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Peer Sexual Harassment: Existing Harassment Doctrine and its Application to School Children

Amy M. Rubin*

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms.1

- Chief Justice Warren

I. INTRODUCTION

Sexual harassment, the practice of making unwelcome sexual advances or requests for sexual favors, is like a disease spreading out of control. It can happen to anyone, male or female,2 and can invade any environment, ranging from the workplace,3 to the housing market,4 to the military,5 to the classroom.6 This epidemic attacks people of all ages, including children.

* J.D., St. John's University School of Law; A.B., University of Michigan; Associate at a firm in New York.
2. This Article will focus primarily on harassment of females, since they are the most common victims. See infra notes 52-62, 87-90 and accompanying text.
3. See infra notes 11-75 and accompanying text.
6. See infra notes 76-108 and accompanying text.
Our legal system has tried to alleviate the problem of sexual harassment, and its long-lasting injuries, through prevention strategies and liability schemes. For example, Congress and the courts have created an analytical construct to deal with sexual harassment in the workplace so that victims may have redress. This construct has served as a model for recent efforts to attack the national problem of peer harassment in elementary and secondary schools. Some schools have implemented sexual harassment policies and grievance procedures, as well as incorporating sexual harassment education into teacher training and student curricula. Moreover, Title IX of the Education Amendments of 1972 has prompted suits against school districts and faculty for failing to take action when they are aware of peer sexual harassment. There is much confusion, however, about the proper approach to prevention of and liability for peer sexual harassment.

Because several courts have modeled peer harassment analyses after the employment construct, this Article will begin with a discussion of established legal definitions and standards for sexual harassment in the workplace. The article will then describe the serious problem of peer harassment in public schools, as well as existing prevention approaches and remedies. A brief discussion about the treatment of children under the law will follow. The conclusion will both recommend better ways to manage the problem of sexual harassment in public schools and suggest a scheme of liability.

II. SEXUAL HARASSMENT IN THE WORKPLACE

A. THE ESTABLISHMENT OF A LEGAL STANDARD

Addressing peer sexual harassment is all the more difficult because traditionally courts have only dealt with sexual harassment in the workplace, as a form of employment discrimination. Prior to 1976, even in the workplace setting, courts treated harassing conduct as a personal matter that was neither related to employment nor based on sex. The first type of sexual harassment to be addressed by our legal system was treated as a form of

7. “Legal system” refers to federal, state, and local legislatures, courts, and agencies.
8. See infra notes 11-75.
11. See Wendy Pollack, Sexual Harassment: Women’s Experience vs. Legal Definitions, 13 Harv. Women’s L.J. 35, 41 (1990) (“Prior to 1976, sexual harassment simply happened to women. It did not have a name . . . .”); see also Catharine A. MacKinnon, Sexual Harassment: Its First Decade in Court (1986), in Feminism Unmodified 103, 105 (1987) (“The legal claim for sexual harassment marks the first time in history . . . that women have defined women’s injuries in a law.”).
employment discrimination.13 The conduct had not even been labeled "sexual harassment."14 Today, as a result of litigation since 1976, sexual harassment commonly refers to offensive sexual conduct, and courts acknowledge that this conduct is a violation of the law. Catharine MacKinnon, a law professor and women's studies scholar, has defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power ..."15

The Equal Employment Opportunity Commission (hereinafter "EEOC") agreed, in part, with MacKinnon's definition, and in 1980 issued guidelines stating that sexual harassment is a violation of Title VII of the Civil Rights Act of 1964.16 The EEOC's definition describes harassment on the basis of sex to be "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." This conduct gives rise to an action under Title VII when: (1) submission to such conduct is made either explicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.17

The Supreme Court recognized two types of actionable sexual harassment in the work place under Title VII in Meritor Savings Bank v. Vinson.18 The first type of harassment, known as quid pro quo harassment, exists when submission to verbal or physical conduct of a sexual nature is an explicit term or condition of employment. It applies when a supervisor

14. Helena K. Dolan, The Fourth - R - Respect: Combatting Peer Sexual Harassment in the Public Schools, 63 FORDHAM L. REV. 215, 224 n.94 (1994) (citing CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN 52 (1979) ("Trivialization of sexual harassment has been a major means through which its invisibility has been enforced.").
16. 42 U.S.C. § 2000 e-2(a)(1) (1989). Title VII precludes employment discrimination on the basis of race, color, religion, sex or national origin. The inclusion of sex as a category of discrimination was meant to cause the defeat of the statute in Congress. The Congressman offering the amendment thought that by adding sex to the statute it would be considered absurd. The attempt failed, and the statute passed, but there is no legislative history to explain the meaning of discrimination based on sex. See 110 Cong. Rec. 2577-84 (1964). The EEOC is the administrative agency charged with enforcement of Title VII. 42 U.S.C. § 2000e-4 & -5.
conditions a tangible benefit on sexual favors and punishes the subordinate who does not comply. The second, called hostile environment sexual harassment, occurs when supervisors and/or co-workers create an atmosphere that is "so infused with hostility toward members of one sex" that it alters the working environment. The trier of fact determines the severity of the situation by looking at the totality of the circumstances and the record as a whole. The legality of conduct is decided on the facts on a case by case basis.

Rather than strictly apply the EEOC guidelines, the Supreme Court in Meritor attached three caveats to its decision and held that not all harassing conduct gives rise to an actionable claim. The first Meritor caveat requires sexual harassment to "be sufficiently severe or pervasive 'to alter the conditions of [the victim]'s employment and create an abusive working environment,'" to be a basis for a cause of action. The dictionary definition of "severe" is marked by strictness or hard to endure, "pervasive" means spread through every part, and "alter" means to make different. This standard echoes the approach used by the 5th Circuit in Rogers v. Equal Employment Opportunity Commission, which requires that a plaintiff prove that the harassment is both pervasive and psychologically debilitating in a Title VII hostile environment case. Significantly, the EEOC rejected

19. See, e.g., Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). Quid pro quo harassment corresponds to (1) & (2) of the EEOC guidelines. 29 C.F.R. §1604.11(a).
20. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (holding that female participant in medical school residency program had made prima facie case of hostile environment); see also Meritor, 477 U.S. at 57. Hostile environment harassment corresponds to (3) of the EEOC guidelines. 29 C.F.R. §1604.11(a).
21. 29 C.F.R. § 1604.11(b); Meritor, 477 U.S. at 69.
22. 29 C.F.R. § 1604.11(b).
23. Meritor, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (following Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)). The Court concluded that the allegations were sufficient to state a claim under Title VII. Respondent claimed she had been subjected to constant sexual harassment by her supervisor for four years. The supervisor made repeated demands for sexual favors during and after business hours. Respondent estimated she had intercourse with him 40 or 50 times. Additionally, "respondent testified that [the supervisor] fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." Id. at 60.
25. Id. at 520.
26. Id. at 38.
27. 454 F.2d 234 (5th Cir. 1971). The Supreme Court has been criticized for using the Rogers approach rather than the EEOC guidelines. See Pollack, supra note 11, at 59 (comparing the guidelines with the "more formidable Rogers approach").
28. Rogers, 454 F.2d at 238 ("I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of [Title VII]. But ... I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psycho-
this requirement in its 1980 guidelines, which protect employees from both single and pervasive incidents of sexual harassment by placing an affirmative duty on employers to stop workplace sexual harassment. Moreover, the EEOC guidelines used a more lenient threshold of “unreasonably interfering”, which means exceeding the bounds of moderation in the act of affecting one another. Although the Court purported to be using the EEOC guidelines as a basis for its opinion, it rejected the guideline language in favor of the much harsher standard. Therefore, the Court’s terminology forces women to tolerate a higher level of abuse than does the language of the EEOC.

The second Meritor caveat requires that the sexual advances must have been “unwelcome.” The fact that the claimant was not forced to participate in the sexual conduct against her will—indeed even if the claimant’s participation was ‘voluntary’—is not a defense to a suit. To determine unwelcomeness, the Court requires scrutiny of the claimant’s conduct. This standard has been criticized for its ambiguity. The Court itself noted the difficulty of applying the standard in stating that “the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact.” This standard has also been criticized for turning the focus on the victim’s behavior, much like the consent standard in a rape analysis, rather than that of the miscreant’s. For example, the fact that the claimant’s

logical stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.”); see Christine O. Merriman & Cora G. Yang, Employer Liability of Coworker Sexual Harassment Under Title VII, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 93 (1985) (“A single incident of discrimination is insufficient grounds upon which to bring a cause of action under Title VII.”).

29. 29 C.F.R. § 1604.11; see Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981); see also Merriman & Yang, supra note 28, at 94-95.


31. Id. at 373.

32. See Meritor, 477 U.S. at 65-66.

33. Cf. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (Finally, in 1993, a unanimous Supreme Court rejected the need for proof of psychological injury when an environment would reasonably be perceived, and is perceived, as hostile or abusive).

34. Meritor, 477 U.S. at 68 (“The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.”) (citing 29 C.F.R. § 1604.11(a) (1985)).

35. Id. at 69.

36. There is much confusion about the distinction between unwelcome conduct and voluntariness. See, e.g., Pollack, supra note 11, at 55-59. Pollack calls the Court’s distinction between voluntary and unwelcome “dangerous language, ripe for misinterpretation.” It suggests that a woman may voluntarily participate in her own harassment which, in effect, blames the victim. This approach makes the unwelcome standard harder to satisfy because it only looks at the woman’s conduct and “judges by a pseudo-neutral perspective.” Additionally, Pollack questions how a court that finds harassment which is sufficiently severe and pervasive to alter the conditions of employment can find that the victim voluntarily participated. Id. at 58.

37. Meritor, 477 U.S. at 68.

38. See Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 827 (1991). This standard
sexually provocative speech or dress is relevant to the unwelcomeness analysis has been severely criticized. 39

Finally, the Court in Meritor addressed employer liability and rejected the contention that in hostile environment cases40 there is automatic liability when supervisors harass employees.41 In addition, the court found that the absence of notice to the employer will not always protect him or her from liability.42 The Court refused to issue a definitive rule for employer liability, but suggested that lower courts look to agency principles for guidance. This vague explanation leaves the issue open for interpretation and circuits remain split on the issue of liability.43 Critics have denounced this part of the presents at least three serious problems. First, the focus is on the victim, generally a woman, not the alleged wrongdoer. No burden is placed on the man to refrain from making advances until the woman, who is generally in a less powerful position, clearly rejects the advances. Second, this standard directs the court to examine the woman’s conduct to determine whether her rejection was clearly expressed. A verbal rejection is not enough for the court to find “unwelcomeness.” Third, the courts may look to a woman’s dress. This factor effectively denies a woman the right to dress as she chooses since an outfit may be used to prove that she invited the harassment. By forcing the victim to prove that her conduct did not welcome the advances, the Meritor Court presumed the woman is to blame for being victimized. Id. at 826-29; see also Pollack, supra note 12, at 55-59.

39. Meritor, 477 U.S. at 69. In response to the Court of Appeals’ statement that testimony regarding respondent’s “dress and personal fantasies . . . had no place in this litigation,” the Supreme Court said “[w]hile ‘voluntariness’ in the sense of consent is not a defense to such a claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.” Id. at 68-69 (quoting Vinson v. Taylor, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985)). See also Estrich, supra note 38, at 827.

40. Employers are strictly liable for quid pro quo sexual harassment. See Henson v. Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (“Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority.”).

41. Meritor, 477 U.S. at 72-73. This variation from liability for quid pro quo harassment has been explained: “The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual.” A supervisor creating a hostile environment acts outside the scope of authority granted him by the employer. Henson, 682 F.2d at 910.

42. Meritor, 477 U.S. at 72.

43. Several commentators and a majority of Federal Circuit courts have interpreted the Court’s language to mean that a formal policy and complaint procedure will shield the employer from liability for either supervisor or co-worker sexual harassment. See, e.g., Bouton v. BMW of North America, 29 F.3d 103, 110 (3d Cir. 1994) (“[A]n effective grievance procedure—one that is known to the victim and that timely stops the harassment— shields the employer from Title VII liability for a hostile environment” because “there is no negligence if the procedure is effective,” and “[a] policy known to potential victims also eradicates apparent authority the harasser might otherwise possess.”); see also Estrich, supra note 38, at 826 (“Those in the majority implicitly suggested that in hostile environment cases no employer, or at least none with a policy against harassment should be found liable in the absence of actual or constructive knowledge.”). But see Karibian v. Columbia University, 14 F.3d 773, 779-780 (2d Cir. 1994) (holding employers strictly liable for hostile environment sexual harassment committed by a supervisor using “actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the
decision, asserting that it makes it more difficult to prove liability than in any other type of Title VII action.\(^{44}\)

**B. A MEASUREMENT OF JUDICIAL SUCCESS**

Thus, the federal cause of action for sexual harassment is an invention of our times. The prohibiting legislation did not come into existence until 1964 with the passage of Title VII.\(^{45}\) Over ten years passed before the statute was applied to sexual harassment\(^{46}\) and the Supreme Court first affirmed such application in the 1980s.\(^{47}\) For conduct that had no name just a few years ago, sexual harassment is now a substantial social concern. The past two decades have seen it become a popular and political issue with incidents such as the Clarence Thomas confirmation hearings,\(^{48}\) the resignation of Senator Bob Packwood,\(^{49}\) and the alleged misconduct of President Clinton.\(^{50}\)

Despite the increased awareness\(^{51}\) and developing jurisprudence, the problem of sexual harassment in the workplace remains pervasive and costly. A 1981 study of the federal workplace showed 42% of the approximately 10,650 women who responded had been sexually harassed in the two

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\(^{44}\) Courts hold employers strictly liability for any other type of discrimination under Title VII. *See, e.g.*, Miller, 600 F.2d at 213 (announcing that respondeat superior applies in Title VII cases). *See Estrich, supra* note 38, at 853-54 and n.158 ("Where a supervisor discriminates in wages, hours, or working conditions, the employer must remedy that discrimination whether or not the employer knew about it, should have known about it, or approved it.").


\(^{46}\) Williams v. Saxbe, 413 F. Supp. 654, 654 (D.C. Cir. 1976). This early recognition only included quid pro quo sexual harassment.

\(^{47}\) Meritor, 477 U.S. at 57.

\(^{48}\) Anita Hill charged that Clarence Thomas sexually harassed her when she worked as his legal assistant at the Education department and the EEOC. She alleged that he asked her out and described pornographic movies, as well as his own sexual fantasies to her. *See, e.g.*, *Anita Hill Isn't Sorry About Harassment Claim; It Almost Cost Clarence Thomas a Seat on High Court*, KAN. CITY STAR, Oct. 7, 1992, at A6.

\(^{49}\) Oregon's Senator Bob Packwood was forced to resign in the face of alleged sexual harassment of coworkers and employees for many years. *See, e.g.*, Donna St. George & Jodi Edna, *Focus on the Packwood Diaries a Life Laid Bare*, ATLANTA J. & CONST., Sept. 10, 1995, at A12 (revealing excerpts of diaries show sexual activity at work for over two decades).

\(^{50}\) Paula Jones alleged that Mr. Clinton harassed her during a state-sponsored event in a Little Rock hotel when he was the Governor of Arkansas and she was a state employee. *See, e.g.*, Neil A. Lewis, *Court Denies Bid to Delay Clinton Sex-Harassment Case*, N.Y. TIMES, Jan. 10, 1996, at A1.

\(^{51}\) For example, companies are taking notice of their responsibilities, as evidenced by a 1994 Society for Human Resource Management poll that showed 75% of 292 companies had implemented some kind of sexual harassment prevention. Deborah Duenes & Francine Hermelin, *Sexual Harassment Inc.*, WORKING WOMAN, Oct. 1, 1994, at 9.
years prior to the survey.\textsuperscript{52} The estimated cost to the government for sexual harassment from 1978 to 1980 was $189 million.\textsuperscript{53} A follow-up study in 1988 revealed a similarly high rate of harassment,\textsuperscript{54} but the cost over a two year period increased to $267 million.\textsuperscript{55} A 1995 survey by the Washington Post of 8,000 federal workers found that 44\% of women and 19\% of men had been the subject of "uninvited, unwanted, sexual attention,"\textsuperscript{56} suggesting that there has not been a significant change in workplace behavior. Between 1992 and 1993, total awards from charges filed with the EEOC doubled, reaching $25.2 million.\textsuperscript{57} According to a 1988 poll in which 160 Fortune 500 companies responded, 90\% had received complaints for sexual harassment and one third had been sued.\textsuperscript{58} It costs the average Fortune 500 company $6.7 million a year in lost productivity from sexual harassment suits.\textsuperscript{59} A New York lawyer said that her corporate clients who go to trial each spend $100,000 in legal fees alone.\textsuperscript{60} Law firms also report high rates of harassment according to recent surveys. For example, a 1989 survey of 900 female associates and partners surveyed in the country's top law firms revealed that 60\% had been sexually harassed.\textsuperscript{61} The foregoing studies are just a sample of the high incidence and costs of sexual harassment in various fields, and the numbers are steadily increasing according to the EEOC. In 1990, the agency received 5,694 sexual harassment complaints, whereas 1995 brought nearly 16,000 complaints.\textsuperscript{62}

Statistical data are not necessarily an accurate reflection of the magnitude of the problem because sexual harassment is largely unreported.\textsuperscript{63} Vic-


\textsuperscript{53} Estrich, \textit{supra} note 38, at 821.

\textsuperscript{54} Baker, \textit{supra} note 4, at 213.

\textsuperscript{55} Estrich, \textit{supra} note 38, at 822.

\textsuperscript{56} Bill McAllister, \textit{Harassment Case Took 5 Years to Resolve; Many Say Lengthy Proceedings Show Difficulty of Proving Charges in Federal Bureaucracy}, \textit{WASHINGTON POST}, Mar. 13, 1996, A19 (citing survey by Merit Sys. Protection Bd.).

\textsuperscript{57} Duenes & Hermelin, \textit{supra} note 51, at 9.

\textsuperscript{58} Baker, \textit{supra} note 4, at n.16 (citing Ronni Sandroff, \textit{Sexual Harassment in the Fortune 500}, \textit{WORKING WOMAN}, Dec. 1988, at 69.)


\textsuperscript{60} Duenes & Hermelin, \textit{supra} note 51, at 9 (quoting Bettina Plevan, attorney with Proskauer, Rose, Goetz & Mendelsohn).

\textsuperscript{61} White & Matluck, \textit{supra} note 59, at 16 (citing a survey conducted by The National Law Journal/West Publishing).

\textsuperscript{62} Baker, \textit{supra} note 4, at 213 (citing Arthur Larson & Lex K. Larson, 1 \textit{Emp. Discrimination} § 41A.12 n.12 (1993)); Suzanne Wolfe, \textit{If You're Sexually Harassed.} (Legally Speaking), RN, Feb. 1, 1996, at 61. Ninety percent of the claims filed with the EEOC are by women. Elaine Herskowitz, a senior attorney with the EEOC's Office of Legal Counsel, explains this: "Sexual harassment is typically perpetrated by people who have power over their victims. And men are more often in a position of power." \textit{Id}.

\textsuperscript{63} See Ronni Sandroff, \textit{Sexual Harassment (Survey Results)}, \textit{WORKING WOMAN}, June 1,
tims fear the embarrassment and degradation of making a complaint, as well as reprisal. These fears are not unfounded, as illustrated by the experience of a woman who reported to her supervisors that she was sexually harassed by coworkers. Instead of correcting the situation, some supervisors participated in the harassment, while another responded that these things "happened in a man's working world every day in the week" so that she should not be oversensitive. Many women believe that filing a complaint is "career suicide." A female sprinkler fitter claims "sometimes I think I won't take this for one more day.' And then I think, 'They will not force me to leave this career, this security, this pay. I'm here to stay.'"

The damage to victims of sexual harassment covers a broad range of problems including the perpetuation of a hierarchical employment structure where women are not always viewed as equal to men. Additional ill effects include discharge, being forced to quit, and other damage to career. Psychological and physical effects such as anxiety, loss of self-confidence, nausea, headaches, high blood pressure, and ulcers are also common.

Finally courts are trying to address sexual harassment, but the Meritor construct is in need of improvement for the legal system to effectively handle the problem. Although recent legislation, such as the Civil Rights Act of 1991 which allows the award of capped compensatory and punitive dam-

1992, at 47 (reporting results of a reader survey with over 9000 participants). "More than 60% of our readers said they personally have been harassed. . . . However, since only one out of four women reported the harassment and most companies receive fewer than five complaints a month, it's obvious that the vast majority of women who are harassed don't feel they can safely report a problem." Id. See also Elizabeth Janice, I'm Not Going to Take it Anymore; Fighting Sexual Harassment in the Workplace, BLACK ENTERPRISE, Feb. 1, 1996, at 65 ("[A]bout 90% of cases are never reported, estimates William Petrocelli, co-author of Sexual Harassment on the Job: What It Is and How to Stop It.").

64. See Merriman & Yang, supra note 28, at 99 (explaining silence of victims makes it difficult to prove notice to employer of sexual harassment).

65. Id. See also Sandroff, Sexual Harassment (Survey Results), supra note 63, at 47 ("I cannot say absolutely that I would file charges, because I need that job! And that fact makes me really, really angry. . . . Many [of our] readers . . . insist that filing a complaint still amounts to 'career suicide.'").


67. See Sandroff, supra note 63, at 47.

68. Pollack, supra note 11, at 84.

69. Sandroff, supra note 63, at 47.

70. See Merriman & Yang, supra note 28, at 83 n.6.

71. Many commentators believe the progress is caused by an increase in society's awareness, and refer to this period as "post-Clarence Thomas-Anita Hill." See Janine De Fao, What is Sex Harassment? Schools Struggle to Learn, SACRAMENTO BEE, Nov. 8, 1994, at A1; see also Shari Finnell, Harassing Behavior Ingrained, INDIANAPOLIS NEWS, June 3, 1994, at C01; Kristina Sauerwein, A New Lesson in Schools: Sexual Harassment is Unacceptable, L.A. TIMES, Aug. 1, 1994, at E1 [hereinafter Sauerwein, A New Lesson] (stating that heightened public awareness has caused a flood of inquiries and lawsuits).

72. See supra notes 18-44 and accompanying text.

ages to victims of intentional harassment,\textsuperscript{74} has advanced plaintiffs' rights, more change is necessary. Most women responding to a 1992 survey believed that the government must make changes such as ease (78%) and speed up (80%) the complaint resolution process, lengthen state statutes of limitations for reporting harassment (60%), and increase penalties for companies (66%).\textsuperscript{75}

III. PEER SEXUAL HARASSMENT

A. THE EXISTING SITUATION AND RESULTING HARMs

Where women see greater recourse in the courts for workplace harassment, school-age girls face entirely unchartered territory in challenging peer sexual harassment.\textsuperscript{76} The increase in lawsuits and inquiries about peer harassment are an indication of the gravity of the problem. For example, the NOW Legal Defense and Education Fund in New York reports an explosion of cases in the past three years. Additionally, the founders of Parents for Title IX, an education-advocacy group dealing with sexual harassment in schools, receive dozens of calls every month about peer harassment. This is a dramatic increase since the group's commencement in 1992.\textsuperscript{77} Children are living through nightmares every day they go to school by being forced to endure fellow students' lewd comments and gestures, as well as being grabbed, rubbed up against, and fondled.

Rise S. Cramer knew shoes. The scuff on a sandal. The hole in a sneaker. The crusted mud on a boot.

The 13-year-old knew people by their shoes because her head hung low. Her eyes would greet feet.

\textsuperscript{74} 42 U.S.C. §1981a(b)(1), (2), & (3) (amount of compensatory and punitive damages varies with size of employer); see Pollack, supra note 11, at 51; White & Matluck, supra note 59, at 16.

\textsuperscript{75} Sandroff, \textit{Sexual Harassment (Survey Results)}, supra note 63, at 47.

\textsuperscript{76} This paper will only examine public elementary and secondary schools, although there is also sexual harassment in private institutions and higher education. See, e.g., Baker, \textit{supra} note 4, at 213 and nn. 20-21.

\textsuperscript{77} Sauerwein, \textit{A New Lesson}, supra note 71, at E1 (quoting Jeanette Lim, an attorney and director of policy and programs for the Federal Office for Civil Rights). See Kristina Sauerwein, \textit{Districts Get Word: Control Sex Behavior, St. Louis Post-Dispatch}, Nov. 26, 1995, at A1. The Department of Education's Office of Civil Rights spokesperson called sexual harassment in elementary and secondary schools "a growth industry": 143 student complaints in the 1992-93 academic year as compared with only 15 in 1987-88. "[A] good number" of these complaints were about peer harassment, although precise numbers are not available. Sauerwein, \textit{A New Lesson}, supra note 71, at E1; see infra notes 79-113 and accompanying text. Peer sexual harassment has been defined as student-to-student "behavior so severe, pervasive and persistent that it creates a hostile environment for the student [victim]... usually of a sexual nature."
Feet proved friendlier than the faces she met on the school bus, riding 10 miles . . . to Kearney Intermediate School.

These were the laughing faces of six or so boys about her age . . . who, she said, laughed when they called her a bitch and a whore. Who, she said, laughed when they told her she enjoyed having sex with dogs. Who, she said, laughed when they masturbated, clothed, in front of her. 78

In a 1993 nationwide survey of children in seventy-nine public schools, the American Association of University Women Educational Foundation (hereinafter "AAUW") found that four out of five eighth to eleventh graders experienced sexual harassment at public school. 79 Of the 1,632 students interviewed, 85% of girls and 76% of boys reported unwanted sexual advances that interfered in their lives. 80 Seventy-nine percent of those students were victimized by other students. 81 A 1995 survey of over 300 high school students in Missouri showed that about one in three students have observed or experienced sexual harassment, mostly student-to-student. 82 Comments written by the students included: "I'm female. It's like that's an open invitation to give me trouble. . . . I don't let it get to me. It happens all the time. [Sex discrimination] has made me untrusting, cautious and a little cynical. . . . It's a huge problem that needs to be addressed." 83 Young students are not immune to sexual harassment in school; the AAUW reported in another study that one third of children harassed by peers were in grade six or earlier. 84 In Minnesota alone, the Attorney General found more than 2,200 peer sexual harassment incidents were reported to elementary school administrators during the 1993-94 school year. 85 As a result of their surveys, the AAUW concluded that "we now know that sexual harassment in the classrooms and hallways of America's schools is a major problem—one we can no longer afford to ignore. Unchecked, it will continue to deny mil-

78. Kristina Sauerwein, Sex Harassment Makes School Hellish For Girl, St. Louis POST-DISPATCH, Nov. 26, 1995, at 1A (describing sexual harassment endured by a teen whose case is expected to go to trial next year).
80. Dolan, supra note 14, at 219 (citing HOSTILE HALLWAYS).
81. Sorenson, supra note 79, at 1.
83. Id.
84. Susan J. Berkson, Sex Harassment is the Enemy, Not This Curriculum, STAR TRIBUNE (MINN.), Dec. 8, 1994, at A27.
85. Id. We can only speculate about how many incidents went unreported. Victims are often unsure of what they have experienced or too afraid to tell anyone. See Kate Beem, Parents are Just Looking For All The Right Answers, KAN. CITY STAR, Nov. 26, 1994, at 1.
lions of children the educational environment they need to grow into healthy, educated adults."\textsuperscript{86}

Females are the most frequent targets, and males are most often the perpetrators of peer sexual harassment.\textsuperscript{87} "Although young men can also be victims of sexual harassment, it occurs less frequently, is usually less severe in form and seems to have less impact on [them]."\textsuperscript{88} The AAUW study estimated 85\% of girls and 76\% of boys reported harassment, but the discrepancy between genders increased when frequency of harassment was considered.\textsuperscript{89} While 66\% of females and 49\% of males claimed occasional harassment, 31\% of females as opposed to just 18\% of males reported being harassed often.\textsuperscript{90}

As the following accounts illustrate, much of the harassment includes remarks, gestures, touching, and staring. Two eighth-grade sisters in Houston stopped taking the bus to school because it became unbearable and dangerous.\textsuperscript{91} Several boys called them derogatory names for months, and on one occasion, a boy forced his hand up one sister’s skirt and blouse.\textsuperscript{92} A middle school boy regularly swatted and grabbed a female classmate on the school bus, in addition to making comments such as, "When are you going to let me fuck you?"\textsuperscript{93} A California teenager endured harassment that included a fellow student saying, "You look so good I could rape you."\textsuperscript{94} A ten-year-old student was fearful as she watched six boys throw two of her girlfriends onto the ground, stuff grass into their mouths to prevent screams, make lewd comments, and try to strip them.\textsuperscript{95} A woman in New York recalls a boy who cornered her in a classroom, put his hand in her blouse, and grabbed her breasts when she was 12 years old.\textsuperscript{96} A student explained her

\begin{thebibliography}{99}
\bibitem{86} Sorensen, \textit{supra} note 79, at 2 (quoting \textit{HOSTILE HALLWAYS}, \textit{supra} note 79, at 7).
\bibitem{87} See Carrie N. Baker, \textit{Proposed Guidelines on Sex-Based Harassment of Students}, 43 \textit{EMORY L.J.} 271, 278 (1994) (citing two national studies that show female students are harassed more than male students and suffer greater consequences than males); see also Dolan, \textit{supra} note 14, at 221-22. Therefore, this paper will only report experiences of female students.
\bibitem{88} John M. Leighty, \textit{When Teasing Goes Over the Line}, \textit{S.F. CHRON.}, Nov. 8, 1992, at 12 (citation omitted).
\bibitem{89} See Dolan, \textit{supra} note 14, at 221-22.
\bibitem{90} \textit{Id.}
\bibitem{92} \textit{Id.} An investigation by the U.S. Office of Civil Rights showed that girls riding on that bus were called obscene names on a daily basis, including "whore," "trick," and "slut." \textit{Id.}
\bibitem{93} Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996).
\bibitem{94} DeFao, \textit{supra} note 71, at A1. The teacher responded to the student’s complaint by moving the harasser’s seat to where he could make comments to other females in the class. \textit{Id.}
\bibitem{95} Sauerwein, \textit{A New Lesson}, \textit{supra} note 71, at E1.
\end{thebibliography}
fear when she was dragged into the boys’ locker room: “It was a joke at first and I was laughing, and then I didn’t think it was a joke anymore and I got really scared.”

Students have made sexual harassment a permanent and regular part of the school day and have even coined terms and phrases for the activities. In one Illinois school district the boys have created a grab-the-girls-in-the-private-parts-week. A Montana school is home to flip-up Friday when the boys lift girls’ skirts for sport. Students also participate in “spiking,” which describes two people pulling another student’s pants down, and “sharking,” which refers to biting body parts, such as breasts.

The consequences of sexual harassment for its victims, like this fourteen-year old New Hampshire girl, are tragic:

I’ve been sexually harassed for almost 3 years now, and it really hurts me, and it makes me feel like I’m a bad person, or that I’m no good and deserve what I get. One guy kept trying to feel me up and go down my pants in class. He’d also rub his leg up and down my leg and I hated it. He’d also ask me to have sex with him . . . . I really felt low and he called me a slut and a bitch when I said “NO.” It shouldn’t be happening to anyone, it breaks your soul and brings you down mentally and physically.

Another such victim is Rise Cramer, who still sees the laughing faces of the boys who harassed her. She saw them in her mind when she took a shard of glass and sliced it into her face. She saw them in her mind as she entered a psychiatric hospital because she “was tired of being alive.” Even after Mrs. Cramer pulled Rise and her brother out of the school district, she did not escape the torture. Rise said the incident “follows me . . . . I am the girl who boys did gross things to.” Another victim describes the harassment as so humiliating that she and her sister became depressed and withdrawn. Their grades plummeted as well as their self-esteem. After

99. Id.
100. Id.
102. Sorenson, supra note 79, at 1 (quoting NAN STEIN, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 3a (1993)).
103. Sauerwein, Sex Harassment Makes School Hellish for Girl, supra note 78, at 1A.
104. Id. As her reputation follows her so does the harassment. She was told by a boy who sucked on a hot dog that she should give him and his friend oral sex. Id.
105. Brooks, supra note 91, at 5 (discussing a peer sexual harassment case that may be heard by the 5th Circuit this year) (“One boy put his hands up my daughter’s skirt and
nine-year-old Jennifer Reichert received a sexually explicit note, she "felt
humiliated, confused, and sick to her stomach." After two of the note's
authors threatened to kill her, Jennifer's parents pulled her out of school,
fearing for her safety.106

Some resulting emotional responses experienced by victims are self­
doubt, fear, shame, anger, helplessness, confusion, and degradation.107
Physical consequences include insomnia, listlessness, and depression.108
Children are forced to change classes, stop riding the bus route, change
schools, and go through their education as innocent victims, enduring psy­
chological and physical torture. The AAUW reported that victims do not
want to go to school, do not want to talk in class as often, and cut classes or
school to avoid the harassment.109 When sexual harassment in school is al­
lowed to continue by those in charge it makes the victims feel betrayed by
peers and school staff, causing distrust and diminished interest in school.110
"If sexual harassment is allowed to occur it disrupts the right to equal edu­
cation by interfering with the student's psychological, social, and physical
well-being, plus learning, attendance, course choices, grades, and therefore,
economic potential."111 Some scholars and school administrators believe
that ignoring this conduct sends a message of inequality to girls and of
privilege to boys,112 a lesson that will remain with students through adult­
hood.113

As with workplace harassment, the first step in correcting peer sexual
harassment is to recognize the harm and move toward effective prevention
and remediation.114 A major obstacle to taking this step is the lack of ap­
propriate responses to the problem of peer sexual harassment by school

blouse, and another touched her genital area. My children suffered tremendously.").
106. Jack Cheevers, Schools Get Low Marks on Sexual Harassment, SEATTLE TIMES, July
107. See Berkson, supra note 84, at A27; see also Monica L. Sherer, No Longer Just
Child’s Play: School Liability Under Title IX For Peer Sexual Harassment 141 U. PA. L.
REV. 2119, 2131-34 (1993) (analyzing the difference in emotional responses evoked by
harassment and flirting).
108. Sherer, supra note 107, at 2134.
109. See Kirsten M. Eriksson, What Our Children are Really Learning in School: Using
Title IX to Combat Peer Sexual Harassment, 83 GEO. L.J. 1799, 1801 n.17 (1995).
110. See Sherer, supra note 107, at 2134.
111. Id. (quoting Susan Strauss, Sexual Harassment in School: Legal Implications for
Principals, NAT”L ASS'N SECONDARY SCH. PRINCIPALS BULL., Mar. 1988, at 93.)
112. See Jane Gross, Schools are Newest Arenas for Sex-Harassment Issues, N.Y. TIMES,
Mar. 11, 1992, at B8; see also Eriksson, supra note 109, at 1808 (“When schools fail to
respond appropriately to peer sexual harassment, they not only permit specific instances of
harassment to continue, but also promote the practice of sexual harassment, because the
perpetrator and others receive an implicit seal of approval from the school administra­
tion.”).
113. See Dolan, supra note 14, at 216 (“Sexual harassment at the student-to-student level
directly impacts the emotional and behavioral development of children, and sets the stage
for how they will treat each other as adults.”).
faculty and administration. A common attitude is "boys will be boys," and the conduct is construed as harmless exploration and joking. School officials have also expressed the view that the girls "asked for it." An elementary school vice principal, hearing about a sexually explicit note written to a female student, told the devastated victim to "respect" the boy and "give him his space." The situation got worse for the victim after making the complaint. School districts must recognize peer harassment as a serious problem in order to be effective in finding its cure.

B. EXISTING REMEDIES

1. State and Local Level

State governments and school districts have made some progress in alleviating the peer harassment problem. Many school districts have implemented sexual harassment policies and procedures, many of which include sanctions from warnings to expulsion. In 1993, California passed a law requiring school districts to have a policy defining sexual harassment and disciplinary measures to deal with violative behavior. Minnesota has had this type of law in effect since 1989. Advocates of harassment policies are glad to increase sensitivity to inappropriate and offensive behavior through publication of and discussion about harassment policies. One school district with a sexual harassment policy and procedure reported that there was no rash of complaints about everyday teenage behavior, as had been predicted. In addition to the existence of a policy and procedure,
many people believe that education and sensitivity must be part of a policy's implementation. "This must be a part of their daily lives, their attitude in every class . . . You can punish the action, but you don't end up changing the attitude that caused it." Critics disagree with trying to control students' social conduct, and caution that the law limits the extent to which a school may discipline a student. They are concerned about punishing students for crossing the not-always-clear-cut line that separates harmless flirting or joking from sexual harassment.

Districts have also educated school staff and students about what harassment is and how to handle it. In Minnesota, private consultants and the state have been providing secondary school teachers with harassment training for years. More recently, the Minnesota Department of Education received a federal grant for the development of a harassment prevention curriculum for elementary schools. Minnesota is the only state to require discussion of sexual harassment in the classroom, but California legislation does allow school officials to suspend or expel students in grades four through twelve for peer harassment. Additionally, schools have developed reporting procedures, surveyed students about harassment in the schools, and hired experts to conduct sexual harassment workshops for teachers and students.

2. Federal Level—Title IX

Under federal law, sexual harassment is prohibited under Title IX of the Education Amendments of 1972 which was designed to eliminate discrimination on the basis of sex in federally funded education programs. The statute provides, in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiv-

125. See Brooks, supra note 91, at 5; see also Katz, supra note 96, at 1 ("High school is a place where students typically joke with each other. . . . [Y]ou don't want to stifle kids' social lives. You don't want kids having to think before they speak.").
126. See Brooks, supra note 91, at 5.
127. The AAUW has workshop materials for teachers and students which covers what sexual harassment is and how to address it. Participants review language and conduct viewed as sexual harassment, and students are reminded of the difference between degradation caused by harassment and positive feelings caused by flirting. Dolan, supra note 14, at n.262 (citing Judy Mann, What's Harassment? Ask a Girl, WASH. POST, June 23, 1993, at D2).
128. Id.
129. CAL EDUC. CODE § 48900.2 (West 1995).
130. Sherer, supra note 107, at 2135-39.
132. 20 U.S.C. §§ 1681-86 (1994); 34 C.F.R. § 106.11 (1996); see Bennett v. West Texas State University, 525 F. Supp. 77 (N.D. Tex. 1981) (holding Title IX applicable only to programs receiving direct federal assistance).
ing Federal financial assistance . . . "133 The Department of Education Office for Civil Rights (hereinafter "OCR") is the agency in charge of enforcing Title IX.134 Its regulations prohibit sex-based harassment under the statute.135

In 1979, the Supreme Court upheld an implied private right of action under Title IX in Cannon v. University of Chicago.136 The Court based its holding on the purposes of Title IX which it interpreted as avoiding the use of federal funds to support discriminatory practices and providing individuals with effective protection against such practices.137 Later, in North Haven Board of Education v. Bell,138 the Supreme Court reaffirmed its view of Title IX and held that courts should accord the statute "a sweep as broad as its language."139

Several courts have since attempted to address the problem of sexual harassment in schools by drawing an analogy between Titles IX and VII, and using established Title VII standards for analysis.140 The Supreme Court first held that a claimant could obtain money damages from a school district for intentional sex discrimination141 under Title IX in Franklin v. Gwinnett County Public Schools,142 a case in which school officials failed to take remedial or preventative action, despite their awareness that a teacher was sexually harassing a student.143 In Franklin, the Court stated that a teacher's sexual harassment of a student, like a supervisor's harassment of

134. 34 C.F.R. § 106.1 (1996). A plaintiff may file a complaint with the Department of Education Office for Civil Rights for administrative remedy. The complainant may petition to be an amicus curiae at any administrative hearing regarding the complaint. Even without a complainant, the Department may investigate violations and impose sanctions, including withdrawal of federal funding. 34 C.F.R. §§ 100.7-.8.
135. 34 C.F.R. § 106.31(a) (1996).
137. Id. at 704.
139. Id. at 521.
140. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Dist. 1988); see also Petaluma, 830 F. Supp. at 1570-77.
141. Although Franklin did not expressly limit its holding to intentional discrimination, lower courts have interpreted the rule that way. See Joseph Beckham, Liability for Sexual Harassment Involving Students Under Federal Civil Rights Law, 99 Ed. Law Rep. 689, 690 (1995). When a school employee is the harasser, the school district’s intent is established under the agency principle of respondeat superior. See Franklin v. Gwinnett County Public Schools,141 503 U.S. 60, 75 (1992); see also Beckham, supra, at 690. The case did not give any further guidance as to what constitutes intentional discrimination.
143. The plaintiff alleged that a teacher asked her sexually-oriented questions, forcibly kissed her on the mouth, asked her out, and removed her from classes in order to subject her to coercive intercourse. When teachers and administrators were told of the harassment of plaintiff and other female students, they took no action to stop it and discouraged plaintiff from pressing charges. The teacher resigned on the condition that all matters pending against him be dropped. Franklin, 503 U.S. at 63-64.
an employee under Title VII,\textsuperscript{144} is enjoible sex discrimination and that a school district has an unquestionable duty to prevent sex discrimination under Title IX.\textsuperscript{145} Prior to Franklin, claimants could only seek withdrawal of federal funds from the institution or other equitable relief.\textsuperscript{146} However, the Court in Franklin noted that monetary damages are necessary to provide an adequate remedy for a student because backpay is inapplicable, and prescriptive relief offers no redress when the plaintiff and/or the accused are no longer at school.\textsuperscript{147}

In Doe v. Petaluma City School District,\textsuperscript{148} a federal district court extended the analogy of Title VII to Title IX to apply to peer sexual harassment. This court was the first to rule that students harassed by other students are entitled to damages from school districts under Title IX.\textsuperscript{149} In Petaluma, the basis of the plaintiff's claim was one of hostile environment sexual harassment;\textsuperscript{150} the plaintiff argued that a student is denied the benefits of or is subject to discrimination in an education program on the basis of sex when he/she is driven to quit the program as a result of the harassment.\textsuperscript{151} The Petaluma court noted that the Franklin case resembled a hostile environment case, because there was no indication that the teacher who engaged in the harassment conditioned a benefit or detriment on plaintiff's response.\textsuperscript{152} It found, in agreement with Franklin, that there must be proof of intentional sex discrimination by the school district for liability to be imposed.\textsuperscript{153} However, the district's failure to take appropriate action in re-

\textsuperscript{144}The Court cited Meritor, a leading case on employment discrimination. See supra text accompanying notes 17-44.

\textsuperscript{145}Franklin, 503 U.S. at 75.

\textsuperscript{146}OCR has never cut off funds to schools that discriminate, despite its power to do so. Tamar Lewin, A Touchy Issue: Schools Run Scared as Sex Suits Increase, COURIER-JOURNAL LOUISVILLE, KY, June 28, 1995, at 01A.

\textsuperscript{147}Franklin, 503 U.S. at 75-76.

\textsuperscript{148}830 F. Supp. at 1571-77.

\textsuperscript{149}Id. at 1576; accord Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996) (holding that plaintiff established prima facie claim under Title IX for sexual discrimination due to the Board's failure to take action to remedy a sexually hostile environment, despite knowledge of its existence). Cf. Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996) (concluding that Title IX does not impose liability on school districts, absent allegations that the district itself directly discriminated on the basis of sex). "Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys." Id.

\textsuperscript{150}Petaluma, 830 F. Supp. at 1575. The court noted the leading Ninth Circuit case, Ellison v. Brady, and its definition of a hostile environment where, "an employee can show (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment." Id. at 1572.

\textsuperscript{151}Id. at 1575; see 20 U.S.C. § 1681(a) (1994).

\textsuperscript{152}Petaluma, 830 F. Supp. at 1575.

\textsuperscript{153}Id. at 1576; cf. Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp 1437 (S.D. Tex.)
sponse to complaints about peer sexual harassment, as alleged by the plaintiff, was held insufficient to prove intent to discriminate. Failure to act, said the court, could be circumstantial evidence of the intent, and a plaintiff may claim that the inaction in the face of complaints was a result of the district's actual intent to discriminate against the student on the basis of sex. The court further stated that liability under Title VII, which holds an employer liable when he/she "knew or should have known" about the hostile environment sexual harassment, is inappropriate. The court said that the "'knew or should have known' standard is in essence a negligence standard," and actual intent is required.

In 1995, a federal district court finally defined intentional sex discrimination by a school district in *Bosley v. Kearney R-I School District.* Plaintiffs in that case claimed a Title IX violation against the school district for failing to act appropriately in the face of complaints about a hostile environment created by peer sexual harassment. The court explained that "discriminatory intent is a fluid concept that is sometimes subtle and difficult to apply." It does not mean the same thing as discriminatory motive, nor does it require that unlawful discrimination be the sole purpose behind defendant's actions. Instead, discriminatory intent is an objective evidentiary showing of defendant's total action and inaction, which "implies that the decisionmaker . . . selected or reaffirmed a particular course of ac-

154. *Petaluma,* 830 F. Supp. at 1576. The district court interpreted *Franklin* as holding that respondeat superior liability exists so that an institution is deemed to have intentionally discriminated when one of its employees harasses a student. It noted that agency principles are inapplicable to the relationship of a school district to a student. Therefore, respondeat superior cannot apply to peer sexual harassment. *Id.* at 1575-76. The court did not expand on what would be sufficient proof of intent to discriminate.

155. *Petaluma,* 830 F. Supp. at 1576 (explaining that "knew or should have known" is like negligence which means "an employer who knows or reasonably should have known of a hostile environment is liable even if it attempts in good faith to eliminate the hostile environment if it is found that the employer's efforts were not reasonably calculated to end the hostile environment.").

156. 904 F. Supp. 1006 (W.D. Mo. 1995). *Franklin* implicitly relies on agency principals to impute intent because it did not deal with peer harassment, and *Petaluma* did not explain what would be sufficient proof for intentional (actual) harassment.

157. *Id.* The court modeled its analysis on Title VII's "knew or should have known" standard and denied defendant's motion for summary judgment because of a genuine issue of fact as to whether defendant failed to act appropriately once on notice of sexual harassment. *Id.* at 1025.

158. *Id.* at 1020 (citing Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1185 (11th Cir. 1983) (holding court's finding of discriminatory intent not clearly erroneous where there was a disparity of municipal services among black and white areas)).

159. *Id.*

160. *Id.*
tion at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹⁶¹ Therefore, a plaintiff must show through direct evidence or by inference that defendant school district chose its response to complaints of peer sexual harassment at least in part because of plaintiff’s sex.¹⁶²

Underlying intent to discriminate is notice of a duty to prevent or stop wrongful conduct under Title IX. The Bosley court found notice to school districts from several sources including: Title IX which was enacted in 1972; the 1981 OCR definition of sexual harassment and subsequent compliance reviews and complaint investigations; OCR Letters of Findings in 1989, which found a school in violation of Title IX for failing to take adequate steps to stop peer harassment and creating a hostile environment; 1989 Title IX regulations requiring schools to appoint a coordinator and have grievance procedures; and the Franklin case in 1992 which put districts on notice of potential monetary liability under Title IX.¹⁶³ The court thus found a recently established duty to protect students from sexual harassment which could dramatically change the legal burdens in proving peer harassment by simplifying proof of intentional discrimination.

As for potential defendants other than school districts, the court in Petaluma held that individuals do not have liability under Title IX.¹⁶⁴ However, on appeal the Ninth Circuit forecasted a change in individuals’ liability for failure to act on reported peer sexual harassment. In reversing the district court’s denial of a school counselor’s qualified immunity, the Court of Appeals for the Ninth Circuit analyzed whether the counselor had a legal duty to take action against the peer harassment.¹⁶⁵ In order to deny a public official qualified immunity for acting in his/her official capacity, his/her duty must have been clearly established at the time of the inaction, which in

¹⁶¹. Id. at 1021 (quoting Personnel Adm’r of Mass. v. Feeney, 99 S.Ct. 2282, 2296 (1979)).
¹⁶². Id.
¹⁶³. Id. at 1025. It seems as if the Petaluma court’s dicta was correct. See supra notes 148-50 and accompanying text. It will be interesting to see what higher courts do with this decision.
¹⁶⁴. Petaluma, 830 F. Supp. at 1576-77 (dismissing claim because individuals have not been held liable under Title IX by other courts, are not subject to administrative enforcement, are not mentioned in related statutes, and are not liable under Title VII); see Davis v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (D. Ga. 1994) (dismissing Title IX claims against individuals because only federally funded institutions may be liable), rev’d on other grounds, 74 F.3d 1186 (11th Cir. 1996); see also Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437 (S.D. Tex. 1994) (dismissing claims against individuals under Title IX).
¹⁶⁵. Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1994). To overcome a claim of qualified immunity, the plaintiff must allege a violation of clearly established law. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). Therefore, it was Doe’s burden to show that the defendant failed to protect her from peer harassment when his duty was clearly established. Petaluma, 54 F.3d at 1449. At the time of defendant’s inaction, there was no clearly established duty to act. Id. at 1450.
this case was from 1990 to 1992. Since Franklin had not been decided at the time of the inaction, the Ninth Circuit concluded that there had not been a clearly established duty to prevent peer harassment. The court noted, however, that "if [defendant] engaged in the same conduct today, he might not be entitled to qualified immunity." In dicta, the court explained that a Title VII analogy, using a "knew or should have known" standard, might be appropriate for individual faculty liability under Title IX for future cases in which the inaction occurred after the Franklin decision. This could change liability for both individuals and districts if courts find school officials breached a clearly established duty to prevent peer sexual harassment.

One month after the Ninth Circuit opinion, the Federal District Court of Connecticut expanded the class of potential defendants by holding, in Mennone v. Gordon, that individual school officials could be held liable under Title IX for failure to protect students from reported sexual harassment. However, the court rejected the analogy to Title VII that other courts had employed. Rather, the court relied on the plain language of the statute and corresponding regulations to conclude that there is no restriction on the nature or identity of a defendant (i.e. individual, institution, etc.) if he, she, or it exercises a sufficient level of control over the federally funded educational program or activity. The statute does not on its face refer to individuals or institutions; it refers to programs or activities receiving federal funds. The regulations clarify the class of potential defendants by defining "recipient" as "any . . . institution, or organization, or other entity, or any person, to whom federal financial assistance is extended directly or

166. Petaluma, 54 F.3d at 1449.
167. Id. at 1452.
168. Id.
169. 889 F. Supp. 53 (D.Conn. 1995). However, defendant's motion to dismiss was granted on the basis of qualified immunity. Id. at 69 (holding that inaction did not violate a clearly established constitutional or statutory right).
170. Id. at 57 ("Although both statutes attack the same type of problems, they are structured so differently that Title VII is not an appropriate reference for determining the proper defendants in a Title IX action.").
171. The plain language of the statute broadly refers to "discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1994). See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1917) (using plain meaning to interpret Mann Act: "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.").
172. 34 C.F.R. §§ 106.1-2 (1996). Although an administrative agency's interpretation of a statute is not conclusive, it is entitled to deference if the interpretation is consistent with the language of the statute. Mennone, 889 F. Supp. at 59-60 (citing Young v. Community Nutrition Inst., 476 U.S. 974 (1986)).
173. Mennone, 889 F. Supp. at 59. The court dismissed contrary conclusions by other courts. Id. (stating "[c]areful review reveals that the Sixth Circuit did not even address this issue . . . . [D]oe offers a thoughtful analysis of the statute, but we believe the court's reliance on analogy to Title VII . . . is inappropriate.").
through another recipient and which operates an education program or activity which receives or benefits from such assistance . . . ."\textsuperscript{175} All that is required of a Title IX defendant is a degree of control over a federally funded education program or activity.\textsuperscript{176} The regulations also support the inclusion of individuals by stating that Title IX is "meant to eliminate . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution . . . ."\textsuperscript{177} Whether courts of appeals adopt this rationale to broaden the group of potential defendants for Title IX litigation remains an open issue.

IV. TREATMENT OF CHILDREN UNDER THE LAW

That children need to be protected from peer sexual harassment is apparent as based on the foregoing analysis, but the legal system must pay attention to the special nature of the victims when formulating standards. Given the extremely harmful effects known to result, the state has a compelling duty not to tolerate sexual harassment in public schools. A lawyer with Advocates for Children and Youth in Baltimore, Maryland correctly stated the need for action against peer sexual harassment: "[S]chool has become a place where things that used to happen outside are now happening inside, things that we never imagined, and we have to become prepared to deal with that . . . . I think that we have to address [these things]. . . . Not addressing them does not stop them from happening."\textsuperscript{178}

The framework of liability for adult sexual harassment does not work for children, who have traditionally received specialized attention under the law. It is well established that "[t]he state’s authority over children’s activities is broader than over like actions of adults . . . ."\textsuperscript{179} Minors’ lack of maturity, competence, and experience require parents and the state to control much of their lives.\textsuperscript{180}

Case law is replete with decisions based on the need to protect children more than adults.\textsuperscript{181} There are also state and federal statutory schemes de-
signed to offer special protections for children. For example, sexual activity with a minor is a criminal offense under state statutes. 182 On the civil side, children lack capacity to enter into binding contracts, and a minor may disaffirm any such contract. 183 The underlying theory is that minors need to be protected from their own inexperience and from adults who may take advantage of them. This policy is strong enough to overcome the contract-law policy of protecting the other party's expectation when he/she deals fairly and in good faith. A child is also prohibited from disposing of property by will; virtually all states require a testator to be at least eighteen years old. 184 This rule as well protects children from themselves and others. Various statutes prohibit the use of children for sexual stimulation or commercial gain. The Supreme Court has upheld such laws based on the compelling interest that states have in protecting the physical and psychological well being of children. 185 Similar interests were used to support child labor laws such as the Fair Labor Standards Act, 186 prohibiting "oppressive child labor" practices, which include employment of children under the minimum legal age for particular types of employment. 187 Children are also protected by statutes of limitations. They are generally given extra time in which to bring claims, usually until the age of majority. 188 The need to protect chil-

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182. E.g., CAL. PENAL CODE § 261.5 (West 1996) (making it unlawful to have sexual intercourse with a minor who is not the perpetrator's spouse); see also LA. REV. STAT. ANN. § 14:80 (West 1995) (making "Carnal knowledge of a Juvenile" unlawful).
183. See, e.g., D.C. CODE ANN. § 28:1-103 (1995) ("The age of majority as it pertains to the capacity to contract is eighteen years of age."); see also MD. CODE ANN., COM. LAW § 1-103 (1995) ("The age of majority as it pertains to the capacity to contract is eighteen years of age."). Disaffirm means "[t]o repudiate; to revoke a consent once given . . . ."

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184. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-1.1 (McKinney 1981).
187. "Oppressive child labor means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer . . . in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being . . . ." 29 U.S.C. § 203(1)(l) (1989).
dren supercedes an important policy by leaving the defendant open to potential liability for many years.189

Following the above examples, our legal system must protect children from peer sexual harassment with a doctrine tailored to meet the special needs of minors.

V. RECOMMENDATIONS AND CONCLUSIONS

The most important place and time to begin to abolish sexual harassment is in elementary and secondary schools before the proscribed conduct occurs.190 By sensitizing children at a young age, school districts can prevent the attitudes that cause people to become both harassers and victims.191 Tolerance of sexual harassment sends a message that society believes girls are less worthy than boys and may be treated accordingly. One of the most fundamental problems is ignorance about sexual harassment.192 Most students are not aware of what it is or that their conduct would be classified as harassment.193 Victims as well, are often unsure of what they have experienced.194 Strongly enforced legislation should require every school district to have a clear and detailed sexual harassment policy and procedure.195 Al-

189. Protecting defendants from stale claims brought after a reasonable time has elapsed is the primary purpose of enacting statutes of limitations. See David Siegel, NEW YORK PRACTICE 37 (2d ed. 1991) ("The statutes embody an important policy of giving repose to human affairs.") (quoting Flanagan v. Mount Eden Gen. Hosp., 248 N.E.2d 871, 872 (1969)).

190. See Spaid, supra note 98, at 3 (quoting the mother of an eighth grade harassment victim who received a $20,000 settlement from school district: "You could get a million dollars, but there's nothing that can pay you back for what's been taken from you.").

191. Just as some schools have diversity training as part of the curriculum to teach tolerance of people of other races, ethnicities, religions, etc., there should be gender education. See, e.g., ILL. ANN. STAT. ch. 105 para. 27-20.4 (Smith-Hurd 1995).

192. E.g., Irene Sege, Sexual Harassment 101, BOSTON GLOBE, May 27, 1993, at 65 (explaining that the 15-year-old boy suspended for verbal sexual harassment did not know how to approach the girl or know the line between friendly and offensive). It should be noted that for "harassment" to exist, the conduct must meet a minimum threshold of offense based on factors such as the age and intent of the perpetrator as well as the nature of the conduct. The recent incident involving six and seven year olds punished for kissing their classmates are better illustrations of the confusion among school officials than of peer harassment. See John Leland et al., A Kiss Isn't Just a Kiss, NEWSWEEK, Oct. 21, 1996, at 71.

193. See Finnell, supra note 71, at CO1 ("The boys were sort of stumped when the issue of sexual harassment came up. They said no one had ever told them they couldn't act like this - their behavior had been accepted throughout grade school and middle school.").

194. See id. ("During that tortuous school year, the thought of sexual harassment never entered my mind. Not once did I think of complaining to the teacher, the principal or my parents about the offensive behavior. In my mind, it was to be tolerated. I just had the misfortune of ending up in the wrong seat because of my last name.") (victim remembering the lewd comments and pinches of a male classmate in seventh grade).

195. Perhaps the best way to implement this proposal is by state law as in Minnesota and California. See MINN. STAT. ANN. § 127.46 (West 1995); see also CAL. EDUC. CODE § 212.6 (West 1995).
though many districts have policies, they often leave out important information such as who should be contacted with complaints and how to appeal school-district decisions to federal authorities. 196 Sections to incorporate into a peer harassment policy include: statement of policy and purpose; definition and examples of sexual harassment; reporting procedure, including notification of specified authorities, and importance of prompt and accurate reports; investigation of complaints, including confidentiality, investigation process, and discovery rules; resolution of complaint, including sanctions for perpetrators and students who make false accusations. 197 Where rules are clear and strict, students will be better protected from sexual harassment and its devastating consequences. 198 In addition, teachers should discuss sexual harassment in the classroom. Nan Stein, director for Wellesley College Center for Research on Women, advises schools against marginalizing the discussion to an assembly, disciplining in the principal’s office, or teaching a senior class on the subject. 199 Schools should fully inform students about what is expected of them and what the ramifications are for misconduct. Students should also have a clear understanding of what they can do as victims. Information is the key. If people learn proper conduct in school, there will be less incidence of peer harassment and less need to reform adult behavior. 200

A grievance procedure must include a well publicized avenue for complaints. Title IX requires the appointment of a coordinator to handle sexual harassment complaints, but not all school districts have complied and not all are effective. 201 Often executives with various other tasks and little or no experience in dealing with harassment are chosen. 202 “They don’t really have knowledge of all the laws; they just have this extra title,” reported Alicia Hetman, who has reviewed school compliance with anti-harassment laws for California’s Department of Education. 203 The person or persons who receive[s] complaints must be well-known and well-trusted to facilitate

196. Cheevers, supra note 106, at A8 (citing Alicia Hetman from California’s Department of Education).
198. In Atlanta, Georgia, Fulton County School District punished 123 students in 1994, Gwinnett County punished 136 students, including suspension of a high school student for coercing another student to perform sex acts behind the school, and Cobb County found 146 students in violation of sexual harassment policies. Sherrel Evans, Schools Get Tough on Sexual Harassment, ATLANTA J. & CONST., Dec. 17, 1995, at G8.
200. See Finnell, supra note 71, at CO1 (“Considering the lessons so many of us missed out on in grade school and high school, it’s no wonder so many men and women look stupefied when charges of sexual harassment enter the workplace.”).
201. See Cheevers, supra note 106, at A8.
202. See id.
203. Id.
student reporting of sexual harassment, whether witnessed or experienced. One possible method of selecting such person[s] is to allow the students to vote for faculty members who are interested. More than one appointee is beneficial, especially if there is at least one male and one female to hear the often embarrassing complaints.

Districts should also provide information and training about peer sexual harassment to administrators and all school district staff because they are responsible for educating and protecting, as well as punishing students. Teachers and school officials need to be able to recognize peer harassment\textsuperscript{204} and handle it when it exists. For example, school officials should take immediate and appropriate action to stop any harassment, use progressive discipline, and never punish the victim (i.e. relocate victim to another classroom)\textsuperscript{205}. Additionally, strict confidentiality may be appropriate to allow a perpetrator to learn from his mistakes without jeopardizing his future.

Even with education, however, there will be sexual harassment in schools, and an internal grievance procedure may not be sufficient. Because of its serious nature and resulting harms, peer sexual harassment must be punished through an effective legal framework that targets those entities and individuals responsible. Both school districts and faculty that condone this behavior by ignoring complaints and cries for help should be held liable pursuant to Title IX. The District Court of Connecticut took the right approach in \textit{Mennone}\textsuperscript{206} for determining who may be liable under the statute. Courts need not look further than the plain language of the statute and regulations to see that individuals and institutions with control over federally funded education activities and programs may be held liable.\textsuperscript{207} This is contrary to the rule under Title VII where individuals are not liable for sexual harassment because employer liability is deemed a cost of doing business. Because public education is different from private employment, there is no reason to create the same ambiguous legal standard under Title IX. Schools should share liability with the employees who allow the perpetuation of sexual harassment of students. Children rely on teachers and administrators for guidance and protection, necessitating that those with authority be held personally liable for violations of Title IX.

\textsuperscript{204} See \textit{Peer Harassment: Ridding Your School District of Title IX Troubles}, supra note 199, at 10 ("A common mistake school officials make when presented with sexual harassment allegations is not being able to recognize what is and is not sexual harassment," said an attorney whose law firm represents 265 schools and community colleges in California). Nan Stein also cautions administrators not to "go nuts if you hear one bad word." Behavior must be repeated, severe, or pervasive to constitute hostile environment sexual harassment. \textit{Id.} at 9.

\textsuperscript{205} \textit{Id.} at 10 (as recommended by counsel for National Women's Law Center). An appropriate response will vary from case to case. \textit{Id.}

\textsuperscript{206} \textit{Mennone}, 889 F. Supp. at 56.

\textsuperscript{207} See \textit{supra} notes 152-56 and accompanying text. Higher level courts have not spoken on \textit{Mennone}'s theory of individual liability.
Now that the duty to protect students from peer harassment has been clearly established, a standard of liability should be framed using some Title VII definitions and substantive standards, but tailored for child plaintiffs. For example, the unwelcomeness standard for employment-related sexual harassment is not well suited for application to children. A child plaintiff should only have to prove that sexual advances were made, not that the his/her conduct made it clear that they were unwelcome. There should be a presumption against the appropriateness of sexual conduct between students in school because sex in school interferes with the academic environment, and minors are traditionally viewed as unable to give consent for sexual activity. Making a student prove unwelcomeness assumes that the conduct is welcome and acceptable unless he/she objects. Furthermore, established methods of proving unwelcomeness should not apply to children; their conduct and dress should not amount to consent. It is inappropriate to treat children as sex objects, and it can be a humiliating and degrading experience for the victim to have his/her speech and dress closely scrutinized.

When a child is sexually harassed in school, the extreme emotional and physical damage interferes with his/her education, thereby creating a hostile environment. The hostile environment theory is fitting for an academic setting where a nondiscriminatory environment is essential to intellectual growth. Hostile environment harassment turns on reasonableness, and subjecting a young student to forced sexual advances in the school setting should be presumed unreasonable. The degree of harassment should be a factor in determining the amount of relief available, not an element of the violation. Franklin, Petaluma, and subsequent cases require proof of intentional discrimination in order to bring a hostile environment action under Title IX. However, prior cases have held that a plaintiff may make out a violation of Title IX without proving defendant had a specific intent to discriminate. A school or faculty member that knew or should have known

208. Bosley v. Kearney R-I Sch. Dist., 904 F. Supp. 1006, 1025 (W.D. Mo. 1995); see Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1401-02 (9th Cir. 1994) ("Given the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools.").

209. See supra note 182 and accompanying text.

210. See Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 551 (1987). Quid pro quo harassment does not apply to peer harassment because there is no supervisor/subordinate relationship on which to condition a tangible benefit.


212. See Estrich, supra note 38, at 858.


215. See Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993)
of the sexual harassment and did not act has discriminated against the victim on the basis of sex. The Petaluma court's statement that this failure could only be circumstantial evidence of intent to discriminate has been criticized by a school attorney who wrote: "It is difficult to imagine when a school district . . . receiving the number and frequency of complaints as did the Petaluma School District, would not be charged with intentional discrimination for failure to act on those complaints." Based on this reasoning, as well as the identity of the claimant, making such discrimination per se intentional when proved by a child is an appropriate legal protection. A per se rule goes one step further than Bosley which held that a federally funded district's failure to act despite knowledge of sexual harassment could lead the factfinder to infer that the defendant intentionally discriminated based on sex.

Peer sexual harassment in schools is a very serious and widespread problem. It is not acceptable for districts and faculty to look the other way and ignore a student's plea for help. The results are too grave. The first steps are prevention and school awareness. However, if school personnel are aware of harassing behavior but do not take action to help the victim, they must be held liable. The cause of action already exists under Title IX, but the analysis must be formulated to apply specifically to children as plaintiff-victims. Although a legal solution will not entirely correct the social problem of sexual harassment, a better legal solution is a viable improvement. It is of supreme importance to reach the goal of Title IX, which is prevention of discrimination in education.