebser* and rejected the more stringent standard, whereby a school would be held liable for its failure to react to student-student harassment of which it knew or should have known. The Court concluded that this standard would not provide the notice of liability required under Title IX.[142] The decision to adopt this standard, however, will likely be detrimental in the prevention of peer sexual harassment in the educational system.

VII. THE PROPER STANDARD FOR HOLDING SCHOOLS LIABLE UNDER TITLE IX FOR PEER SEXUAL HARASSMENT

It is well established that the text of Title IX should be accorded "a sweep as broad as its language."[143] In keeping with this principle, a school should be held liable under Title IX for peer sexual harassment if the school's official "knew or should have known" of the sexual harassment

138. No. 97-843, 1999 WL 320808 (U.S. May 24, 1999), *rev'g* 120 F.3d 1390 (11th Cir. 1997).

139. *Davis*, 1999 WL 320808, at *10.

140. *Id.*

141. *Id.* at *8.

142. *Id.* at *9.

143. *See, e.g.*, North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982); Griffin v. Breckenridge, 403 U.S. 88, 97 (1971); Daniel v. Paul, 395 U.S. 298, 307-08 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); United States v. Price, 387 U.S. 787 (1966).

and failed to take immediate and appropriate corrective action. This is the standard adopted by the Fourth Circuit in *Brzonkala* and by the OCR.

In 1997, the OCR issued guidelines intended to inform educators and educational institutions of the appropriate standards to be followed under federal law when investigating and resolving claims of sexual harassment under Title IX.[144] Under these guidelines, a school will be held liable under Title IX for student-student sexual harassment if the following circumstances are present: (1) a hostile environment exists in the school's programs or activities; (2) the school knows or should have known of the harassment; and (3) the school fails to take immediate and appropriate corrective action.[145] In these instances, a school's failure to respond to the existence of a hostile environment[146] within its own programs permits an atmosphere of sexual discrimination that is prohibited by Title IX.[147] Therefore, Title IX holds a school liable not for the actions of the harassing students but, rather for the school's own discrimination in failing to adequately remedy the problem once it has notice.[148]

The notice standard set forth in OCR guidelines is whether the school "knew, or in the exercise of reasonable care, should have known" about the harassment.[149] Thus, a school is put on notice if it actually knew of the harassment or, through a theory of constructive notice, if it should have known about the harassment through "reasonably diligent inquiry."[150]

The OCR guidelines merit significant consideration by the courts. The courts have long concluded that "when interpreting Title IX, [it is appropriate to] . . . accord the OCR's interpretations appreciable defer-

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

145. Sexual Harassment Guidance, 62 Fed. Reg. at 12,039.

146. A hostile environment is created if "conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program . . . ." Sexual Harassment Guidance, 62 Fed. Reg. at 12,041.

147. *Id.* at 12,039.

148. *Id.* at 12,040. The Fifth Circuit in *Rowinsky* misinterpreted Title IX by reasoning that the plaintiff was trying to use Title IX to hold the school liable for the acts of third parties. However, the OCR guidelines clearly explain that Title IX holds a school liable, not for the actions of the third parties, but, rather, for the school's own failure to take immediate remedial action. *Id.*

149. *Id.* at 12,042.

150. *Id.* at 12,042. Constructive notice exists in a situation where the school knows of some incidents of harassment but negligently fails to undertake an investigation which would have led to the discovery of additional incidents of harassment. *Id.* In addition, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment. *Id.*

ence."[151] In fact, the *Davis* Court, without commenting on the standard set forth by the OCR, expressly supported the OCR guidelines because they provide for peer sexual harassment to be covered under Title IX.[152] It is not disputed that courts recognize the Department of Education, acting through its OCR, as the administrative agency charged with administering Title IX.[153] The amount of deference that a court will give to agency regulations, however, depends on such factors as the circumstances of the guidelines' promulgation, the consistency with which the promulgating agency has adhered to the position announced, the consideration that has gone into its formulation, and the agency's expertise.[154]

When these factors are applied to the OCR guidelines, it is clear that the courts should accord them substantial deference. The OCR created the comprehensive set of guidelines setting forth the legal standards involved in resolving incidents of sexual harassment in an effort to eliminate sexual harassment and in response to the requests of schools, teachers, and parents.[155] The OCR guidelines reflect longstanding OCR policy and practice in the area of sexual harassment. They also reflect extensive consultation with groups representing students, teachers, school administrators, and researchers.[156] Through these meetings, the OCR "gained valuable information regarding the realities of sexual harassment in schools, as well as information regarding promising practices for identifying and preventing harassment."[157] Therefore, under the rationale set forth in *North Haven* and *Batterton*, the standards of liability set forth in the OCR guidelines should be afforded considerable respect.

In addition to being incorporated into the OCR guidelines, the Title VII "knew or should have known" standard also works to satisfy both of Title IX's objectives.[158] It is effective both in preventing federal resources

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151. *See, e.g.*, North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982); Rowinsky v. Bryan Indep. School Dist., 80 F.3d 1006, 1014 n.20 (5th Cir. 1996); Rosa H. v. San Elizario Indep. School Dist., 106 F.3d 648, 658 (5th Cir. 1997).

152. *Davis*, 1999 WL 320808, at *12.

153. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984); *See also* Udall v. Tallman, 380 U.S. 1, 16 (1965) (noting that the Supreme Court "gives great deference to the interpretation given the statute by the officers or agency charged with its administration").

154. Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

155. Sexual Harassment Guidance, 62 Fed. Reg. at 12,034-35.

156. *Id.* at 12,035.

157. *Id.*

158. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). The court concluded that Title IX "sought to accomplish two related, but nevertheless somewhat different objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Id.*

from being used to support discriminatory practices and in providing individual citizens effective protection against those practices. Contrary to the Seventh Circuit's holding in *Doe* and the Supreme Court's decision in *Davis*, the "actual knowledge" standard cannot serve as the appropriate limitation upon institutional liability because it does not fulfill Title IX's objectives. The Supreme Court's decision to require schools to have actual knowledge of the harassment, in effect, allows school officials to turn their backs to harassment that, through reasonable inquiry, could have been discovered and remedied. The "knew or should have known" standard encompasses the actual knowledge standard and also addresses situations in which a school should know about the harassment. This more stringent standard would promote efficiency in the schools by forcing officials to effectuate proper policies and regulations through which ongoing sexual harassment can be uncovered and future incidents prevented. At the same time, it would protect those schools from being blind-sided by liability based upon events that officials could not have known were taking place.

The *Davis* Court relied directly on the *Gebser* decision for the standard to be used in instituting educational liability. In *Gebser*, the majority rejected the standard espoused by the OCR guidelines and adopted the "actual knowledge" standard.[159] Despite its holding, *Gebser* actually strengthens the argument for a "knew or should have known standard" for student-student sexual harassment.

The *Gebser* Court rejected the "knew or should have known standard" for two primary reasons. First, the majority reasoned that Title IX, unlike Title VII, contains no reference to the concept of agency and, therefore, does not expressly call for the application of agency principles.[160] When considering student-student sexual harassment, however, agency principles are irrelevant. The victim of student-student sexual harassment seeks to hold the school liable for its own failure to remedy the harassment once it was put on notice rather than to hold the school liable for a teacher's or student's harassment.

Second, the Court determined that, because Title IX was enacted pursuant to Congress' spending power, it creates a contract with the recipient of federal funding that requires that notice be given of the potential for monetary liability.[161] In *Gebser*, the Court concluded that, if a school's liability were governed by the "knew or should have known standard," the notice requirement would be violated because a school

159. *Gebser*, 118 S. Ct. at 1999.
160. *Id.* at 1996.
161. *Id.* at 1998.

could be held liable for discrimination of which it was unaware.[162] This argument fails to accurately depict the effect of the "knew or should have known" standard. Under this standard, a school would be considered to have notice of the harassment if it actually knew of the harassment or if it should have known about the harassment through "reasonably diligent inquiry." Therefore, contrary to the Court's suggestion in *Gebser*, the school would not be unaware of the discrimination. Both of these arguments relied on by *Gebser* Court do conclusively support the rejection of respondeat superior liability (liability without regard to notice). However, they also clearly support the use of the "knew or should have known" standard in student-student sexual harassment cases.

CONCLUSION

Peer sexual harassment is a major problem in America's schools. It has a crippling effect on students' educational environment as well as their behavioral and emotional well-being. To deal with this acute problem, the courts must adopt a standard of liability under Title IX that will promote a nationwide decrease in student-student sexual harassment. In doing so, the courts must embrace a standard that furthers the objectives of Title IX while providing protection to educational institutions from discrimination of which they are legitimately unaware.

The *Davis* Court failed to fulfill these goals when it adopted the "actual knowledge" standard. The Title VII "knew or should have known" standard, however, effectively accomplishes these objectives. It prevents the use of federal funds by institutions that either overtly support discriminatory practices or fail to take the necessary actions to remedy those practices once they are put on notice that they exist. Moreover, it protects students from peer sexual harassment by holding schools financially liable for their own inaction in dealing with the conduct. The OCR has adopted this standard with an understanding of its potential impact on the educational system. The nation can only hope that the Supreme Court will realize its mistake and adopt the standard as well.

Anthony M. Lamanna

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162. *Id.*