

1-1-2001

Peer Sexual Harassment in California after Davis

John F. Walsh

Follow this and additional works at: <https://repository.uchastings.edu/hwlj>



Part of the [Law and Gender Commons](#)

Recommended Citation

John F. Walsh, *Peer Sexual Harassment in California after Davis*, 12 Hastings Women's L.J. 215 (2001).
Available at: <https://repository.uchastings.edu/hwlj/vol12/iss1/9>

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Women's Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Peer Sexual Harassment in California After *Davis*

John F. Walsh*

I. INTRODUCTION

On the day the United States Supreme Court issued *Davis v. Monroe County Board of Education*,¹ a local newspaper reporter asked for my reaction as an attorney who represents California schools and colleges. In one regard, the question was relatively straightforward to answer: given the Supreme Court's Title IX employee-to-student harassment decision of the previous term, *Gebser v. Lago Vista Independent School District*,² its adoption of the same actual knowledge/deliberate indifference standard³ for peer harassment hardly came as a surprise. The Court adopted neither the National School Boards Association's argument that damages under Title IX should only be available against grant recipients for employee wrongs under narrow circumstances nor the "knew or should have known" or constructive knowledge standard used by the Office for Civil Rights ("OCR") of the U.S. Department of Education in administrative enforcement actions.

As a practicing school attorney, it has become clear to me that the *Davis* decision raises far more practice questions than it does provide answers. Additionally, from my clients' standpoint, the Supreme Court's implied criticism of school administration practice does not make much sense. For almost a decade, California school districts have been required, as a matter of state law, to adopt and implement district-wide policy, complaint and investigation procedures for peer- and employee-to-student sexual harassment matters. Peer harassment is a separate ground for

* John Walsh is an attorney with the law firm of Best, Best & Krieger LLP in Riverside, California. Mr Walsh graduated *cum laude* from Loyola Law School and holds a doctorate in history from the Claremont Graduate School. I would like to offer my thanks to my colleagues Angie Castillo, Mala Subramanian, Charisse L. Smith and Megan Starr, and my wife Katherine Liegler, for invaluable assistance and support.

1. 526 U.S. 629 (1999).

2. 524 U.S. 274 (1998).

3. See *Davis*, 526 U.S. at 633.

student discipline under the California Education Code.⁴ Given the often considerable efforts made by California school districts throughout the 1990s to train staff on sexual harassment complaint and investigation procedures, the overwhelming school administrator reaction to *Davis* appears to have been: (1) why is the Supreme Court now imposing this new source of liability under Title IX and (2) how does this affect our current harassment policies and investigation procedures?

From a legal standpoint, much of the confusion among California school administrators regarding the *Davis* decision stems from two difficulties: first, understanding the parameters of the *Davis* decision itself, and second, "placing" *Davis* with respect to pre-existing sources of California and Ninth Circuit law. Quite simply, Justice O'Connor's majority opinion in *Davis* is a rather formalist interpretation of the Title IX statutory scheme, falling well short of providing needed practical guidance to practitioners and school administrators. Moreover, the majority opinion does not clearly define the parameters of actionable peer harassment. The remaining questions are: (1) who among school administrators and officials must hold actual knowledge, such that institutional liability may be imputed; (2) what types of harms a plaintiff must demonstrate to maintain a peer harassment cause of action and (3) where, when and under what contexts institutional liability may be imposed under Title IX. Further, California administrators, like their counterparts elsewhere, must now attempt to understand the interrelationship between Title IX peer liability and possible state causes of action, as well as the relationship between private Title IX lawsuits and OCR administrative enforcement actions.

This Article attempts to clarify the questions posed by *Davis* for California schools and to give, to the extent possible in this rapidly changing area of the law, practical guidance as to what Title IX liability issues may now confront schools. It will first discuss Ninth Circuit law related to peer harassment prior to *Davis*, then analyze *Davis* itself from a practical standpoint, with a particular eye to areas of uncertainty raised by the majority opinion. The Article will next address peer harassment as a cause of action under California law and discuss the interrelationship and overlap between Title IX and California law. Finally, this Article will discuss liability and immunity defense issues.

4. See CAL. EDUC. CODE § 48900.2 (2000).

II. FEDERAL LAW REGARDING PEER SEXUAL HARASSMENT

A. APPROACHES TO TITLE IX PEER HARASSMENT LAWSUITS PRIOR TO DAVIS

Title IX does not expressly prohibit sexual harassment,⁵ nor does this statutory scheme expressly allow private parties to bring suit for money damages.⁶ The legislative history of Title IX similarly fails to indicate whether Congress intended to proscribe peer harassment, and whether it even considered peer sexual harassment to be a form of discrimination based on sex.⁷

Given this lack of statutory clarity, the circuits' split prior to *Gebser* and *Davis* over whether Title IX supported a private cause of action for sexual harassment and, if it did, whether the liability standard should be analogized to Title VI⁸ or Title VII⁹ of the Civil Rights Act of 1964. In *Rowinsky v. Bryan Independent School District*,¹⁰ the Fifth Circuit concluded that Title IX could not support sexual harassment suits "absent allegations that the school district itself directly discriminated based on sex."¹¹ Accordingly, the Fifth Circuit concluded that Title IX liability could only be premised on an agency theory, not on principles of vicarious liability or an independent duty to protect third parties.¹²

Conversely, the Eleventh Circuit, in its *Davis* decision,¹³ adopted a five-prong test for peer harassment under which a plaintiff must show:

- (1) that she [or he] is a member of a protected group; (2) that she [or he] was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her [or his] education and create an abusive educational environment;

5. Title IX states: "No person in the United States shall, on the basis of sex . . . be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2000).

6. *See id.*

7. *See* 117 CONG. REC. 39252 (1971) (statement of Rep. Mink).

8. 42 U.S.C. § 2000d *et seq.* (2000).

9. 29 U.S.C. § 206(d) (2000).

10. 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 519 U.S. 861 (1996).

11. *Id.* at 1008.

12. *See id.* at 1011. Other courts have adopted this reasoning. *See, e.g.,* *Franks v. Kentucky Sch. for the Deaf*, 956 F. Supp. 741, 748 (E.D. Ky. 1996), *aff'd*, 142 F.3d 360 (6th Cir. 1998); *Haines v. Metropolitan Gov't of Davidson County, Tenn.*, 32 F. Supp. 2d 991 (M.D. Tenn. 1998); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006 (W.D. Mo. 1995); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193 (N.D. Iowa 1996); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412 (N.D. Iowa 1996).

13. 74 F.3d 1186, 1193 (11th Cir. 1996). This case was subsequently vacated by the Eleventh Circuit. However, the original decision was used as the basis for reasoning in other circuits.

and (5) that some basis for institutional liability has been established.¹⁴

Following Title VII case law, the Eleventh Circuit held that a peer harassment suit could be maintained under Title IX where the plaintiff proves that school officials and employees knew or should have known of the harassment and failed to take "prompt and remedial action to end the wrongful conduct."¹⁵

As did the other circuits, the Ninth Circuit struggled with the appropriate Title IX liability standard for peer harassment. Throughout the 1990s, two questions shaped Ninth Circuit analysis regarding peer harassment liability under Title IX: (1) what should the institutional liability standard be for third party damage suits and (2) under what circumstances might school officials and employees be personally liable through 42 U.S.C. section 1983 actions for third party acts of peer harassment.

In *Doe v. Petaluma City School District*,¹⁶ a Ninth Circuit district court first addressed peer harassment under Title IX. Jane Doe, a junior high school student, sued her school district and various school administrators because she had been the subject of harassing comments from classmates for almost two school years.¹⁷ Though plaintiff Doe's parents frequently complained to administrators about this abusive conduct, school administrators took no action until after a fellow student physically assaulted her. Finally, she transferred to a private girls' school and sued the school district under Title IX.

The *Petaluma I* court struggled over whether to apply Title VI or Title VII standards to her allegations.¹⁸ If Title VI applied, the plaintiff would be required to prove that the district itself intentionally discriminated against her when investigating her complaints.¹⁹ Conversely, if Title VII applied, the plaintiff would only be required to show that the institution knew or should have known of the harassment and failed to take appropriate measures.²⁰ To resolve these questions, the *Petaluma I* court considered the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*,²¹ where the Court first held that money damages were available under Title

14. *Id.* at 1194.

15. *Id.* at 1195.

16. 830 F. Supp. 1560 (N.D. Cal. 1993) [hereinafter *Petaluma I*], *subsequent appeal*, *Doe v. Petaluma Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1995) [hereinafter *Petaluma II*], *different results reached on reconsideration*, *Doe v. Petaluma Sch. Dist.*, 949 F. Supp. 1415 (N.D. Cal. 1996) [hereinafter *Petaluma III*].

17. *See Petaluma I*, 830 F. Supp. at 1564-66.

18. *Id.* at 1571-73.

19. *See id.* at 1573.

20. *See id.* at 1571.

21. 503 U.S. 60 (1992).

IX.²² In *Franklin*, the Court impliedly analogized Title IX to Title VI because each was enacted pursuant to the Spending Clause.²³ Using the contract analogy for the Spending Clause first offered in *Pennhurst State School and Hospital v. Halderman*,²⁴ the *Petaluma I* court imported Title VI standards and held that institutional liability only attached where an employee of the school actually knew of the discrimination and failed to take appropriate remedial action.²⁵

In *Petaluma III*, the court reconsidered this liability standard, reversed its earlier decision and held that Title VII's "knew or should have known" standard was more appropriate for peer sexual harassment.²⁶ Under the *Petaluma III* standard, liability attached to a grant recipient where: (1) the gender based harassment was so severe or pervasive as to create a hostile environment and (2) the plaintiff proved that the entity actually knew or should have known of the harassment.²⁷ The court also indicated that no liability attaches if the school took prompt remedial action.²⁸ Reiterated in *Nicole M.*, this became the Ninth Circuit peer harassment standard until *Davis*.²⁹

Prior to *Davis*, the Ninth Circuit also struggled with the question of whether personal liability might attach to school officials and administrators through 42 U.S.C. section 1983 actions for a failure to prevent third party acts of sexual harassment.³⁰ In *Oona, R.-S. v. Santa*

22. See *id.* at 76.

23. *Id.* at 70-71.

24. 451 U.S. 1 (1981). "Unlike legislation enacted under § 5 [of the 14th amendment] . . . legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* at 17 (citations omitted).

25. See *Petaluma I*, 830 F. Supp. at 1574; accord *Oona, R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1466 (N.D. Cal. 1995).

26. *Petaluma III*, 949 F. Supp. 1415, 1426 (N.D. Cal. 1996).

27. See *id.*; see also *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369 (N.D. Cal. 1997). The *Nicole M.* court's rationale was the "knew or should have known" standard requires severe or pervasive conduct that would ordinarily give notice to a reasonable administrator. The position of teacher would be sufficient for institutional liability to attach, given the status relationship between teachers and students.

Certainly, this rule is even more compelling in the case of principals, vice principals and other school employees responsible for student discipline and a school's educational environment. In other words, an official or a supervisor of students such as a principal, vice principal or teacher cannot [ignore harassing conduct] once she [or he] has been alerted to a severe and pervasive hostile . . . environment [claim].

Id. at 1378; see also *Oona, R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1466-70 (N.D. Cal. 1995).

28. See *Petaluma III*, 949 F. Supp. at 1426.

29. *Nicole M.*, 964 F. Supp. 1369 (N.D. Cal. 1997).

30. See *Oona, R.-S.*, 890 F. Supp. at 1459-62.

Rosa City School District, the district court concluded that based on legislative history and review of *Franklin* itself, Congress had not foreclosed the use of section 1983 actions under Title IX.³¹ The *Nicole M.* court agreed, concluding that the lack of enforcement procedures set forth in Title IX permitted private plaintiffs to state such a claim against school officials in their individual capacities.³²

B. DAVIS V. MONROE COUNTY

The facts in *Davis* are well-known and quite egregious. In 1993, Aurelia Davis brought suit against Monroe County Board of Education, a Title IX funding recipient, alleging that the Board had failed to protect her daughter LaShonda, a ten-year old fifth grade student, from acts of sexual harassment perpetrated by a fellow student, G.F.³³ As alleged in the complaint, LaShonda had been subjected to a six-month barrage of offensive and abusive conduct, including vulgar sexual comments, fondling and rubbing and other inappropriate touching by G.F.³⁴ LaShonda apparently reported these instances to her teachers and her mother.³⁵ Ms. Davis contacted one of LaShonda's teachers and requested that LaShonda be transferred to another classroom, which did not occur.³⁶ Unlike California school districts, Monroe County did not have a sexual harassment policy and complaint investigation procedure in place.³⁷ LaShonda's harassment ended when G.F. plead guilty to charges of sexual battery.³⁸

In a five to four decision, the Supreme Court ruled in *Davis* that a funding recipient may be liable for monetary damages under Title IX for peer sexual harassment (1) where it was deliberately indifferent to acts of sexual harassment; (2) of which it had actual knowledge and (3) which was so severe, pervasive and objectively offensive that it deprived the victim of access to educational opportunities or benefits.³⁹ Justice O'Connor's majority opinion concluded Title IX liability would only be imposed for a grant recipient's *own* acts (or failure to act) of deliberate indifference to known harassing conduct within its control, not through principles of vicarious liability for the acts of third parties.⁴⁰

Much of Justice O'Connor's opinion focused on a statutory

31. *Id.* at 1461.

32. *Nicole M.*, 964 F. Supp. at 1381.

33. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632-33 (1999).

34. *See id.* at 633-34.

35. *See id.* at 634.

36. *See id.* at 635.

37. *See id.*

38. *See id.* at 634.

39. *Id.* at 645-52.

40. *See id.* at 644-45.

interpretation of Title IX.⁴¹ Noting that Title IX, like Title VI, was adopted under Congress's Spending Clause powers, Justice O'Connor reasoned that Title IX represented a contract between educational institution funding recipients and the federal government.⁴² Consequently, prior to any damage assessment, the grant recipient must have notice of its breach of the Title's terms and conditions.⁴³ Monroe County had argued that the plain language of Title IX had not placed it on notice that it may be subject to liability for third party wrongs.⁴⁴ The *Davis* majority concurred, but emphasized that Ms. Davis was attempting to hold Monroe County liable for its own indifference in the face of known acts of harassment.⁴⁵

C. ISSUES FLOWING FROM THE *DAVIS* DECISION

The *Davis* decision raises numerous questions from a practical standpoint, some of which the circuits have now begun to address. Specifically, the decision raises questions regarding: (1) what constitutes "actual" notice; (2) what is "deliberate indifference" or a "clearly unreasonable" response to peer harassment and (3) under what circumstances do schools have sufficient control over harassing situations such that Title IX liability might attach.

1. Actual Notice

The actual notice standard announced in *Davis* raises two fundamental questions. First, what constitutes institutional "notice" of the complained of harassment? Second, what employee/administrative categories must have actual notice such that Title IX liability may be imputed to the institution? In *Gebser*, Justice O'Connor defined the employee who must have knowledge as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf"⁴⁶ In *Davis* itself, the actual notice requirement was satisfied by repeated complaints to teachers and the school's principal.⁴⁷

Different definitions of "actual knowledge" have emerged among the circuits. Applying *Davis*, some courts have held that an educational institution is placed on notice where a student expressly complains to a teacher about the harm at issue or where a teacher witnesses the incidents of alleged harassment.⁴⁸ Additionally, in *Doe v. School Administrative*

41. *See id.*

42. *See id.* at 640.

43. *See id.*

44. *See id.*

45. *Id.* at 640-41.

46. 524 U.S. 274, 290 (1998).

47. 526 U.S. 649, 653-54.

48. *See Carroll K. v. Fayette County Bd. of Educ.*, 19 F. Supp. 2d 618, 621-22 (S.D. W. Va. 1998); *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908 (1999).

District No. 19,⁴⁹ a First Circuit district court held that a school district had notice for Title IX purposes where it knew of a teacher's pattern of wrongful relationships, even if the school was not aware of the specific wrongful relationship at issue in the lawsuit. The *Doe* court also concluded that the "actual knowledge" prong meant that the school must be aware of more than mere "inappropriate conduct."⁵⁰ Under this standard, a complaint or report, even if credible, must contain sufficient factual details to establish an allegation of sexual harassment.⁵¹

Applying *Davis*, the Tenth Circuit declined to list specific employment categories fulfilling the notice requirement, finding that the actual knowledge inquiry must be "fact-based" and dependent on whether the school employee at issue had "substantial control" over the complained of conduct.⁵² The court concluded that the employee must be "a school official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision"⁵³ This standard leaves open the question of whether a teacher's knowledge of harassment may be imputed to the educational institution.⁵⁴ Other circuits have generally indicated that the position of teacher has substantial control over harassment, thereby satisfying this "actual knowledge" prong in the *Davis* test.⁵⁵

The Ninth Circuit has construed this "actual knowledge" requirement in only one post-*Davis* decision, *Reece v. Jefferson School District No. 14J*.⁵⁶ A widely publicized case from Oregon, *Reece* involved four female high school seniors were suspended from commencement activities for hiding in the boys' bathroom and throwing water balloons at male students.⁵⁷ The girls claimed that their actions were in retaliation for sexual harassment they suffered the preceding year.⁵⁸ The females filed suit against the school district contending that the school district failed to take appropriate action to stop the harassment.⁵⁹

In denying plaintiffs' Title IX claim, the *Reece* court ruled that the school district had no actual notice of the alleged harassment because the plaintiffs did not report the conduct to school officials until after the school

49. 66 F. Supp. 2d 57, 63 (D. Me. 1999) (a teacher to student harassment case).

50. *Id.*

51. *See id.*

52. *Murrell v. School Dist. No. 1 Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999).

53. *Id.*

54. *See id.* at 1247-48.

55. *See Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2nd Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999); *Carroll K. v. Fayette County Bd. of Educ.*, 19 F. Supp. 2d 618, 621-22 (S.D. W. Va. 1998).

56. 208 F.3d 736 (9th Cir. 2000).

57. *Id.* at 738.

58. *See id.*

59. *See id.*

year ended.⁶⁰ The *Reece* court also ruled that though a teacher may have witnessed one threat by male students toward one of the plaintiffs, this did not place the institution on notice of the “worse and ongoing alleged harassment” alleged in the complaint.⁶¹ Nor did witnessing one incident apparently create a duty on the school district’s part to investigate the matter further.⁶² Finally, the *Reece* court clarified (from *Gebser*) that actual knowledge of the alleged misconduct must be possessed by a school official “who at a minimum has authority to address the alleged discrimination,” though the court did not specify whether actual knowledge by a teacher may satisfy this requirement.⁶³

Though *Reece* gives some indication that the Ninth Circuit will not liberally construe the “actual notice” prong, much still remains unclear in this circuit on this issue. Additionally, *Reece* holds that institutional knowledge must be shown *at the time* of the harassment allegation, or “the school district cannot be deemed to have ‘subjected’ the plaintiffs to the harassment.”⁶⁴ Post-hoc knowledge of purported misconduct is insufficient because the institution has not been placed on notice to effectively remedy the situation. Further litigation in this circuit may clarify which specific employment categories qualify as “actual knowledge” such that institutional liability may be imputed under Title IX.

2. Deliberate Indifference

A second practical issue flowing from the *Davis* decision is what constitutes “deliberate indifference” or “clearly unreasonable” action on the institution’s part in the face of known peer harassment for purposes of Title IX liability.

Lower courts have struggled with this deliberate indifference standard. Some district courts have held that to maintain a Title IX claim, a plaintiff must show that the institution did more than “turn a blind eye” to the harassment allegation,⁶⁵ or that the acts or omissions of the school must be more than merely inept, erroneous, ineffective or even negligent.⁶⁶ Other courts have considered the deliberate indifference standard as an affirmative defense under which school districts need only show that they acted promptly in response to allegations to avoid Title IX liability.⁶⁷ Consequently, schools may be immunized from Title IX liability so long as

60. *Id.* at 740.

61. *Id.*

62. *See id.*

63. *Id.* at 739.

64. *Id.*

65. *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610 (8th Cir. 1999).

66. *See Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998).

67. *See Priddy v. Hardin County Bd. of Educ.*, No. 3:96-CV-473-C, 1998 U.S. Dist. LEXIS 12968, *19-20 (W.D. Ky. Aug. 13, 1998).

their officials took timely and reasonable measures to end the harassment.⁶⁸ However, an institution may not shield itself from liability if the responsible official only took "minor steps to address the harassment with the knowledge that such steps would be ineffective."⁶⁹

Other courts have interpreted the deliberate indifference prong more favorably to student plaintiffs. At least one First Circuit court has held that this standard mandates that the educational institution take "timely and reasonable measures to end the harassment," and it may be required to take further steps to avoid liability "if it learns that its measures have proven inadequate," a standard that approaches, if not embraces, negligence.⁷⁰ In a recent Sixth Circuit decision, *Vance v. Spencer County Public School District*,⁷¹ the Court of Appeals concluded that a school could not evade its responsibilities under Title IX

by merely investigating and [doing] absolutely nothing more Although no particular response is required, and although the school district is not required to eradicate all sexual harassment, the school district must respond and must do so reasonably Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.⁷²

Finally, in a pre-*Davis* decision, the Seventh Circuit similarly ruled that it would not absolve an educational institution of Title IX liability unless the school aggressively investigated all harassment complaints and responded consistently and meaningfully when those complaints were found to have merit.⁷³

Questions regarding what may constitute "deliberate indifference" have not been fully developed in the Ninth Circuit, primarily because in *Reece*, the sole post-*Davis* case in the Circuit, the school district's specific responses to known harassment were not before the court.⁷⁴ Consequently, though the Ninth Circuit has arguably taken pro-plaintiff positions in its Title IX harassment decisions prior to *Davis*, there is no clear indication how it will approach the factual issues involved in developing the "deliberate indifference" standard.

68. See *Soper v. Hoben*, 195 F.3d 845, 854-55 (6th Cir. 1999), cert. denied, 120 S. Ct. 2719 (2000); *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 65 (D. Me. 1999); *Vaird v. School Dist. of Phila.*, No. 99-2727, 2000 U.S. Dist. LEXIS 6492, at *10 (E.D. Pa. May 12, 2000).

69. *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 910 (D. Minn. 1999).

70. *Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999).

71. No. 99-5095, 2000 U.S. App. LEXIS 27589, *1 (6th Cir. Nov. 6, 2000).

72. *Id.* at *18.

73. See *Chontos v. Rhea*, 29 F. Supp. 2d 931, 934 (N.D. Ind. 1998).

74. *Reece v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000).

3. Actionable Harassment: The Severe, Pervasive and Objectively Offensive Standard

In *Davis*, Justice O'Connor declined to list the types of misconduct constituting actionable peer harassment, instead opting for a contextual test which considers factors such as the age of the harasser and victim, the number of individuals involved, the relationships between the parties, the specific circumstances of the event and the expectations involved.⁷⁵ In setting out this contextual test, she specifically distinguished the schoolyard context from the adult workplace, noting that children sometimes engage in behavior that would be unacceptable in the adult world.⁷⁶ Consequently, not every act of teasing or name-calling, even if it targeted at differences based on sex, gives rise to Title IX liability.⁷⁷

This contextual standard raises significant questions regarding what evidence a plaintiff must offer to meet the severe, persistent and objectively offensive standard. This standard requires a "nexus." For example, the plaintiff must prove not only that severe, pervasive and offensive misconduct occurred, but also that she or he was denied equal access to educational opportunities *because of* that misconduct. In this regard, Justice O'Connor indicated that a mere drop in grades by itself is insufficient evidence to state a Title IX cause of action.⁷⁸ She also indicated that more than one incident of wrongful conduct is ordinarily required, though she left open the possibility that liability may attach for a single incident of harassment, stating that, "[I]n theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have . . . an effect" of denying access to educational opportunities.⁷⁹

Beyond this brief discussion of the contours of actionable conduct, Justice O'Connor offered no specific insights as to how courts or schools should weigh the specific wrongfulness of any misconduct at issue.⁸⁰ In light of these analytic and evidentiary concerns, lower courts since *Davis* have struggled to fashion the contours of actionable peer harassment. For example, action resulting in the hospitalization of a student or causing a student to leave school are sufficient to give rise to a Title IX cause of action.⁸¹ Most cases are not so obvious. In *Seamons v. Snow*,⁸² for example, the Tenth Circuit found that a male high school student who had been tied naked to a wall in a school locker room was not entitled to Title IX damages on the grounds that the conduct at issue was not based on sex.⁸³

75. 526 U.S. 629, 651 (1999).

76. *See id.* at 651-52.

77. *See id.* at 651.

78. *See id.* at 653-54.

79. *Id.* at 652.

80. *See id.* at 654.

81. *See Murrell v. Colorado*, 186 F.3d 1238, 1247 (10th Cir. 1999).

82. 84 F.3d 1226 (10th Cir. 1996).

83. *See id.* at 1233.

Given this lack of clarity, only through further litigation will the standard for actionable peer harassment be delineated in the Ninth Circuit.

4. Control and Context of the Harassment: The "Substantial Control" Test

The *Davis* Court concluded that Title IX liability must be limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."⁸⁴ Institutional liability is only appropriate where the harassment takes place "'under' an 'operation' of the funding recipient" of which the institution has actual knowledge and to which it is deliberately indifferent.⁸⁵ Under these circumstances, the institution's own knowingly wrongful conduct or failure to act contributes to the harms suffered by the student.

Subsequent litigation will be required to determine the contexts and limits of this "substantial control" test. As a matter of state law, for example, a California school district's liability for third-party harm to students is limited to on-campus activities and those off-campus activities where students are involved in school-related undertakings.⁸⁶ California case law has often construed "school undertakings" narrowly, thereby limiting school district liability for such third party harms.⁸⁷ Given this developed body of state law, the *Davis* "substantial control" test raises significant practical questions in California. Under what circumstances do incidents occurring during post-instructional hours give rise to institutional liability under Title IX? Must a connection be made to on-campus instructional hours activities? What about voluntary extra-curricular events, school dances, graduation night or band night? In short, what are the edges of institutional "substantial control" under Title IX? Additionally, may the fact that a school has asserted disciplinary control over its students for specific non-instructional activities be used to prove that it has "substantial control" for Title IX purposes? In *Reece*, the plaintiffs faced disciplinary action because of their off-campus misconduct during "senior skip day."⁸⁸ May harassment occurring during "senior skip day" give rise to a Title IX cause of action? These questions remain unanswered.

D. LIABILITY UNDER THE EQUAL PROTECTION CLAUSE

Sexual harassment is a form of sexual discrimination, and plaintiffs may use the Equal Protection Clause to state peer harassment claims against educational institutions.⁸⁹ Additionally, a school official may be

84. 526 U.S. at 645.

85. *Id.*

86. See CAL. EDUC. CODE §§ 44808, 44809 (2000).

87. See *Huff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 945 (1998).

88. 208 F.3d 736, 738 (9th Cir. 2000) (plaintiffs were barred from participating in their graduation ceremony).

89. See *Murrell v. Colorado*, 186 F.3d 1238, 1247 (10th Cir. 1999).

sued for peer harassment in his or her individual capacity under 42 U.S.C. section 1983 for violating Equal Protection Clause principles.⁹⁰ In *Monell v. New York Department of Social Services*,⁹¹ the Supreme Court set forth the test for institutional liability under the Equal Protection Clause: a plaintiff must demonstrate either that the discriminatory actions were representative of the public entity's policy or custom or that they were carried out by an official with final policy-making authority.⁹²

In the peer sexual harassment context, the Tenth Circuit held that the existence of student misconduct of a sexual nature does not in and of itself demonstrate a school custom or policy sufficient to give rise to an Equal Protection Clause claim against the institution. Additionally, some courts have concluded that teachers and principals are not "policy-makers" and therefore cannot be individually sued based on the Equal Protection Clause.⁹³ Other courts have suggested that, where teachers and principals have participated in or consciously acquiesced to peer harassment, they may face personal liability through a section 1983 claim.⁹⁴

The Ninth Circuit recognizes that student-victims may bring peer harassment claims against either educational institutions or offending officials in their personal capacities under the Equal Protection Clause and Title IX theories.⁹⁵ Other circuits have concluded that Equal Protection Clause claims for peer harassment must be subsumed under Title IX.⁹⁶ Consequently, in other circuits, plaintiffs may be required to elect under which federal theory they wish to pursue their peer harassment claims.

III. CALIFORNIA LAW

A. PEER HARASSMENT CLAIMS UNDER THE UNRUH ACT

In California, student litigants may also bring peer harassment lawsuits under the Unruh Civil Rights Act (hereinafter the "Unruh Act" or the "Act").⁹⁷ Two principal questions have shaped peer harassment litigation under the Unruh Act: (1) are schools "business establishments" and

90. See *Oona R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1453, 1468 (N.D. Cal. 1995).

91. 436 U.S. 658, 694-95 (1978).

92. See *id.* (citing *Starrett v. Wadley*, 876 F.2d 808, 820 (10th Cir. 1989)).

93. See *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); see also David Schimmel, *When School's are Liable for Peer Sexual Harassment: An Analysis of Davis v. Monroe*, 141 EDUC. LAW REP. 437 (March 2000) (raising the question of what liability may attach to the actions or inaction of bus drivers and chaperones).

94. See *Murrell*, 186 F.3d at 1247.

95. See *Oona R.-S.*, 890 F. Supp. at 1464; see also *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996).

96. See *Bruneau v. South Kortright Sch. Dist.*, 935 F. Supp. 162, 172 (N.D.N.Y. 1996); *Mennone v. Gordon*, 889 F. Supp. 53, 57-58 (D. Conn. 1995); *Bougher v. University of Pittsburgh*, 713 F. Supp. 139, 146 (W.D. Pa. 1989).

97. CAL. CIV. CODE § 51 (West Supp. 2001).

therefore subject to the Act's prohibitions and (2) does the failure to prevent peer harassment constitute intentionally discriminatory conduct on the school's part such that it may have violated the Unruh Act? At least two federal district courts have held that school districts and school employees may be liable under the Act for failing to adequately remedy incidents of sexual and racial discrimination.⁹⁸

The Unruh Act is a broad based civil rights provision prohibiting discrimination in the provision of facilities and accommodations. Specifically, section 51 of the California Civil Code states:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.⁹⁹

Under section 51.5, "business establishments" may not discriminate against any person on the basis of sex.¹⁰⁰ Section 52(a) allows plaintiffs to recover damages against "whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to section 51 or 51.5," broadening the Act's scope to include individually discriminatory conduct.¹⁰¹ Finally, section 51.9 sets forth the four elements for a sexual harassment cause of action under the Act.¹⁰²

98. See *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369 (N.D. Cal. 1997); *Davison v. Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225 (C.D. Cal. 1998).

99. CAL CIV. CODE § 51 (2000).

100. CAL CIV. CODE § 51.5 (2000).

101. *Nicole M.*, 964 F. Supp. at 1388 (finding that a plaintiff may bring a claim against the superintendent of a school district and the principal of a school for violations of section 51.5) (citation omitted).

102. California Civil Code section 51.9 elements are as follows: First, a business, service or professional relationship must exist between the plaintiff and defendant. Second, the defendant must engage in sexually harassing behavior that was unwelcome and pervasive or severe. Third, the plaintiff is unable to easily terminate the relationship. Finally, "the plaintiff has suffered or will suffer economic loss or disadvantage or personal injury." This code specifically enumerates the kinds of relationships the legislature had in mind to satisfy the first element of a sexual harassment cause of action under the Act.

The second, third and fourth elements of this provision of the Code were recently amended. This section now applies to verbal, visual, or physical conduct of a sexual or hostile nature based on gender. It no longer requires that the conduct be persistent or severe, rather the conduct must instead be "pervasive or severe." Additionally, sexual harassment by the defendant can occur even without a request by the plaintiff to stop. The third element no longer requires the inability of plaintiff to easily terminate the relationship without tangible hardship; the amendment removes the language "without tangible hardship," requiring plaintiffs to only prove an inability to easily terminate the relationship. Finally, the amended section specifies that a cause of action under section 51.9 applies to an injury involving emotional distress or the violation of a statutory or constitutional right. While no cases have been decided under the amended section, it appears the amendments have made it easier for a plaintiff to show sexual harassment. The second element has been broadened significantly to include not only sexual advances, solicitations, requests or demands, but

To state an Unruh Act violation, a plaintiff must show that intentionally discriminatory acts directed toward him or her have deprived him or her of equal access to facilities, accommodations or services. Generally, discriminatory conduct that may have an indirect adverse impact on a plaintiff is not sufficient for Unruh Act liability.¹⁰³ In *Harris v. Capital Growth Investors XIV*, the California Supreme Court expressly rejected the use of a disparate impact analysis, sometimes used in the Title VII employment litigation context, to prove intentional discrimination under the Unruh Act.¹⁰⁴

The first application of the Unruh Act to public schools occurred in a disability case, *Sullivan v. Vallejo Unified School District*.¹⁰⁵ In *Sullivan*, the plaintiff, a sixteen-year-old student with learning disabilities, brought Unruh Act and federal claims against a school district for refusing to allow her to bring a service dog to school.¹⁰⁶ Though it commented that the "plain meaning" of "business establishment" would appear to exclude public schools, the court nonetheless allowed the student's claim to go forward based on the conclusion that the Act must be interpreted "in the broadest sense reasonably possible."¹⁰⁷

In *Petaluma I*,¹⁰⁸ a sexual harassment case, the district court also found that a public school is a business establishment for Unruh Act purposes. The court concluded that a plaintiff "must prove that the defendant(s) interfered (or attempted to interfere) with her rights by threats, intimidations, or coercion . . ."¹⁰⁹ In *Petaluma I*, the court dismissed the lawsuit because plaintiffs had failed to allege that the defendants *themselves* had intentionally engaged in acts of sexual harassment.¹¹⁰ *Sullivan* and *Petaluma I* set the stage for *Nicole M. v. Martinez Unified School District*.¹¹¹ In *Nicole M.*, the school district directly contended that:

also verbal, visual or physical conduct of a sexual or hostile nature. Although this apparently changes the definition of sexual harassment, the legislature explicitly states in section 51.9(d) that the "definition of sexual harassment and the standards for determining liability set forth in this section shall be limited to determining liability only with regard to a cause of action brought under this section." Therefore, the changes in the definition of sexual harassment made in this section presumably do not apply to sections 51 or 51.5. Section 51.9 has not been applied to peer sexual harassment, but given the recent decisions in peer harassment cases, it may not be much of a stretch to contemplate a situation where section 51.9 may be implicated.

103. See *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1175 (1991) (dismissing plaintiff's cause of action for violation of the Unruh Act because of defendant's alleged sex discrimination based on disparate impact).

104. *Id.*

105. 731 F. Supp. 947, 947 (E.D. Cal. 1990).

106. *Id.*

107. *Id.* at 952 (citing *Isbister v. Boys Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 76 (1985)).

108. 830 F. Supp. 1560, 1582 (N.D. Cal. 1993).

109. *Id.* at 1582.

110. *Id.* at 1583-84.

111. 964 F. Supp. 1369 (N.D. Cal. 1997).

(1) the Act only prohibited intentional discrimination carried out by the school itself and (2) no precedent existed for application of the Act to the peer sexual harassment context.¹¹²

Rejecting defendant's argument, the *Nicole M.* court concluded that a school district's "inadequate response to complaints of sexual harassment" constituted a denial of "advantages, facilities, privileges, or services" for Unruh Act purposes.¹¹³ In other words, the court concluded that a student who has been subjected to a sexually hostile environment at school is deprived of the advantages and privileges of public education.¹¹⁴ Consequently, when it fails to adequately address such a hostile environment, the school district itself has engaged in intentional discriminatory behavior in violation of the Act.¹¹⁵

In *Davison v. Santa Barbara High School District*, a district court held that the school district's inadequate response to known acts of racial discrimination gave rise to an Unruh Act violation.¹¹⁶ The court concluded that under the Unruh Act, "[a]n educational institution [must] . . . provide a nondiscriminatory environment that is conducive to learning."¹¹⁷ It therefore now appears fairly well established that an Unruh Act claim may be stated against public schools and school personnel for failure to take steps to remedy known acts of peer harassment.¹¹⁸

B. OTHER BASES UNDER CALIFORNIA LAW FOR PEER HARASSMENT LAWSUITS

California plaintiffs have attempted to bring peer harassment claims under the Education Code and general common-law negligence principles. Education Code sections 200, 212.5, 220 and 230 require school districts to

112. *Id.* at 1388.

113. *Id.* at 1389.

114. *See id.* at 1388-89.

115. *See id.* at 1389.

116. 48 F. Supp. 2d 1225, 1232 (C.D. Cal. 1998).

117. *Id.* at 1231.

118. Under the Unruh Act, plaintiffs have sued various school personnel, including principals, superintendents and school districts. Prior to the 1959 adoption of the Unruh Act, a California court held that a private school is not a "place of amusement or accommodation within the meaning of Civil Code sections 51 or 52." *Reed v. Hollywood Prof'l Sch.*, 169 Cal. App. 2d Supp. 887, 889 (1959); *see also* *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 796 (1983). However, since the adoption of the Unruh Act courts have interpreted business establishments in the broadest sense reasonably possible. In fact, the California Supreme Court has held that "the broadened scope of business establishments in the final version of the bill . . . is indicative of an intent by the Legislature to include therein all private and public groups or organizations . . . that may reasonably be found to constitute 'business establishments of every type [sic] whatsoever.'" *Village Green Owners*, 33 Cal. 3d at 795-96. Therefore, it is possible that a court would hold that a private school is liable under the Unruh Act. In general, teachers have not been pursued as defendants under the Unruh Act. This probably has more to do with the fact that a teacher would not be considered to be a deep pocket and would not have as much authority to take remedial action to stop the sexual harassment as a principal.

prohibit discrimination based on sex and adopt district wide harassment complaint policies and investigation procedures.¹¹⁹ However, no private cause of action is expressly provided for under these Education Code sections.

The *Nicole M.* court declined to imply a private cause of action under these Education Code provisions because the plaintiff was already able to state claims under the Unruh Act and Title IX.¹²⁰ Notwithstanding this ruling, it is not clear that under different circumstances the court would necessarily bar a private cause of action under the Education Code. Generally, a private cause of action will be implied under California law if such private lawsuits are necessary to ensure the effectiveness of the statute.¹²¹

One California appellate court established its own standard for determining whether a private cause of action may be implied from a statute:

when a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may . . . accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.¹²²

Until the courts provide better direction regarding the availability of private causes of action under the Education Code, however, it remains unclear whether a plaintiff may state a peer sexual harassment claim under its provisions.

C. NEGLIGENCE CLAIMS

Under California law, public employees are not liable for injury resulting from the exercise of discretion within the scope of their employment.¹²³ A discretionary act is one that requires the exercise of judgment or choice, sometimes defined as an equitable decision of what is just and proper under the circumstances.¹²⁴

In the peer harassment context, courts have also held that "decisions by a school principal or superintendent to impose discipline on students and conduct investigations of complaints necessarily require the exercise of

119. CAL. EDUC. CODE §§ 200, 212.5, 220, 230 (2000).

120. 964 F. Supp. 1369, 1390 (N.D. Cal. 1997).

121. See *Arriaga v. Loma Linda Univ.*, 10 Cal. App. 4th 1556, 1564 (1992).

122. *Id.* (citing *Middlesex Ins. Co. v. Mann*, 124 Cal. App. 3d 558, 570 (1981)). Although the *Arriaga v. Loma Linda University* court acknowledged that this test has arguably been superseded by *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287 (1988), the court assumed that it was still good law, and applied it anyway.

123. See CAL. GOV'T. CODE § 820.2 (2000).

124. See *Nicole M.*, 964 F. Supp. at 1389.

judgement or choice, and accordingly are discretionary, rather than ministerial acts."¹²⁵ Public entities are immunized under California Government Code section 815.2(b) for the discretionary acts of their employees.¹²⁶ Therefore, a California school district would likely be immune from a negligence claim when the exercise of an employee's discretion is involved.¹²⁷

IV. ADMINISTRATIVE ENFORCEMENT

A. OCR

The OCR is the administrative enforcement agency for Title IX regulations and may impose financial sanctions for non-compliance with federal law. OCR first investigates complaints and then determines whether a funding recipient has complied with Title IX. OCR is primarily concerned with terminating, refusing to grant or continuing federal funding. OCR has taken the position that a heightened knowledge requirement is appropriate for its enforcement procedures.

OCR carries out its responsibility regarding Title IX provisions through compliance enforcement.¹²⁸ Its principal enforcement activity is the investigation and resolution of complaints filed by individuals alleging sex discrimination at education institutions.¹²⁹ OCR also initiates agency reviews of selected recipients.¹³⁰ By doing so, OCR is able to identify and remedy sex discrimination that may not be addressed through complaint investigations.

OCR's basic test for peer harassment for the purpose of its administrative compliance proceeding is: (1) whether a hostile environment exists; (2) the school knows or should have known of the conduct and (3) the school fails to take immediate, appropriate steps to remedy it.¹³¹ This

125. *Id.* (citing *Petaluma I*, 830 F. Supp. 1560, 1580-83 (N.D. Cal. 1993)).

126. CAL. GOV'T CODE § 815.2(b) (2000).

127. This is apparently not the case in other jurisdictions. Under Michigan state law, for example, while principals, superintendents and school districts are immune from suits for ordinary negligence, they are not immune from suits alleging gross negligence. Under Michigan law, gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern of whether an injury results." *Soper v. Hoben*, 195 F.3d 845, 851 (6th Cir. 1999). Further, in Maine, principals, superintendents and school districts do not have immunity from negligence claims. *See Doe v. School Admin. Dist. No. 66*, F. Supp. 2d 57, 68 (1999).

128. *See Title IX of the Education Amendments of 1972 Prohibits Discrimination Based on Sex in Education Programs or Activities which Receive Federal Financial Assistance*, U.S. Dep't of Education, Office for Civil Rights (last modified August 1998) <<http://www.ed.gov/offices/OCR/tixdis/html>>.

129. *See id.*

130. *See id.*

131. *See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,039-40 (1997) [hereinafter *Guidance*].

OCR standard embraces a “constructive notice” requirement, and is therefore more stringent than the “actual knowledge” standard set forth in *Davis*.¹³²

The OCR also published sexual harassment guidelines in 1997 (“OCR Guidelines”).¹³³ The OCR Guidelines defines sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature which is sufficiently severe, persistent or pervasive to limit a student’s ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.¹³⁴

The complained of conduct must also be unwelcomed as defined by OCR’s Guidelines. According to OCR Guidelines, conduct is unwelcome if the student being harassed did not “solicit or invite it” and “regarded the conduct as undesirable or offensive.”¹³⁵ The inquiry is not whether the victim’s participation was voluntary, but whether he or she indicated by his or her actions that the sexual conduct was unwelcome.¹³⁶ However, a victim’s participation in the sexual conduct may be a factor to consider.¹³⁷ If there is a dispute as to whether the conduct actually occurred or was welcomed, school officials are required to consider several evidentiary factors.¹³⁸ OCR also requires that the complained of conduct be severe, pervasive and persistent.¹³⁹

132. *See id.* at 12042. According to OCR’s guidance, schools have notice of peer-to-peer sexual harassment if: (1) a student filed a grievance; (2) a student complained to a teacher about other students; (3) a student/parent contacted the principal, campus security, bus driver, teacher, affirmative action officer or Title IX Officer; (4) an agent/responsible employee may have witnessed the harassment; (5) flyers about the incident were posted at the school or (6) members of the media / school staff / the educational community provided indirect notice. *See id.* Schools will have constructive notice of peer-to-peer sexual harassment if: (1) they should have known through a “reasonably diligent inquiry”; (2) the pervasiveness of the harassment, for example, the conduct was observed in the hallways, graffiti in public places, or conduct observed at recess/P.E. classes under a teacher’s supervision or (3) harassment is pervasive when it is widespread, openly practiced or well-known to students and staff. *See id.*

133. *See id.*

134. *See id.* at 12041-42. This is the same standard adopted by Justice O’Connor in *Davis*. 526 U.S. 629 (1999).

135. *Guidance, supra* note 131, at 12,040.

136. *See id.*

137. *See id.* at 12,040-41.

138. *See id.* These factors include: (1) statements by witnesses; (2) credibility evidence including corroborative evidence, detail and consistency; (3) evidence that the harasser has harassed others in the past or that the accuser made false claims in the past; (4) the reaction or behavior of the accused immediately after the alleged incident and (5) whether the alleged victim reported the harassment soon after it occurred. *See id.*

139. *See id.* at 12,041-42. Factors to be considered when determining if student harassment was severe, persistent or pervasive include the following: (1) the degree to which the conduct affected one or more students’ education; (2) the type, frequency and duration of a conduct; (3) the number of individuals involved; (4) the age and sex of the alleged harasser and the subject(s) of the harassment; (5) the size of the school, location of

Anyone who believes a grant recipient has engaged in acts of sexual discrimination under Title IX may file a complaint with OCR.¹⁴⁰ The person or organization filing the complaint may be the alleged victim or filing on behalf of another person or group.¹⁴¹ A complaint must be sent to the OCR enforcement office that serves the state in which the alleged discrimination occurred.¹⁴² A complaint must be filed within 180 days of the alleged discrimination, unless the time for filing is extended for good cause by the Enforcement Office Director.¹⁴³

This past November, OCR proposed revisions to its 1997 Guidelines.¹⁴⁴ While OCR determined that certain areas in the 1997 Guidelines could be strengthened by further clarification and explanation, it did not propose a change to its "constructive knowledge" requirement.¹⁴⁵

B. CALIFORNIA DEPARTMENT OF EDUCATION REGULATIONS

At the state level, the California Department of Education has proposed revisions to its sexual discrimination regulations applicable to elementary and secondary education programs in response to *Gebser* and *Davis*.¹⁴⁶

the incidents and context in which they occurred; (6) other incidents at the school and (7) incidents of gender/bias and non-sexual harassment. *See id.*

140. *See How to File a Discrimination Complaint With the Office of Civil Rights*, U.S. Dep't of Educ., Office for Civil Rights (last modified July 9, 1998) <<http://www.ed.gov/offices/OCR/howto.html>>.

141. *See id.*

142. *See id.*

143. *See id.* Complaint letters should explain: (1) who was discriminated against; (2) in what way; (3) by whom or by what institution or agency; (4) when the discrimination took place; (5) who was harmed; (6) who can be contacted for further information; (7) the name, address and telephone number of the complainant(s) and (8) the alleged discriminatory act(s). *See id.*

144. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 65 Fed. Reg. 66,092 (2000).

145. *Id.*

146. 2000 Reg. LEXIS 20589. Specifically, the proposed revisions, if adopted would do the following: (1) require that school districts comply with both state and federal non-discrimination laws in any program or activity conducted; (2) require that all educational programs and activities receiving or benefiting from state or federal funds be available to all qualified persons without regard to their sex; (3) apply not only to public schools but also to any educational institution ("educational institution" means any public or private preschool, elementary or secondary school or institution operated by the local agency, or any combination of school districts or counties recognized as the administrative agency for public elementary or secondary schools); (4) apply to local agencies that not only receive funding from the Department of Education but also to any local agency that receives any financial assistance from the state or federal government; (5) ensure that local agencies enforce the nondiscriminatory laws and regulations of American with Disabilities Act, Fair Employment and Housing Act, Individuals with Disabilities Education Act, Equal Educational Opportunities Act and the Unruh Civil Rights Act; (6) extend the prohibition against sexual harassment to any "extra-curricular activity," other than an athletic activity, that has all of the following characteristics: the program is supervised or financed by the local agency, students participating in the program represent the local agency, students exercise some degree of freedom in either the selection, planning or control of the program and the program includes both preparation for a performance and performance before an

Currently, the regulations provide that no person in the State of California shall be subjected to discrimination or excluded from participation in or denied benefits of any public school program or activity on the basis of sex in any program or activity conducted by an educational institution or any other local agency.¹⁴⁷

V. DEFENSES TO LIABILITY

A. QUALIFIED IMMUNITY GENERALLY

Where applicable, the doctrine of qualified immunity affords public officials and employees an affirmative defense to personal liability when they have been sued in their individual capacities under 42 U.S.C. section 1983. This defense protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁴⁸ Teachers, principals and other school employees are entitled to assert this qualified immunity defense.¹⁴⁹ This qualified immunity defense is not available to institutions, including public schools.

The qualified immunity test is a two-part inquiry. First, the law governing the official's conduct must be clearly established. Second, the reasonable official must have believed his or her conduct to be lawful.¹⁵⁰

audience or spectators; (7) define harassment as unwelcome conduct based upon protected status that is severe or pervasive, which unreasonably disrupts an individual's educational or work environment that creates a hostile educational or work environment; (8) include a definition for "sex" under the regulations ("sex" would be defined as the biological condition or quality of being a female or male human being); (9) extend the prohibition against sexual harassment to students in grades K-12 (The disciplinary consequences will depend upon the age of the student and the factual circumstances of the incident); (10) prohibit the retaliation against the complainant, witness or other person who supports or participates in a sexual harassment investigation; (11) require that all complaints or allegations of sexual harassment be kept confidential during any informal and/or formal complaint procedures except when necessary to take subsequent remedial measures or monitor and (12) extend the "educational environment" to include campus or school grounds, properties controlled or owned by the school district and off-campus activities sponsored by the school district or conducted by organizations sponsored by or affiliated with the school district. *See id.*

147. *See* CAL. CODE REGS. tit. v, § 4900-4940 (1993). Under the regulations, a "local agency" is defined as a school district governing board or county office of education or a local public or private agency, which receives funding from the Department of Education to provide programs or activities. *See id.* at § 4910.

148. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

149. *See* *Wood v. Strickland*, 420 U.S. 308, 318 (1975); *see also* *Bruneau v. South Kortright Sch. Dist.*, 163 F.3d 749 (2d Cir. 1998) (school officials are entitled to immunity); *Niles v. Nelson*, 72 F. Supp. 2d 15 (1999) (school officials are entitled to immunity); *Mennone v. Gordon*, 889 F. Supp. 53 (D.C. Conn. 1995) (teachers entitled to immunity); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999) (teacher, principal, Director of Special Education and school district superintendent are entitled to immunity); *Petaluma II*, 54 F.3d 1447 (9th Cir. 1995) (school counselor entitled to immunity).

150. *See* *Act up!/Portland v. Bagley*, 988 F.2d 868, 871-73 (9th Cir. 1992).

Conversely, if the federal law is clearly established and the reasonable official would not have engaged in the conduct at issue, the official in question may not assert the qualified immunity defense.¹⁵¹ However, it is not necessary that a prior decision rule that "the very action in question" is unlawful for a public official to be denied qualified immunity protection.¹⁵² Rather, "the contours of the right must be sufficiently clear so that a reasonable official would know that his conduct violates that right."¹⁵³ If the law at the time is not clearly established, however, the official cannot be expected to anticipate future legal developments and is entitled to qualified immunity.¹⁵⁴

Prior to *Gebser* and *Davis*, the Ninth Circuit allowed sexual discrimination suits against school officials in their individual capacities predicated on either equal protection or Title IX harassment legal theories.¹⁵⁵ With respect to Equal Protection Clause claims, the Ninth Circuit rejected a public official's claim of qualified immunity in *Lindsey v. Shalmy*.¹⁵⁶ The discriminatory conduct in *Lindsey* took place in 1988, and the appellate court concluded that "well prior to 1988 the protection afforded under the Equal Protection Clause was held to proscribe any purposeful discrimination by state actors, be it in the workplace or elsewhere, directed at an individual solely because of his membership in a protected class."¹⁵⁷ In *Oona, R.-S.*, the Ninth Circuit similarly found that school officials have a duty to ensure their institutional environments are free from peer harassment.¹⁵⁸ The Ninth Circuit therefore holds that school officials may be sued individually based on their intentional failure or participation in acts of harassment from 1988 onward.¹⁵⁹

151. See *id.* at 873.

152. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); see also *Neely v. Feinstein*, 50 F.3d 1502, 1507 (9th Cir. 1995).

153. *Browning v. Vernon*, 44 F.3d 818, 823 (9th Cir. 1995). Public officials are expected to know basic constitutional rights, but a mere finding that the official violated the constitution does not satisfy the "clearly established law" prong of the qualified immunity analysis. In fact, the Supreme Court has consistently extended the protection of qualified immunity to officials who have violated constitutional amendments, if the laws interpreting those amendments were unclear or contradictory. To invoke the defense of qualified immunity the official must show that the rights violated were not clearly established at the time or under the circumstances of the situation or that other reasonable officials would have acted in the same way. See, e.g., *Anderson*, 483 U.S. at 640 (granting immunity to officers conducting illegal warrantless searches of innocent party's home); *Malley v. Briggs*, 475 U.S. 335 (1986) (granting immunity to officers that have caused unconstitutional arrest); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (granting qualified immunity to police officials alleged to have conducted warrantless wiretaps in violation of Fourth Amendment).

154. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

155. See *Oona, R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452 (N.D. Cal. 1995); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369 (N.D. Cal. 1997).

156. 29 F.3d 1382 (9th Cir. 1994).

157. *Id.* at 1386.

158. 143 F.3d 473, 475 (9th Cir. 1998).

159. See *id.*

The *Nicole M.* court found that school officials have a clear duty under the Equal Protection Clause to take steps to eliminate intentional discrimination on the basis of sex. Consequently, the court concluded that the school principal was not entitled to qualified immunity from personal liability if it could be clearly established that a reasonable official in the same position would have taken steps to end the harassment.¹⁶⁰

In *Petaluma II*, the Ninth Circuit considered whether school officials had a duty under Title IX to prevent peer sexual harassment in the period from fall of 1990 to February 1992.¹⁶¹ Because the allegedly impermissible conduct in *Petaluma II* occurred prior to the Supreme Court's ruling in *Franklin*, the Ninth Circuit held that as of February 1992, school officials had no clearly established duty under Title IX to remedy peer sexual harassment and were therefore entitled to qualified immunity.¹⁶² However, the court recognized that the *Franklin* decision clearly established that school officials have a duty, as of the date of that decision, to prevent peer harassment.¹⁶³

The Ninth Circuit has not revisited the issue of immunity subsequent to *Davis*. However, since 1993, it has been clearly established in the Ninth Circuit that a student has the right to be free from peer sexual harassment under both the Equal Protection Clause and under Title IX. It is therefore unlikely that school district officials, administrators and teachers who have actual knowledge of peer sexual harassment and show deliberate indifference to the wrongful conduct will now be shielded from personal liability.

B. ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment¹⁶⁴ to the United States Constitution prohibits federal suits against state governments by a state's own citizens, by citizens of another state or by citizens of foreign countries. Broadly, this concept of state sovereignty protects states from federal suits in federal courts. California schools are state agencies for Eleventh Amendment purposes.¹⁶⁵

States accepting funds from the federal government waive their right to claim sovereign immunity in Title IX cases. Section 42 U.S.C. 2000d-7(a)(1) states:

[A] state shall not be immune under the Eleventh Amendment of

160. See 964 F. Supp. at 1382-83.

161. 54 F.3d 1447, 1451 (9th Cir. 1995).

162. See *id.*

163. *Id.*

164. U.S. CONST. amend. XI states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."

165. See *Kirchmann v. Lake Elsinore Unified Sch. Dist.*, No. E026060, 2000 Cal. App. LEXIS 785 (Oct. 11, 2000).

the Constitution of the United States from suit in federal court for violation of Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other federal statute prohibiting discrimination by recipients of Federal financial assistance.¹⁶⁶

Congress may also abrogate, abolish or annul a state's Eleventh Amendment immunity if it clearly expresses its intent to do so and acts pursuant to a valid exercise of power.¹⁶⁷ The Supreme Court has stated that Congress may validly abrogate a state's Eleventh Amendment immunity if it acts pursuant to Section Five of the Fourteenth Amendment.¹⁶⁸ Section Five of the Fourteenth Amendment grants Congress the authority to enforce the Amendment's substantive provisions, which proscribe gender discrimination in education.¹⁶⁹ Similarly, Congress had the authority, pursuant to Section Five, to make Title IX applicable to the states.¹⁷⁰ Based on this reasoning, several circuits have held that Congress's intention to abrogate the states' Title IX immunity was unmistakably clear pursuant to its authority under Section Five of the Fourteenth Amendment and, therefore, a state is not entitled to invoke sovereign immunity in a Title IX case.¹⁷¹

C. PERSONAL LIABILITY DEFENSES UNDER THE CALIFORNIA TORT CLAIMS ACT

A school district may be obligated under the California Tort Claims Act to defend and indemnify an employee against any lawsuits brought against its employee arising from the scope of his or her employment.¹⁷² A school district may be obligated to defend a peer harassment suit, including one based on federal law, filed against its employee in his or her individual capacity. Indeed, the California Supreme Court held in *Williams v. Horvath*¹⁷³ that the indemnification provisions of the Tort Claims Act apply

166. 42 U.S.C. § 2000d-7(a)(1) (2000). An educational institution may be entitled to invoke sovereign immunity where the student alleges negligence on the school's part. *Bosley v. Kearney R-1 School District* held that in the unique instance of a state run school, sovereign immunity may bar suits premised on a negligence theory. 904 F. Supp. 1006 (W.D. Mo. 1995).

167. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

168. See *id.* at 45-46 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

169. See *United States v. Virginia*, 518 U.S. 515 (1996).

170. See *Doe v. University of Ill.*, 138 F.3d 653, 659-60 (7th Cir. 1998).

171. See *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Doe v. University of Ill.*, 138 F.3d 653, 657 (7th Cir. 1998); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997).

172. See CAL. GOV'T. CODE § 825 (2000). Section 825 of the Government Code permits the employing entity to reserve the right to refuse to pay a judgment until it is established that the employee's acts were in fact within the scope of employment.

173. 16 Cal. 3d 834 (1976). *Williams* involved the applicability of the California Tort

regardless of whether: (1) the lawsuit is grounded on a public entity's statutory liability under the Tort Claims Act¹⁷⁴ or (2) the public official is being sued in his or her official capacity under a 42 U.S.C. section 1983 claim.¹⁷⁵ Therefore, a school district employee, such as a principal, may require a school district to defend and indemnify him or her against a suit based on his or her failure to take discretionary remedial actions to stop peer harassment.

The immunity and indemnification issues raised by Title IX lawsuits are extremely complex and not completely settled in the Ninth Circuit. It appears that public educational institutions can not raise sovereign immunity as a defense to Title IX lawsuits. Additionally, school officials and employees may be subject to personal liability under Title IX and the Unruh Act if they fail to prevent peer sexual harassment taking place in circumstances under their control. However, it also appears that the California Government Code's defense and indemnification provisions may be available to school officials and employees in instances where their failure to act caused harassment to occur at schools.

VI. CONCLUSION

It has now been over a year since the *Davis* decision came down, and it is still not clear what, if any, implications it may have for California schools. Certainly, *Davis* established the general liability standard for peer harassment under Title IX. However, as discussed above, several questions remain regarding all elements of the *Davis* test. The only post-*Davis* decision in the Ninth Circuit, *Reece*, left open issues relating to what constitutes actual notice and deliberate indifference. California school districts must also be aware of liability issues flowing from the Unruh Act. It now appears settled that an Unruh Act claim may be stated against a public school district and its officials and employees for failure to remedy known acts of peer harassment on school grounds. As decisional authority related to the use of the Unruh Act to state peer harassment claims remains

Claims Act to an action grounded exclusively on the federal Civil Rights Act. *Id.* Specifically, the Court had to decide whether the indemnifications provisions of the Tort Claims Act, Government Code section 825, applied to suits brought under section 1983. The *Williams* court held that not only did the claims presentation requirement of the statute need not be met in order to file an action based on section 1983, but also the indemnification provisions apply regardless of whether the lawsuit is grounded on the Tort Claims Act or on section 1983. *Id.* In reaching its conclusion, the Supreme Court analyzed the history and purpose of the Tort Claims Act and the federal Civil Rights Act. The Court noted that the state scheme was conceived to strictly limit governmental liability while the federal statute was designed to ensure an adequate remedy for violations of civil rights. *See id.*

174. CAL. GOV'T. CODE § 815. Under the Tort Claims Act, a public entity is liable in tort only to the extent declared by statute and have certain immunities and defenses. *Id.*

175. Section 1983 is a federal statute designed to ensure an adequate remedy for violations of civil rights and can be invoked against a public official, in his individual capacity, who infringes on such rights.

underdeveloped, it is not clear whether school districts have greater duties to remedy peer harassment under its provisions than they do under Title IX. Finally, though California school districts may not be exempt from Title IX suits, school officials and employees might be able to receive indemnification, under certain circumstances, from personal liability.