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Boys Will Be Boys: Peer Sexual Harassment in Schools and the Implications of *Davis v. Monroe County Board of Education*

* Tianna McClure*

Students, as a group, do nothing. Teachers do nothing. Schools do nothing. The government does nothing. And the courts do nothing. The burden falls squarely on the shoulders of sexually harassed children, and the message sent to them is "deal with it."¹

For years when the topic of peer-to-peer sexual harassment has arisen, the refrain among courts and educators has been "boys will be boys."² Some argue that no one would react in this manner today, but unfortunately this is not the case. "Teasing, kicking, shoving and pokes in the face are annoying and hurtful to any child who is victimized by them. Such behavior may even leave them quite traumatized and upset... [but] such conduct... is not actionable."³ Furthermore, in determining the issue of peer-to-peer sexual harassment, the Supreme Court has stated that "[t]easing is as standard in elementary schools as the ABC's."⁴ These comments not only underplay the severity and prevalence of sexual harassment in schools, but they fail to recognize the true magnitude of the problem. Sexual harassment among students goes far beyond simple

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². Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1565 (N.D. Cal. 1993), rev'd in part, 54 F.3d 1447, 1455 (9th Cir. 1995) (quoting Richard Homrighouse, a counselor at Kenilworth Junior High School in Petaluma, California, in response to a sexual harassment claim filed by one student against another student).


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“teasing,” including acts of physical violence and rape.

"ALMA MCGOWEN"

In 1996, Alma McGowen filed a lawsuit against the Spencer Board of Education, alleging that she had been subjected to intentional discrimination as a result of peer conduct in violation of Title IX of the Education Amendments. Between 1992 and 1995, McGowen was subjected to severe emotional and physical abuse at the hands of other students. During her sixth-grade year, students yelled “Oh, there’s that German gay girl” and a high school student asked her to describe oral sex. After McGowen complained to school officials, the student continued to curse at her and “was even more vulgar than before.”

When McGowen entered high school in 1993, the school principal’s nephew confronted her and demanded to know if she was a lesbian in front of other students. The official school response came from the assistant vice-principal, who told her that the boys were just flirting with her because they thought she was cute. The assistant principal then told her that she should just “be friendly.” Throughout the remainder of the year, students regularly pushed her into walls, stole and destroyed her homework and grabbed her bookbag. In another incident, a male student in her class called her and other female students “whores” and “motherfuckers,” hit them, snapped their bras and touched them in sexually explicit ways. The student also stole a pen from McGowen’s bag, and when she tried to retrieve her pen, the student stabbed her in the hand. After McGowen reported the incident to school officials, the student told McGowen that he would not get into trouble because he was the son of a school board member.

Perhaps the most violent incident occurred while McGowen was in her seventh-grade science class. While the teacher was out of the room, two boys held McGowen’s hands, while other students grabbed her hair and yanked her shirt off. It was only when a male student began to take off his pants and said he was going to have sex with McGowen that another student intervened. The only school response was that the teacher “spoke” with the boys. The harassment then escalated to the point that McGowen was “propositioned or touched inappropriately in virtually every class. [McGowen] testified that the more she complained to the principals, . . . the harassment . . . increased.”

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6. Id. at 256.
7. See id.
8. Id.
9. Id.
subjected to resulted in her withdrawing from school.10

"THE SPUR POSSE"

In the spring of 1993, another case came to media attention that illustrated the true severity of sexual harassment in schools.11 A group nicknamed the "Spur Posse" garnered massive media attention after nine members were arrested on charges of rape and other related charges.12 In complaints filed by seven young women and girls, the young women alleged that they were victims of harassment, intimidation and gang rape by members of the "posse."13 After one of the victims reported being raped,14 members of the "Spur Posse," while on school premises, threatened to kill her, physically assaulted her and called her derogatory names such as "bitch," "whore" and "slut."15 In light of this, the young woman approached school administrators in an effort to receive help.16 Unfortunately, the administration merely validated the young men's actions through their failure to aid the young woman and their failure to discipline the members of the "posse."

As if this behavior alone were not serious enough to have merited the attention of school administrators, members of the "Spur Posse," while on school property, sold T-shirts that read "Member of the Lakewood High Posse."17 These T-shirts contained illustrations of stick figures representing a point system, which awarded a point to members each time they achieved orgasm with a different female.18

While the facts of this case alone are sufficient to shock the conscience of any person, the response by the school and some members of the community was almost as outrageous as the conduct of the members of the "posse." A father of one of the "posse" members stated that the competition was nothing more than "healthy teenage fun" and that the girls were simply promiscuous.19

In the end, a majority of the members of the "posse" were subject to minimal amounts of censor and punishment by the school and the

10. See id. at 257. In September 1998, a jury returned a verdict in favor of McGowen, awarding her $220,000. See id. at 258. While this action was pending on appeal, the Supreme Court decided Davis. See id.
12. See id.
15. Id.
16. See id.
18. See id.
community." In fact, after the story began to garner media attention, the Principal of Lakewood High School, Mike Escalante, proposed that rather than discipline the young men involved, some of the victimized young women should transfer to other schools. In response to this, a mother of one of the victimized girls stated quite eloquently: "Our daughters have to go?... I don’t see why they can’t get the kids together and say this will not be tolerated. If handling it means getting rid of the victims, then they’re sure not handling it very well."****

I. INTRODUCTION

The recent Supreme Court decision in *Davis v. Monroe County Board of Education*, recognized for the first time that a school district may be held liable for failure to respond adequately to peer sexual harassment under Title IX. While the issue of teacher on student harassment is no less serious, this Note specifically addresses the issue of peer-to-peer sexual harassment in schools. In Part II of this Note, I identify and discuss recent court cases that have established a school’s liability for sexual harassment under Title IX, looking, in part, to the case law surrounding Title VII. Part III examines the jurisdictional conflicts regarding peer sexual harassment prior to the Supreme Court’s holding in *Davis*. In Part IV, I discuss and examine the holding and rationale of *Davis*. Part V highlights policy considerations, including the applicability of applying a loci parentis standard to schools and the use of state law remedies as an alternative to Title IX. Part V concludes with an examination of the ways in which Congress can amend Title IX, thus providing students the level of protection that they deserve. But, before this analysis continues, it is necessary to define sexual harassment and consider the societal factors that contribute to it.

Under the California Education Code, sexual harassment is defined as:

[U]nwelcome sexual advances, requests for sexual favors, and

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20. After the extensive press coverage of the incidents, which occurred at Lakewood High School, the Los Angeles District Attorney’s Office charged two of the individuals with child molestation for allegedly engaging in sexual intercourse with a ten-year-old girl. The District Attorney’s Office declined to prosecute the other fifteen claims that were filed, explaining that, "Although there is evidence of unlawful sexual intercourse, it is the policy of this office not to file criminal charges where there is consensual sex between teenagers." While "the District Attorney’s Office in no way condones the callous and cruel behavior of the Spurs,... arrogance and contempt for young women... cannot form the basis for criminal charges." David Ferrell, 2nd Molestation Charge Filed in Teen Sex Scandal, L.A. TIMES, Apr. 20, 1993, at B1, B1-B3.


22. Id.


other verbal, visual, or physical conduct of a sexual nature, made
by someone from or in the work or educational setting, under any
of the following settings:

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

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

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

Submission to, or rejection of, the conduct by the individual is
used as the basis for any decision affecting the individual
regarding benefits and services, honors, programs, or activities
available or through the educational institution.\(^2^5\)

Furthermore, Bernadette Marcezly, a professor of education at
Cleveland State University, has defined sexual harassment in schools as:

Sexual harassment is defined by the victim; if an individual finds
the comments or physical contact to be unwelcome, then it is
harassment and sexual harassment is a continuum of unwanted
behaviors ranging from spoken or written comments or stares [pep
rally skits . . . which degrade females, graffiti in bathroom walls or
a playboy centerfold used as a high school text book cover by male
students are some of the least egregious examples in the literature]
to actual physical assault and attempted rape.\(^2^6\)

In the workplace, sexual harassment has been defined as:

Harassment on the basis of sex is a violation of Sec. 703 of Title
VII. Unwelcome sexual advances, requests for sexual favors, and
other verbal or physical conduct of a sexual nature when . . . (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.\textsuperscript{27}

Therefore, a working definition of sexual harassment includes sexual attention, which is unwanted, from peers, teachers, school administrators and coaches, "or anyone the victim must interact with in order to fulfill . . . school duties,"\textsuperscript{28} which creates a hostile or offensive educational environment. This unwanted attention includes comments that are sexual in nature, jokes, gestures, being touched or groped in a sexual manner, being shown sexually explicit pictures, messages or notes, being the target of sexual rumors and/or being forced to engage in sexual activity.\textsuperscript{29} Having established a working definition of what may constitute sexual harassment in a school setting, we are left with the question: What causes such behavior in students?

A. FROM WHERE DOES THE PROBLEM OF SEXUAL HARASSMENT IN SCHOOLS STEM?

In today's society, the problem of sexual harassment is prevalent in schools and in the workplace. It is so prevalent that many educators "ignore, downplay or [are] unaware of sexual harassment,"\textsuperscript{30} even assuming it to be an ordinary part of the school day—"a lot of people do it, it's no big deal."\textsuperscript{31} "Although employers are recognizing and responding to sexual harassment in the workplace, schools are still in the early stages of deciding what to do about peer sexual harassment."\textsuperscript{32}

In response to the Supreme Court's decision in \textit{Davis}, schools must begin to understand the nature and severity of sexual harassment by students in schools or face the possibility of monetary damages. Schools must recognize that they are responsible for monitoring student behavior and preventing or remedying peer sexual harassment. In order to achieve this level of understanding, it is imperative that one considers what societal factors contribute to the problem of sexual harassment in schools.

While a common refrain when addressing sexual harassment in schools

\begin{itemize}
\item \textsuperscript{27} 29 C.F.R. § 1604.11 (2000).
\item \textsuperscript{28} Jill Suzanne Miller, \textit{Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims}, 1995 U. ILL. L. REV. 699, 707 (1995) (quotations and citations omitted).
\item \textsuperscript{29} See Andrea Giampetro-Meyer et al., \textit{Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in Title IX Peer Sexual Harassment Cases}, 12 WIS. WOMEN'S L.J. 301, 303 (1997).
\item \textsuperscript{30} JOHN F. LEWIS & SUSAN C. HASTINGS, \textit{SEXUAL HARASSMENT IN EDUCATION} 20 (2d ed. 1994).
\item \textsuperscript{31} AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., \textit{HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN SCHOOLS} 12 (1993) (noting that thirty-seven percent of student harassers gave the answer that it was no big deal to explain their behavior) [hereinafter AAUW survey]. Louis Harris and Associates conducted the survey, which contained surveys of 1,632 public school students from more than seventy-nine schools across the United States. \textit{See id.}
\item \textsuperscript{32} Nash, supra note 26, at 1131.
\end{itemize}
is that "boys will be boys," the causes of sexual harassment stem from complex circumstances, including gender stereotypes and myths. There are many myths regarding sexual harassment in schools, including—it is just teasing, it is a natural part of adolescence or the harassment will stop if a person simply ignores the offensive behavior.33

Perhaps more importantly, the gender stereotypes that are prevalent in society in general contribute to and encourage sexual harassment. Gender stereotypes "are not based on factual information [but] are the thoughts or cognitions we hold about the supposed nature of women and men... women are typically perceived as helpful, loyal, patient, submissive, dependent, nurturing, and sexual... men are typically perceived as independent, dominant and aggressive."34 The "deeply engrained idea of man as the powerful protector of woman has been a compelling and pervasive component of every child's education and socialization. Too often the hidden curriculum of our schools teaches our students that power over women is a basic right and responsibility of manhood."35 Therefore, "[w]hile girls are learning that they are not as valuable as boys, boys are learning that they are more important than girls and come to believe that girls [do not] have the same rights."36

For girls, school becomes the place where their aspirations are stymied, their self-confidence is all but destroyed and their physical integrity is stripped. For boys, school becomes the place where they learn not only that discrimination and harassment are acceptable, but also where they learn how to discriminate and harass.37

The way children, boys in particular, view the members of the opposite sex and members of their own sex is a key component in understanding what are the underlying causes of sexual harassment among children, adolescents and adults.

35. Robert J. Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide for Administrators and Teachers 31 (1994). But see Christina Hoff Sommers, The War Against Boys, ATLANTIC MONTHLY, May 2000, at 59-74. In this article, Sommers argues that in reality girls are faring better under the current educational system than boys. She argues that girls receive higher grades, have higher educational goals, and enroll in more advanced placement courses. Conversely, boys are more likely to be suspended or expelled from school, have higher rates of suicide and are less likely to go to college. See id. at 59-74.
37. Bodnar, supra note 1, at 565.
B. THE PREVALENCE OF SEXUAL HARASSMENT IN SCHOOLS.

Peer-to-peer sexual harassment begins as early as kindergarten, continues throughout elementary school and persists into high school, where harassment is unfortunately the norm rather than the exception. Take for example an Illinois school district where male students routinely participate in “grab-the-girls-in-the-private-parts week.” Similarly, in a Montana elementary school boys participate in “flip-up Friday” where they try to lift up as many girls’ skirts as they can. Across the United States, incidents such as these and others including pulling down girls’ pants and biting girls’ body parts have become so common that they are referred to in slang as “sharking” and “spiking.”

While the majority of empirical studies conducted on peer sexual harassment have focused on the university or collegiate level, a comprehensive national study was conducted in 1993 by the American Association of University Women Educational Foundation (hereinafter “AAUW survey”). The survey, which defined sexual harassment as “unwanted and unwelcome sexual behavior that interferes with your life,” asked the students if another student, teacher or other school employee had done any of the following:

- made sexual comments, jokes, gestures or looks;
- written sexual graffiti on the bathroom or locker room walls about the student;
- shown, given, or left the student sexual messages or pictures;
- spread sexual rumors about the student’s sexual activity or orientation;
- spied on the student while dressing or showering;
- flashed or mooned the student;
- touched, grabbed or pinched the student;
- intentionally brushed against the student in a sexual way;
- pulled the student’s clothing in a sexual way;

39. Id.
40. Id. at 1799-1800.
41. See AAUW Survey, supra note 31, at 7.
blocked or cornered the student in a sexual way; or

forced the student to engage in kissing or something sexual, other than kissing. 42

The 1993 Survey revealed what many students, school administrators, teachers and practitioners already knew—that eighty-one percent, or four out of five students, had been subjected to, and the target of, “unwanted and unwelcome behavior that interfered with their lives.” 43 The majority of this harassment is not teacher on student, but rather it is peer-to-peer sexual harassment. Eighty-six percent of the girls and seventy-one percent of the boys who responded that they had been harassed were targeted by “a current or former student at school.” 44 Likewise, sixty-six percent of the boys and fifty-two percent of the girls surveyed admitted to having sexually harassed another student. 45

This survey illustrates the pervasiveness of peer-to-peer sexual harassment. Sexual harassment between students is often “misconstrued as a normal rite of passage [or] as awkward ‘getting-to-know-you’ behaviors,” and thus perceived as nothing more than harmless adolescent behavior such as “flirting.” 46 However, “this ignorance about the dangerous effects of harassing behavior all too often results in lifelong injury to its victims.” 47 The ramifications of sexual harassment can be devastating to all victims, but it is especially harmful to those who are victimized while in the process of changing from a child to an adolescent and adult. It is at this time that one’s perceptions about the world and oneself are formed. To be victimized sexually at this time is something that cannot, and should not, be ignored by the schools or by the courts.

C. THE EMOTIONAL, PHYSICAL AND EDUCATIONAL CONSEQUENCES OF SEXUAL HARASSMENT IN SCHOOLS.

The consequences of having been sexually harassed by one’s peers can be severe, affecting one’s physical, mental and emotional well-being. The emotional responses triggered by the harassment may manifest themselves as physical problems, which can include: insomnia, ulcers, headaches, weight loss or gain, respiratory problems, eating disorders and suicide attempts. 48 Furthermore, some researchers have suggested that these effects

43. AAUW Survey, supra note 31, at 7.
44. Id. at 11.
45. See id. at 11-12.
47. Bodnar, supra note 1, at 559.
48. See Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to
can be characterized as the "sexual harassment syndrome,"\textsuperscript{49} manifested by the following symptoms:

- general depression;
- undefined dissatisfaction with classes;
- sense of powerlessness, helplessness and vulnerability;
- loss of academic self-confidence;
- feelings of isolation from other students;
- fear and anxiety;
- inability to concentrate; and
- alcohol and drug dependency.\textsuperscript{50}

Most importantly, sexual harassment in schools undermines the very educational process that is supposed to occur in school. As Adrienne Rich noted:

Women and men do not receive an equal education because . . . women are perceived not as sovereign beings but as prey . . . . The undermining of self, of women's sense of her right to occupy space and walk freely in the world, is deeply relevant to education. The capacity to think independently . . . to assert ourselves mentally, is inseparable from our . . . feelings of personal integrity. Because sexual harassment affects girls' and young women's self-esteem and self-confidence, interferes with their emotional health, forces them to change their behavior at school, and directly affects their course of study, academic accomplishments and learning

\textit{Prohibit Student to Student Sexual Harassment,} 2 UCLA WOMEN'S L.J. 85, 89 (1992). For example:

A young woman in the eighth grade is writing out her last will and testament . . . . Life seems unbearable because the school day has become a living hell. The boys have been incessantly taunting her about the size of her breasts to the point where she cannot face them at school. She would walk to school and, all of a sudden, she would hear "moo" bellowing out from a group of boys. This behavior occurred before school, after school, between classes, during classes, and at lunchtime. Her mother complained but the school refused to take any action. The school board's response: "boys will be boys."

Bodnar, \textit{supra} note 1, at 561 n.106 (quoting Sherer, \textit{supra} note 46, at 2120).

\textsuperscript{49} Vita C. Rabinowitz, \textit{Coping with Sexual Harassment, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS} 103, 112-13 (Michele Paludi ed. 1990).

\textsuperscript{50} Id.
environments, the mere presence of sexual harassment clearly limits girls and young women in their educational pursuits.\textsuperscript{51}

It is important to remember that what occurs in a school setting can affect an adolescent for years to come and therefore shape society. The "school environment provides an important context for the development of self-esteem" among boys and girls.\textsuperscript{52} "It is within the school setting that children and adolescents experience varying degrees of success in both academic tasks and social integration with peers."\textsuperscript{53} By interfering with healthy development, sexual harassment in schools leads to a myriad of problems. One very serious consequence is an increased likelihood of delinquency. Adolescents who engage in delinquent behavior tend to be unable to recognize their own acceptability and value.\textsuperscript{54} There appears to be a direct correlation to a child's or an adolescent's perception of self and involvement in delinquent or criminal behavior.\textsuperscript{55} The deprivation of access to an equal education is only one result of peer sexual harassment. However, it is also one that now constitutes a violation of federal law.\textsuperscript{56} In accord with the Supreme Court decision recognizing peer sexual harassment as actionable under Title IX, educators, parents and the community as a whole must continue to reinforce that sexual harassment is legally and ethically unacceptable. It is not simply a case of "boys being boys."

\textbf{II. NOTABLE COURT CASES ESTABLISHING A SCHOOL'S LIABILITY FOR SEXUAL HARASSMENT}

The judicial interpretation of Title IX recognizes that sexual harassment in the context of education constitutes sex discrimination and is therefore actionable under Title IX.\textsuperscript{57} \textit{Alexander v. Yale University}, the first case to discuss the issue of sexual harassment as a form of gender discrimination under Title IX, established three important prerequisites for school liability under Title IX.\textsuperscript{58} These included that:

the school must possess actual notice of the alleged sexual

\textsuperscript{51} Bodnar, \textit{supra} note 1, at 563-64 (quoting ADRIENNE RICH, \textit{TAKING WOMEN STUDENTS SERIOUSLY} (1978), \textit{reprinted in ON LIES, SECRETS, AND SILENCE} 237, 241-42 (1979)).
\textsuperscript{52} Sandra Bosacki et al., \textit{Field Independence—dependence and self-esteem in preadolescents: Does gender make a difference?}, \textit{J. OF YOUTH AND ADOLESCENCE} 691, 691 (Dec. 1997).
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{See id.}
\textsuperscript{55} \textit{See id.}
\textsuperscript{56} \textit{See Davis v. Monroe County Bd. of Educ.}, 526 U.S. 629, 629-32 (1999).
\textsuperscript{57} \textit{See Alexander v. Yale Univ.}, 459 F. Supp. 1, 4 (D. Conn. 1977), \textit{aff'd}, 631 F.2d 178 (2d Cir. 1980) (discussing the issue of whether a school's failure to remedy allegations of sexual harassment made by students against members of the faculty has the effect of condoning the behavior and thus constituting gender discrimination under Title IX).
\textsuperscript{58} \textit{Id.}
harassment and fail to take steps to remedy the situation;

the alleged harassment must have been conducted by a faculty member as an agent of the school; and

the sexual demands must be in exchange for an educational opportunity or benefit.  

It was not until 1979, however, that the United States Supreme Court held in Cannon v. University of Chicago, that Title IX confers on plaintiffs the implied right to maintain a private cause of action against educational institutions that violate the Act's provisions.  The Court stated that while it is better for Congress to explicitly specify its intent for plaintiffs to have the right to maintain a private cause of action, 

the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation. Title IX presents the atypical situation in which all of the circumstances . . . supportive of an implied remedy are present.

Subsequent to the decisions in Alexander and Cannon, courts have heard various claims regarding a school board's liability for sexual harassment. For years the standard to show school liability for sexual harassment remained the standard set forth in Alexander. However, courts began to apply the principles established under Title VII to Title IX cases. Therefore, in order to discuss school sexual harassment case law in depth, an analysis of Title VII employment case law is necessary.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."  Two theories of liability have developed through case law under Title VII: quid pro quo and hostile work environment. The traditional standard required that a plaintiff demonstrate that there was quid pro quo harassment where an employee's superior made a demand for sexual favors in exchange for employment. In order to establish a prima facie case the plaintiff has to prove that unwelcome comments or conduct occurred and

59. Id.
60. 441 U.S. 677, 717 (1979). In spite of the fact that Alexander identified liability for sexual harassment under Title IX, three years passed before the Court definitively interpreted Title IX to grant parties a private cause of action.
61. Id.
63. See, e.g., Ellerth v. University of Tex. at Dallas, 52 F.3d 543, 545 (5th Cir. 1995).
the conditions of the plaintiff’s employment were contingent upon his or her response to those comments or actions. Further, the plaintiff must show that the employer should be liable for the actions of a supervisory employee under the doctrine of respondeat superior.

In 1986, the Supreme Court expanded employer liability for sexual harassment, recognizing that sexual harassment also exists if the unwelcome conduct or comments create a “hostile work environment” for the employees. In *Meritor Savings Bank v. Vinson*, the Court first recognized that a hostile work environment is a form of sexual discrimination actionable under Title VII. Furthermore, the Court held that Title VII is not limited to “tangible” discrimination, but also applies to sexual harassment resulting in a non-economic injury, such as emotional or psychological damage. The plaintiff in *Meritor*, female bank employee Mechelle Vinson, filed suit against Meritor Savings Bank and the Vice President of the bank, Sidney Taylor. Ms. Vinson alleged that Taylor had constantly subjected her to sexual harassment. Ms. Vinson recounted that Taylor invited her to dinner, during which he suggested they have sexual intercourse at a motel. At first Ms. Vinson refused to comply, but she eventually agreed out of fear of losing her job. She further alleged that Taylor fondled her in front of other employees, exposed himself to her and forcibly raped her on more than one occasion.

In establishing that a hostile work environment can constitute actionable sex discrimination under Title VII in the wake of *Meritor*, courts have identified five elements which a plaintiff must prove: (1) membership in a protected class; (2) gender-based harassment; (3) unwelcome and severe harassment; (4) hostility in the workplace under both an objective and subjective standard and (5) that the employer “knew or should have known” of the sexual harassment and failed to remedy it.

An understanding of Title VII is necessary to understand how courts initially responded to sexual harassment in schools. The Supreme Court first applied Title VII jurisprudence to sexual harassment in schools in the landmark case of *Franklin v. Gwinnett County Public Schools*. Franklin

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66. *See Meritor*, 477 U.S. at 64-68.
67. *Id.*
68. *See id.*
69. *See id.* at 59.
70. *See id.* at 59.
71. *See id.*
72. *See id.*
73. *See id.*
74. Giampietro-Meyer et al., *supra* note 29, at 308.
75. 503 U.S. 60, 75 (1992).
was also the first Title IX sexual harassment case considered by the Supreme Court.\textsuperscript{76} The primary issue in \textit{Franklin} was whether a student who had been sexually harassed by a teacher could receive monetary damages from the school under Title IX.\textsuperscript{77} In their decision, the Justices unanimously held that schools could be held liable for monetary damages for violating Title IX.\textsuperscript{78}

Christine Franklin, a female high school student, alleged that over the course of two years, Mr. Andrew Hill, an athletic coach and teacher employed by the school district, subjected her to "continual sexual harassment."\textsuperscript{79} Ms. Franklin alleged that beginning in the fall of her sophomore year, Hill forcibly kissed her in the school parking lot, telephoned her at home, engaged her in sexually explicit conversations and interrupted one of her classes to take her to a private office where he subjected her to "coercive intercourse."\textsuperscript{80} Furthermore, Ms. Franklin alleged that school officials, aware of this behavior, investigated the matter but failed to take action to protect her.\textsuperscript{81} The school district even discouraged Franklin from reporting Mr. Hill to the authorities.\textsuperscript{82}

In spite of these serious allegations, the United States District Court dismissed Ms. Franklin's complaint, stating that "Title IX does not authorize an award of damages."\textsuperscript{83} The Eleventh Circuit affirmed the lower court's decision.\textsuperscript{84} Reversing the Circuit Court's decision, the Supreme Court acknowledged that "where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."\textsuperscript{85} Therefore, the Court recognized that monetary damages were an appropriate remedy for a Title IX violation.

\textit{Franklin} is important, not just because it recognized damages as an appropriate remedy, but also because it analogized sexual harassment in the workplace to sexual harassment in the schools. Issuing a strong statement opposing sexual harassment in schools, the Court stated:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when

\textsuperscript{77} 503 U.S. at 63.
\textsuperscript{78} See id. at 64-77.
\textsuperscript{79} Id. at 63.
\textsuperscript{80} Id.
\textsuperscript{81} See id. at 64.
\textsuperscript{82} See id.
\textsuperscript{83} Id.
\textsuperscript{85} \textit{Franklin}, 503 U.S. at 66 (quoting \textit{Bell v. Hood}, 327 U.S. 678, 684 (1946)).
a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” We believe the same rule should apply when a teacher sexually harasses and abuses a student.66

However, the Court failed to address what standard of liability was applicable to Title IX sexual harassment claims. Therefore, the “question of whether students should have the same, or even more, protection in the educational setting under Title IX as workers have in the employment setting under Title VII . . . puzzled” courts and educators.87

The Supreme Court finally addressed the issue of the correct standard of liability in Gebser v. Lago Vista Independent School District.88 Prior to this decision, the Supreme Court issued opinions in two pivotal cases in its 1997 term. In Faragher v. City of Boca Raton89 and Burlington Industry, Inc. v. Ellerth,90 the Supreme Court adopted the theory of vicarious liability for the workplace. Under this theory, an employee could recover damages against the employer for the actions of a supervisor even if the employer did not have actual knowledge of the supervisor’s actions.91 Therefore, while it was clear that schools could be held liable for the actions of their employees, the myriad of court opinions failed to produce a clear legal framework under which cases could be heard and school boards could operate.92 Finally, in 1998, the Supreme Court in Gebser definitively answered the question of what standard of liability applies to teacher on student sexual harassment in schools.

A discussion of the facts surrounding Gebser illustrates the severe emotional consequences that sexual harassment can have on a child. While in the eighth-grade, plaintiff, Alida Gebser, joined a book discussion group led by Frank Waldrop, a teacher at Lago Vista High School.93 Ms. Gebser alleged that during the discussion sessions, Mr. Waldrop made sexually suggestive comments.94 Upon entering high school, Ms. Gebser was enrolled in one of Mr. Waldrop’s classes.95 During class, Mr. Waldrop continued making sexually suggestive comments and began directing these comments towards Ms. Gebser.96 In the spring of her freshman year, Mr.

86. Id. at 75 (quoting Meritor, 477 U.S. at 64).
91. See id.
92. See Neiger, supra note 87, at 37-38.
93. See Gebser, 524 U.S. at 277.
94. See id.
95. See id. at 277-78.
96. See id. at 278.
Waldrop kissed and fondled her while visiting her at home. On a number of occasions throughout the school year, the two engaged in sexual intercourse. This "relationship" continued into the following school year, and while the two often engaged in sexual activity during school hours, it never took place on school property.

During this time, parents of other students complained to the administration about what they believed were inappropriate comments made by Mr. Waldrop. While the principal discussed the complaints with Mr. Waldrop, he failed to notify the school superintendent, who was the school district's Title IX coordinator. A few months later a police officer discovered Mr. Waldrop and Ms. Gebser engaged in sexual activity and arrested Mr. Waldrop. In response, the school immediately terminated his employment.

The district court rejected Gebser's Title IX claim, finding that in order to be liable a school district must have actual notice of the alleged sexual harassment. Further, the court held that in this case the evidence presented "was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that Waldrop was involved in a sexual relationship with a student." The Fifth Circuit affirmed the district court's opinion and held that a school district is not liable for teacher on student sexual harassment under Title IX unless (1) the school board or the proper employee knew or should have known of the abuse, (2) the person had the power to end the abuse and (3) failed to do so.

The Supreme Court responded to the lower court's decision, centering its opinion on the question of whether a school should be held liable for the acts of employees when the school itself did not know about the harassment. Writing for the majority, Justice O'Connor distinguished Title IX from Title VII, stating that while Title VII's goal is to remedy discrimination throughout the economy and to compensate victims, "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." The majority held that it would therefore "frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a

97. See id.
98. See id.
99. See id.
100. See id.
101. See id. The Title IX coordinator is responsible for ensuring the school district complies with the provisions of Title IX and responds to claims of sexual harassment appropriately.
102. See id.
103. See id.
104. See id. at 279.
105. Id.
106. See id at 279-80.
107. Id. at 287.
student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official."^{108} Furthermore, the Court held that damages were only appropriate when an official "who at a minimum has the authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge... and fails to adequately respond."^{109} Therefore, an appropriate school official must have actual knowledge and the school official's failure to stop the harassment must amount to deliberate indifference.

The body of case law that the Supreme Court had to this point developed clearly identified sexual harassment as a form of sex discrimination actionable under Title IX. However, prior to Davis, the Court had not decided whether schools could be or should be held liable for peer-to-peer sexual harassment. In light of this, there was a complete lack of consensus among lower courts regarding whether school districts could be found liable for peer-to-peer sexual harassment, and if they could, then what was the proper standard of liability—actual notice or constructive notice.

III. PEER-TO-PEER SEXUAL HARASSMENT: THE JURISDICTIONAL SPLITS PRIOR TO DAVIS V. MONROE COUNTY BOARD OF EDUCATION

Because of the failure by the Supreme Court to address the issue, there was intense disagreement between federal courts regarding what standard of liability, if any, should apply to peer sexual harassment. As previously mentioned, all of the Supreme Court decisions regarding sexual harassment in schools involved teacher on student harassment. As a result, federal courts were left to their own devices and developed three different approaches to this issue.

The Fourth, Ninth and Tenth Circuits adopted the constructive notice standard established under Title VI"^{110} As previously discussed, under Meritor,"^{111} this required only that a school knew or should have known of the sexual harassment to be liable.

108. Id. at 285.
109. Id. at 290. Under the standard established, the Court held that the school district was not liable for damages. See id. at 292.
111. 477 U.S. 57, 69-71 (1986). See also 29 C.F.R. § 1604.11(d), which stated that: [W]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.
The second approach, which was the Equal Protection Test applied by the Fifth Circuit, imposed liability only when the school responded to sexual harassment claims differently based upon gender. Under Rowinsky v. Bryan Independent School District, a school district was not liable for peer-to-peer sexual harassment absent allegations that the school district "responded to sexual harassment claims differently based on sex." In rejecting the argument that Title IX imposes liability on school districts for the acts of third parties, the court held that a plaintiff must prove that the school intentionally discriminated against the abused student because of the student's gender. The court found the application of Title VII principles of constructive notice inapplicable because in peer sexual harassment "the key ingredient of power is missing between harasser and victim."

The third approach, utilized by the Eleventh Circuit sitting en banc in the now overruled Davis decision, refused to find any liability for school districts for peer sexual harassment under Title IX. In reaching this decision, the Eleventh Circuit held that "Title IX only imposes the duty on educational institutions to 'prevent their employees from themselves engaging in gender discrimination,' not a non-employee from discriminating against a student."

IV. DAVIS V. MONROE COUNTY BOARD OF EDUCATION: A CRITICAL EXAMINATION

The Supreme Court in its decision in Davis definitively resolved this conflict between federal courts, finally answering whether peer sexual harassment was actionable under Title IX and what the appropriate standard of liability for such claims would be. This section focuses upon the pertinent facts of the Davis case and offers a critique of the majority's opinion.

In their recent decision in Davis, the Court framed the issue for consideration as whether deliberate indifference to known acts of harassment amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. The Supreme Court held that a school board may be liable for damages under Title IX in cases of peer sexual harassment "in certain limited circumstances." However, the Court qualified this...
holding, requiring that to incur liability a school board must: (1) be deliberately indifferent to the sexual harassment and (2) have actual knowledge of the harassment.\textsuperscript{120} Furthermore, the plaintiff must establish that the harassment is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively" deprived of access to the educational opportunities or benefits provided by the school.\textsuperscript{121} With this decision, the Supreme Court finally recognized that peer sexual harassment is a serious problem, deserving protection under Title IX. In reaching this conclusion, the Court established an even stricter standard than \textit{Gebser}, placing the bar at such a level that, contrary to the opinion expressed by the dissent,\textsuperscript{122} it will often be impossible for a plaintiff to recover against a school board in cases of peer sexual harassment.

Beginning in December of 1992, Petitioner's minor daughter, LaShonda, became the target of a prolonged pattern of sexual harassment by a fellow fifth-grade classmate.\textsuperscript{123} According to the Petitioner, the aggressor, G.F., made statements such as, "I want to get in bed with you" and "I want to feel your boobs."\textsuperscript{124} G.F. also attempted to grab LaShonda's genitals and breasts.\textsuperscript{125} After each of these instances, LaShonda reported G.F.'s inappropriate behavior to her teacher, Diane Fort, and to her mother, the Petitioner.\textsuperscript{126} The Petitioner also contacted Ms. Fort to report the harassment of her daughter.\textsuperscript{127} At this time, Ms. Fort allegedly reassured the Petitioner and told her that the principal, Bill Querry, had been notified regarding the incidents.\textsuperscript{128} However, no disciplinary actions were apparently taken to remedy G.F.'s behavior.\textsuperscript{129}

This pattern of abusive behavior continued for several more months, and in February of 1993, G.F.'s harassment escalated to include physical contact. In one particularly disturbing incident, G.F. placed a doorstop in his pants and "proceeded to act in a sexually suggestive manner towards LaShonda during physical education class."\textsuperscript{120} Less than one week later,

\textsuperscript{120} \textit{See id.} at 633.
\textsuperscript{121} \textit{Id.} at 651 (emphasis in original).
\textsuperscript{122} \textit{See id.} at 654-86. Justice Kennedy's dissent stated: "[T]he majority's liability standards will allow almost any plaintiff to get to summary judgment, if not to a jury." \textit{Id.} at 680. For a discussion of the dissenting opinion in \textit{Davis}, see Joan E. Shaffner, \textit{Davis v. Monroe County Board of Education: The Unresolved Questions}, 21 \textit{WOMEN'S RTS. L. REP.} 79, 83-84 (2000) ("The dissent claimed that '[t]he prospect of unlimited Title IX liability, will . . . breed a climate of fear that encourages school administrators to label even the most innocuous childish conduct sexual harassment.").
\textsuperscript{123} \textit{See Davis}, 526 U.S. at 633.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{See id.}
\textsuperscript{126} \textit{See id.} at 633-34.
\textsuperscript{127} \textit{See id.} at 634.
\textsuperscript{128} \textit{See id.}
\textsuperscript{129} \textit{See id.}
\textsuperscript{130} \textit{Id.}
G.F. again engaged in sexually harassing behavior. In April of 1993, G.F. allegedly pressed his body against LaShonda in “a sexually suggestive manner.” LaShonda reported each incident to a teacher and the Petitioner contacted the teachers to follow up on the complaint.

However, the behavior did not stop until May of 1993, when G.F. was charged with, and pled guilty to, sexual battery. As a result of the prolonged sexual harassment, LaShonda’s grades dropped because of her inability to concentrate on her schoolwork in the face of continued abuse. Moreover, LaShonda contemplated suicide, going so far as to write a suicide note and telling her mother that she “didn’t know how much longer she could keep [G.F.] off her.”

As if the experience of LaShonda taken by itself was not sufficient to warrant the school administration’s involvement, it was also alleged that numerous other girls were targets of G.F.’s harassment as well. In fact, a group of female students, including LaShonda, attempted to discuss the abuse with the principal. According to the complaint, however, their efforts proved futile. “[A] teacher denied the students’ request [to meet with the principal] with the statement, ‘If [Querry] wants you, he’ll call you.’” Furthermore, when the Petitioner asked the principal what action would be taken to stop the behavior, Principal Querry stated, “I guess I’ll have to threaten him a little bit harder.” At no point, according to the complaint, was G.F. ever disciplined for his actions. Furthermore, Querry even asked the Petitioner why LaShonda “was the only one complaining.”

LaShonda was only allowed to move her classroom seat away from G.F. after more than three months of reported complaints. In response to the school’s failure to respond to the allegations and protect LaShonda, the Petitioner filed suit in district court, alleging “[t]he persistent sexual advances and harassment by the student G.F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities,” and that “[t]he deliberate indifference by the Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school

131. See id.
132. Id.
133. See id.
134. See id.
135. See id.
136. Id.
137. See id. at 635.
138. See id.
139. Id.
140. Id.
141. See id.
142. Id.
143. See id.
environment in violation of Title IX.” The district court dismissed the claim, concluding that absent an allegation that the school board or an employee of the school board was involved in the harassment, Title IX provided no liability. On appeal to the Eleventh Circuit, the dismissal of Petitioner’s claim was reversed. Analogizing to Title VII, the Eleventh Circuit panel determined that peer sexual harassment stated a cause of action under Title IX:

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

However, in an en banc hearing the Eleventh Circuit reversed the decision of the panel and affirmed the district court’s decision to dismiss Petitioner’s claim. Relying upon the understanding that Title IX was passed pursuant to Congress’s authority under the Spending Clause of the United States Constitution, the Court held that the statute must provide "potential recipients of federal education funding with ‘unambiguous notice of the conditions they are assuming when they accept’ it.” They held that the language of Title IX fails to give adequate notification to funding recipients that they have a duty to prevent peer sexual harassment. In a dissent, four judges urged that the failure of the statute to identify “the perpetrator of the discrimination” indicates that it covers misconduct by third parties as well as employees, reasoning that the plain language of the statute provided sufficient notice to a district that failure to respond to peer sexual harassment could trigger liability.

In response to the confusion among lower courts regarding the scope of Title IX, the Supreme Court granted certiorari to resolve the issue of whether and when a school district may be held liable for peer sexual harassment under Title IX. As previously stated, the Supreme Court reversed the en banc decision of the Eleventh Circuit and held that peer sexual harassment is a violation of Title IX for which school districts may

144. Id. at 636.
145. See id. (citing Davis, 862 F. Supp. 363, 368 (M.D. Ga. 1994)).
146. See id. (citing Davis, 74 F.3d 1186, 1195 (11th Cir. 1996)).
147. Id. (quoting Davis, 74 F.3d at 1193).
148. See id. at 637 (citing Davis, 120 F.3d 1390, 1390 (11th Cir. 1997) (en banc)).
149. See id. (citing Davis, 120 F.3d at 1399); see also U.S. Const. art. I, § 8, cl. 1.
150. Id. (quoting Davis, 120 F.3d at 1399).
151. See id. (citing Davis, 120 F.3d at 1401).
152. Id.
153. See id.
be held liable. The Court established that a plaintiff must meet a two prong test for a school district to incur liability. The plaintiff must show that the school acted (1) with deliberate indifference to the sexual harassment and (2) had actual knowledge of the harassment. Furthermore, the harassment must interfere with the sexually harassed student's ability to achieve an education and deprive that student of educational opportunity.

In establishing the first prong of the test, requiring a school respond with deliberate indifference, the Court simply applied the same standard it had established in Gebser. In Gebser, the Court stated that deliberate indifference was the appropriate standard because "[u]nder a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' actions." Under the deliberate indifference standard established by the Court, what amount of action by schools is enough and what level of inaction amounts to deliberate indifference? In establishing this standard, the Court fails to identify what response by schools is adequate and what response is inadequate. The Court only states that the school "must merely respond to known harassment in a manner that is not clearly unreasonable."

If a school administrator suspends the perpetrator from school for one day, even for one week, is that sufficient to avoid liability? Applying the facts of Davis, if Principal Querry had responded by moving LaShonda's seating assignment in class, or transferred her to another class, would that have been sufficient action? Assuming that such actions had been taken, in all likelihood the sexual harassment would have continued. Under the Court's opinion, it is possible that although the school has failed to protect LaShonda, they are no longer liable under Title IX because they have not responded with "deliberate indifference."

The second prong of the test, which requires that the school have actual notice of the sexual harassment, is equally troubling. A more appropriate standard of liability would be the constructive notice standard, requiring that the school knew or should have known of the harassment. Before addressing why a constructive notice standard, developed according to Title VII cases, is the better standard, we must examine arguments set forth by the Court and commentators against the application of the constructive notice standard.

In Davis, the Supreme Court operates under an assumption that actual knowledge is the correct standard of liability. In arguing that the

154. See id. at 642-43.
155. See id. at 643.
156. See id. at 650.
158. Id. at 290-91.
constructive notice standard established under Title VII is inapplicable to Title IX, the employment context has been distinguished from the educational context. Opponents to the constructive notice standard have stated that schools are not able to control students to the same extent that employers can control their employees. Furthermore, "in light of the inherent difficulties in controlling the behaviors of children, the possibility of imposing significant legal liability on a school system based on the behavior of an uncontrollable student can be difficult to justify." Others also rationalize the rejection of the constructive notice standard because school administrators "cannot and do not want the additional responsibility of monitoring and controlling student-on-student interactions to prevent harassment." In a survey, one principal even stated that although he believed "that the school should control blatant sexual harassment, subtle types of harassment, including sexually suggestive comments and excessive flirtation, were beyond the school's power to control."

We should look to the similarities that exist in the two spheres of work and school, rather than simply say that schools are different from employment. This comparison between the workplace and schools illustrates that adoption of the constructive notice standard by the Court would have been more appropriate and provided better protection to students. First, as the Fifth Circuit articulated, "there is no meaningful distinction between the work and the school environment which would forbid such discrimination in the former context and tolerate it in the latter." The similarities between the workplace and schools are numerous, including that attendance is required. In the workplace, most individuals must go to work every day or at least regularly to support themselves and their families. Similarly, parents, society in general and the government compel students to attend school regularly.

Furthermore, the differences between students in schools and employees in a workplace setting increase the need for a more protective constructive notice standard. Students are even more constrained than employees are because they must attend the public school for the district in which they live unless they are able to afford a private school.

160. See Giampetro-Meyer et al., supra note 29, at 316.
161. Id.
162. Id. (footnotes and citations omitted).
163. Id. (footnotes and citations omitted).
164. Doe v. Independent Sch. Dist., 975 F.2d 137, 149 (5th Cir. 1992), vacated, 15 F.3d 443 (5th Cir. 1994).
165. Currently, all fifty states have compulsory attendance laws, requiring students to attend school regularly.
Elementary and secondary students are essentially captives in their educational environment. An employee can change jobs more easily than a student may change schools. A student is often restricted to certain school districts... transferring to a private school is not an option. As economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.67

Moreover, school administrators exercise a higher level of control over students than an employer does over employees. The school, under the law, assumes supervision and custody of students during school hours such that they made be held liable for injury to students during school hours.68

Both the similarities and the differences emphasize the necessity for at least the constructive notice standard for Title IX liability for peer sexual harassment. These illustrate the obvious conclusion that a student who is a victim of peer sexual harassment "should not be required to make a more difficult showing" than an adult who is a victim of sexual harassment in the workplace.69 '[T]he distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in schools.'70

Nevertheless, it is true that an employment relationship differs from that of a school/student relationship. Clearly, the ways in which schools respond to a student who sexually harasses another student must be different from the remedies available to an employer. An employer may terminate the employment of an employee who engages in sexually harassing behavior. While a school district may not "fire" a student, they do have a variety of solutions available to them that are analogous. For instance, a school may remove the student from the class, issue a suspension, or even expel the student. While this may create additional costs for the school district in placing the expelled students elsewhere, the expense incurred would be well worth it when one considers the incalculable benefits of an education free from sexual harassment. The additional expense is worth the benefits of empowering generations of girls and young women.

Furthermore, the Court went one step beyond Gebser, requiring that in cases of peer sexual harassment not only must the school be deliberately indifferent to sexual harassment of which they have knowledge, but the harassment must be of such severity that it deprives the victim of access to educational opportunities before liability will attach. Unfortunately, the

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69. Giampetro-Meyer et al., supra note 29, at 320.
Court fails to identify what behavior will satisfy this requirement. While it is therefore clear that peer sexual harassment is actionable, the question remains: where does the Court—and thus school districts—draw the line "between childish behavior and ‘actionable’ harassment.”

V. POLICY: USING ALTERNATIVE METHODS FOR ANALYZING SCHOOL LIABILITY

In the Davis decision, the Supreme Court affords substantially less protection to students than it does to adults in the workplace. Essentially, the Supreme Court held that "students are separate, less equal, and more vulnerable legally to sexual harassment under Title IX than are adult workers under Title VII.” The question now arises: Is there another form of relief available to students who are sexually harassed by their peers? Initially scholars argued that the answer might lie in the traditional notion of in loco parentis, where school administrators exercise considerable control over students for numerous reasons. School officials “are considered to stand in loco parentis towards students to protect them from exposure to such things as sexually explicit, indecent, or lewd speech; [and] school officials may also administer corporal punishment to exercise disciplinary control if it is required.”

Unfortunately, despite the level of control that schools exert over the lives of students, the Supreme Court has held that schools do not stand in loco parentis under the law. The Court instead stated that school administrators “do not merely exercise authority voluntarily conferred on them by individual parents” but instead they act “as representatives of the state, not merely as surrogates for the parents.”

We require attendance at school up to a certain age, enforcing this government mandate through truancy laws. If the government requires students to attend school and decides which schools they may attend, then the government must accept some responsibility for their safety. Schools are parents during the school day. Not only are students compelled to attend them, the school tells them what to wear, what they can and cannot say, and even discusses intimate issues such as sexuality. It is logical that as a result schools should be held to stand in loco parentis.

171. Shaffner, supra note 122, at 82.
172. Jeffrey A. Thaler, Are Schools Protecting Children from Harassment? Not Well Enough, and the U.S. Supreme Court’s Recent Interpretation of Title IX is Shielding Schools from Liability, 35 AUG. TRIAL 32, 33 (1999).
173. The literal translation of the Latin phrase “in loco parentis” is “in the place of the parents.” Specifically, the school acts as the parent, with all the legal responsibilities, during school hours. See id. at 32.
174. Giampetro-Meyer et al., supra note 29, at 319 (citations and footnotes omitted).
175. See Thaler, supra note 172, at 33; see also DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989); New Jersey v. TLO, 469 U.S. 325, 336 (1985).
An alternative solution to the current problem is to create a state remedy. Various states have enacted statutes making it a violation of state law to allow or fail to remedy peer sexual harassment. Minnesota requires all schools to have a specific policy which condemns sexual harassment.\textsuperscript{177} Massachusetts, California and Colorado all forbid sexual harassment by statute but do not mandate that individual school districts establish policies against sexual harassment.\textsuperscript{178} In passing such statutes, states need not rely on the provisions set forth in Title IX. Furthermore, they need not utilize the rationale set forth in the Supreme Court, but they may instead remedy peer sexual harassment in a way that they see fit, offering the protection to their students that they deserve.

While the creation of a state-based remedy would certainly be a step in the right direction, it would not ensure that all U.S. students receive the same level of protection. Therefore, the best way to achieve a remedy to peer sexual harassment is for Congress to amend Title IX to include a provision regarding peer-to-peer sexual harassment. This amendment must legislatively establish a constructive notice standard as a response to the Supreme Court's decision in \textit{Davis}. Specifically, the amendment to Title IX should:

Include the term sexual harassment.

Include a definition of sexual harassment, which incorporates peer sexual harassment as well as teacher on student harassment.

Establish constructive notice as the appropriate standard under which courts should determine liability.

Therefore, Title IX § 1681 should be amended to read:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

For the purposes of this Title, discrimination on the basis of sex shall include sexual harassment that is by teachers on students and by students against other students.

Sexual Harassment is defined as: sexual attention, which is unwanted, from peers, teachers, school administrators, and coaches, or anyone with whom the victim must interact in order to fulfill school duties, which creates a hostile or offensive


\textsuperscript{178} See Nash, supra note 26, at 1135-36.
educational environment.

The recipient of Federal financial assistance shall be held liable if they knew or should have known of the discrimination and failed to remedy it.

VI. CONCLUSION

It is well established that peer sexual harassment is a pervasive part of the educational landscape. Failure to respond adequately to the abuse of children while they are in school has long-range and far-reaching consequences. Unfortunately, while clearly a step in the right direction, the recent Supreme Court decision in Davis leaves schoolchildren without adequate protection. Instead, the Court provides less protection and legal redressability than that granted to adult victims of sexual harassment—who are in a better position to protect themselves. Victims of peer-to-peer sexual harassment are forced to look to other avenues to redress their injury. Some states have responded to this in passing statutes that set the bar higher than the Supreme Court in Davis. Adoption of the in loco parentis doctrine is another alternative.

Ultimately, Congress must amend Title IX to ensure all of America’s students have adequate protection from peer sexual harassment. School administrators, teachers and parents must recognize the damage sexual harassment can inflict on young people and seek to remedy it instead of excusing peer-to-peer harassment as instances of “boys being boys.” It must be the goal of every member of Congress, school administrator, teacher and parent to eradicate peer sexual harassment from our schools and finally guarantee all children equal access to an education.