STUDENT ON STUDENT SEXUAL HARASSMENT: IF SCHOOLS ARE LIABLE, WHAT ABOUT THE PARENTS?

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A public school district in Petaluma, California agreed to pay $250,000.00 to a seventh grade girl who was taunted with sexual comments by other students and whose school counselor allegedly failed to inform her of her right to file a sexual harassment grievance under Title IX of the Education Amendments of 1972. The United States Court of Appeals for the Eleventh Circuit held that a school can be liable for student against student sexual harassment if the school authorities “knowingly fail to act to eliminate the harassment.” In October of 1996, a sixth grade girl who was harassed by a classmate brought suit against her school under a negligence theory. A California state court jury delivered a $500,000.00 verdict in her favor. Meanwhile, the United States Court of Appeals for the Fifth Circuit has made it more difficult for students to impose liability on schools on account of student on student sexual harassment. Closer to home, in the United States District Court for the Western District of Missouri a Kearney, Missouri elementary student brought an action claiming, inter alia, that the school district was liable under Title IX for permitting a hostile environment of student on student sexual harassment. The court, in response to the defendant's motion for summary judg-

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2. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996).
4. Dawn E. Conner, Student-On-Student Sexual Harassment Stats: Are They Viable? LAW WEEKLY USA, January 27, 1997, at B1, B10 (citing Doe v. Petaluma City Sch. Dist., No. C-93-0123-EFL (N.D. Cal. Dec. 24, 1996)) This is the largest verdict yet against a school district resulting from student on student sexual harassment. Id.
5. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996) (determining that under Title IX a school district cannot be held liable for student on student sexual harassment unless the district itself directly discriminated based on sex).
ment, found sufficient evidence to allow the claim to go forward.\(^7\)

Thus, any school, public or private, which receives federal funds under Title IX, faces a new threat - financial liability to students who are victims of sexual harassment by other students. Title IX already permitted the United States Department of Education to revoke federal funds from a school if it found that the school violated Title IX in a student on student sexual harassment case;\(^8\) now, the institution also runs the risk of paying monetary damages to a student victim of student on student sexual harassment.

Because the courts are split, the legal standards used in determining whether schools should be held liable for a student’s bad behavior or criminal acts against another student are in flux. This uncertainty makes it difficult for a school and its staff to understand when they might be held liable or to take the necessary steps to limit, eliminate, or hold others liable. Preventing or punishing a student who sexually harasses another student certainly falls within a school’s disciplinary responsibility. What is new is the prospect of large financial obligations to victimized students if the sexual harassment by other students is not prevented or eliminated by the school. As schools find themselves faced with additional liability, they should in turn look to other parties, such as the offending student or his or her parents for indemnification and payment of the damages assessed against the school.

**WHAT CONSTITUTES STUDENT ON STUDENT SEXUAL HARASSMENT?**

On January 11, 1985, a fifteen year old girl was attacked by two fifteen year old boys and a fourteen year old boy. The girl was attending a high school hockey tournament with her family. She was attacked in her hotel room; the boys removed her clothes and fondled her in a sexual manner. She did not complain until she heard the boys were bragging that “they had screwed her.” Charges were then filed against the boys. Two of the boys ultimately plead guilty to fourth degree sexual assault in adult court and the third was convicted in juvenile court. The boys were placed on probation. The girl and her parents were roundly criticized for filing charges against the boys. At school, she was verbally harassed and her locker defiled with obscene names on account of her actions in charging the boys with a crime. When she complained to school authorities about the harassment, the vice principal told her “I’ve got 200 kids who were late for school.

\(^7\) Bosley, 904 F. Supp. at 1025.

I've got to arrange their detention. Clean the locker yourself."

Not long ago, what is now deemed "sexual harassment" was seen as merely part of the perennial "battle of the sexes"; it began in school playgrounds as soon as boys and girls realized they were different from one another. Behavior that started as recess jingles: "I see London, I see France, I see Mary's underpants" moved on to verbal taunts about body parts or sexual acts, unwanted touching of an overtly sexual nature and serious sexual assaults. Though schools treated this activity as "inappropriate student behavior," they often did little to seriously punish the perpetrators (unless actual traditional sex crimes occurred, in which instance the school turned matters over to the police), or termed most of the activity "teasing", "horseplay", or "flirting." Parents, and often parents of both the harasser and the victim, characterized the behavior as the inevitable result of raging hormones, natural and unalterable and of little concern in all but the most serious cases involving violent sexual attacks. The "boys will be boys" rationalization predominated.

Bernadette Marcezly, an education professor at Cleveland State University, explained that

[most experts now agree that 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 in a high school which degrade females, graffiti on a bathroom wall, or a Playboy centerfold used as 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.]

The National Advisory Council on Women's Education Programs defines academic sexual harassment as "the use of authority to emphasize the sexuality or sexual identity of the student in a manner which prevents or impairs the student's full enjoyment of education benefits, climate or opportunities." Yet another definition of sexual harass-

11. Id.
12. Elaine Yaffe, Expensive, Illegal and Wrong: Sexual Harassment in Our Schools, 77 PHI DELTA KAPPAN 1, 2-3 (Nov. 1995).
ment in schools refers to “unwanted sexual attention from peers, subordinates or supervisors or customers, clients or anyone the victim must interact with in order to fulfill job or school duties where the victim’s responses are restrained by fear of reprisal”

THE STATUTORY DEFINITIONS OF SEXUAL HARASSMENT

When Tawnya Brawdy was in eighth grade, a group of fifteen to thirty boys taunted her daily about the size of her breasts. They waited for her every morning outside the school. As her mother dropped her off, they would “moo” and call out crass comments. . . . This teasing and tormenting occurred not only before school, but also in class, at lunch, after school, and even during harassing telephone calls to her home at night.

Sexual harassment first gained notice in the employment realm. After federal, state and local laws were passed to prohibit sexual discrimination in employment, more women gained employment in fields traditionally dominated by men. As a result, many women employees soon found themselves subjected to harassment in the workplace. The Equal Employment Opportunity Commission (the “EEOC”) was created to enforce anti-discrimination laws of Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment on the basis of sex, race, color, religion or national origin. In 1980, after studying the problems women faced in the workplace, the EEOC promulgated a definition of sexual harassment and implemented regulations dealing with sexual harassment in the workplace. If an employer was found guilty of sexual harassment by virtue of the acts of its employees, then the employer would be deemed to have discriminated against the women employees on the basis of gender.

The EEOC defined two types of sexual harassment: (1) “quid pro quo, in which a person's hiring, promotion or wages are conditioned on sexual favors,” and (2) “hostile environment, in which pervasive, intrusive unwelcome behavior interferes with a person's job performance.” Quid pro quo sexual harassment and hostile environment sexual harassment were both found to discriminate against women on the basis of gender because such behavior typically involved harass-

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15. Kristen M. Eriksson, What Our Children are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment, 83 Geo. L.J. 1799, 1799 (1995). In the situation above, the U.S. Department of Education found that her school had failed to protect her from gender discrimination. Id.
19. Id.
20. Id.
ment of a female employee by that employee’s male superior or male co-employee in a fashion which limited the victimized employee’s promotion or interfered with her day-to-day work. The EEOC noted in its regulations that the key to determining when an act or environment is illegal sexual harassment and violative of Title VII of the Civil Rights Act of 1964 is whether the behaviors were welcomed or unwelcomed by the person claiming to have been harassed.

Title IX governs gender equality in schools receiving federal financial aid. Title IX states, in part, that “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.” The Office of Civil Rights (“OCR”) of the United States Department of Education was formed to enforce Title IX; the OCR is the Education Department’s counterpart of the EEOC in the Department of Labor. The OCR has yet to promulgate its definition of sexual harassment in the education realm. However, courts have applied the Title VII definition promulgated by the EEOC to Title IX cases. The statutory penalty imposed on a school for violation of the definition is the loss of federal financial assistance. The OCR has issued a memorandum to schools stating that for a school to be in compliance with Title IX, the school “must formulate and publish a policy opposing sexual harassment, a grievance procedure that is available to complainants, and procedures providing for prompt and equitable resolution of complaints.” Clearly, the OCR takes sexual harassment seriously as it imposes a severe penalty for schools that violate Title IX - the loss of federal funds. This penalty, however, has never been imposed on a single school as a consequence of violating Title IX sexual harassment regulations.

States have also adopted statutes similar to Title IX. Minnesota is a leader in legislating prohibitions on sexual harassment in schools. In Minnesota, all schools are required to have specific policies condemning sexual harassment. Other states, such as Massachusetts, California and Colorado, forbid harassment but do not

21. *Id.* at 2-3.
22. *Id.* at 3.
24. *Id.*
25. Yaffe, 77 PHI DELTA KAPPAN at 3.
26. *Id.*
28. Yaffe, 77 PHI DELTA KAPPAN at 3.
29. *Id.*
30. *Id.*, MINN. STAT. ANN. § 127-46 (West 1994).
31. MINN. STAT. ANN § 127-46 (West 1994).
mandate that individual school districts establish their own policies. In Minnesota, even kindergartners can be expelled for repeated acts of sexual harassment. In California, under a law effective in 1993, only children from fourth grade and up are covered.

These federal and state laws were opposed by some groups, including the American Civil Liberties Union and the National PTA. Both groups said the laws were unnecessary as school principals “already had the authority to discipline students who commit obscene acts, injure classmates or use profanity.” Opponents also criticized the laws as too vague and broad in their definitions of sexual harassment. Sue Sattel, a gender equity specialist with the Minnesota Department of Education, on the other hand, thinks the laws are necessary and believes the California law is wrong to exempt children younger than fourth graders; “Title IX protects kids from kindergarten through college. I’m not sure you can exempt anyone.”

Most of the state laws permit court action by students to require the school to take action to eliminate the sexual harassment when the school has failed to prevent the improper student behavior; the state statutes do not provide for monetary damages to the injured student.

As sexual harassment is now thought of not as “boys will be boys” behavior, but as serious student misconduct with serious harm done to victims, more complaints are being brought to the attention of school administrators. This change in attitude has also brought about lawsuits to hold schools legally liable for monetary damages to victims of student on student sexual harassment. Prior to the 1980’s and 1990’s, educational sexual harassment cases generally involved teachers “harassing” students (often in consensual sexual relationships, but deemed to be harassment because of the authority exercised by the teacher). As students and parents became more aware of the damage caused by sexual harassment and learned of their rights under Title IX, they saw that schools were not being subjected to the penalties permitted under Title IX. A school’s failure to properly enforce Title IX and protect its students also sparked an increase in court actions seeking monetary damages as an alternative remedy to the penalties imposed by the OCR.

32. Yaffe, 77 PHI DELTA KAPPAN at 3.
33. Id.
34. Id. Violation of the California law can result in student expulsion, the most serious penalty a school can impose in that state. Id.
35. Yaffe, 77 PHI DELTA KAPPAN at 3.
36. Id.
37. Id.
38. Id. at 4.
39. See, e.g., Rowinsky, 80 F.3d at 1010 (requesting compensatory damages for alleged student on student sexual harassment).
THE PREVALENCE OF STUDENT ON STUDENT SEXUAL HARASSMENT

In one Illinois school district, the male students participated in “grab-the-girls-in-the-private-parts” week. In an elementary school in Montana, boys try to lift up as many of the girls’ skirts as they can on “flip-up Friday.”

The American Association of University Women (“AAUW”) conducted one of the first in depth studies of peer sexual harassment. The survey consisted of 1632 students, grades eight through eleven, in seventy-nine public schools. The students were asked if teachers, students or other school employees had done any of the following:

1) made sexual comments, jokes, gestures or looks;
2) shown, given or left the student sexual messages or pictures;
3) written sexual graffiti on bathroom or locker rooms walls about the student;
4) spread sexual rumors about the student’s sexual activity or orientation;
5) spied on the student while dressing or showering;
6) flashed or mooned the student;
7) touched, grabbed or pinched the student;
8) intentionally brushed against the student in a sexual way;
9) pulled the student’s clothing in a sexual way;
10) blocked or cornered the student in a sexual way; or
11) forced the student to engage in kissing or something sexual, other than kissing.

The AAUW study revealed that eighty-five percent of girls and seventy-six percent of boys reported they were subjected to “unwanted and unwelcome sexual behavior that interfered with their lives.” A fair percentage of students reported sexual harassment by adults, but this figure was dwarfed by the number of school children claiming student on student harassment. Of the nearly eighty-seven percent of students who revealed they experienced sexual harassment, eighty-six percent of girls and seventy-one percent of boys stated they were targeted by a current or former student from school. Incidents of peer sexual harassment were not limited to high school. Rather, ac-

40. Ericksson, 83 GEO. L.J. at 1799.
42. Dolan, 63 FORDHAM L. REV. at 219.
43. Id. at 219 n.37.
44. Id. at 219.
45. Id.
According to the AAUW survey, “students are ‘most likely’ to have their first experience with sexual harassment at the middle school level of grades six through nine.” The AAUW survey also revealed the pervasiveness of peer sexual harassment at the middle school level. In fact, forty-seven percent of harassed students were first harassed in middle school and thirty-one percent of the girls said that this harassment occurred “often.”

Another study was performed by the Wellesley College Center on Women and the National Organization of Women Legal Defense and Education Fund. The study was done in connection with a survey in Seventeen magazine. It focused exclusively on the experience of female students. A one-page questionnaire with the headline “What’s Happening to You?” was printed in the September, 1992 issue of the magazine. The survey posed thirteen questions about whether very specific unwelcome behaviors had ever occurred. It also asked “when, where, how often, by whom, whether the victim told anyone and whether anything happened to the harasser.” The respondents ranged in age from nine to nineteen and from grade two through grade twelve. Ninety percent were in public schools. The vast majority, ninety-two percent, were between the ages of twelve and sixteen. Eighty-nine percent of the girls reported being harassed; one-third before entering seventh grade. The Seventeen study revealed that thirty-nine percent of the 4200 girls surveyed reported suffering sexual harassment every school day.

Another study was conducted in the Connecticut high schools during the 1993-1994 school year as a collaboration between the Connecticut Permanent Commission on Women and the School of Social Work at the University of Connecticut. The study surveyed 235 boys and 308 girls in grades ten through twelve in seven high schools in seven different Connecticut school districts. The investigators also contacted fifty-eight Title IX coordinators in Connecticut schools. In the Connecticut survey, ninety-two percent of the girls and fifty-seven percent of the boys reported at least one experience of sexual harassment during high school. Although these studies surveyed different stu-

46. Id. at 220.
47. Yaffe, 77 PHI DELTA KAPPAN at 9.
49. Yaffe, 77 PHI DELTA KAPPAN at 7-8.
50. Id. at 9.
51. Id. at 8.
52. Id. Title IX coordinators are charged with investigating sexual harassment complaints, whether by students on students or teachers or other school employees on students. Id.
dent populations and solicited their respondents in different fashions, their findings were dramatically similar. Most significantly, they revealed that a large portion of the student population had been subjected to unwelcome sexual behavior. After reviewing results of the AAUW study, researchers at the University of Michigan analyzed the data more extensively and found that requiring the student target of harassment to be able to name the place and surroundings where an incident took place changed the percentage of reported harassment very little. For boys, the percentage dropped from seventy-six percent to seventy percent and for girls the percentage dropped from eighty-one percent to seventy-six percent. The study results are significant because the students would have little to gain from falsifying surveys; moreover, the students also appeared to be honest about their own behaviors. In the AAUW survey, sixty-six percent of the boys and fifty-two percent of the girls admitted to sexually harassing another student at school and nearly all those who claimed to have been harassed also admitting to harassing others.

The studies showed not only the extent of the harassment, but also its forms. The most prevalent form was verbal harassment such as sexual comments about parts of the body, clothing, or looks; degrading epithets; or allusions to what certain individuals would be good at sexually. Girls, more often than boys, were subject to physical manifestations, such as whistles, howling, lip-licking and crotch-grabbing as well as grabbing and pinching. These study results indicate there could be a huge number of student claims if schools were routinely held liable under Title IX for peer sexual harassment.

THE IMPACT OF SEXUAL HARASSMENT

With respect to the overall education of students, peer sexual harassment influences the educational choices students make. As one commentator noted, "[s]tudents taking classes not traditionally taken by their gender - girls in auto shop or boys in home economics classes - endure taunts and sometimes actual sabotage." Such peer behaviors discourage students from selecting classes they might otherwise choose to take. By and large female students are still the most frequently victimized by peer harassment. Although similar numbers in both genders reported sexual harassment, the number of girls reporting that harassment occurred "often" was thirty-one percent in the

54. Id.
55. Id. at 10.
56. Id. at 9.
57. Id.
58. Id. One girl reported finding her auto shop tools taken, her work destroyed and lack of cooperation in group projects. Id.
AAUW study compared to only eighteen percent of boys. They tended to be harassed by more than one boy at a time, whereas boys subjected to harassment were usually only harassed by a single girl. The emotional, educational and behavioral impact of peer sexual harassment is significant for all student victims, but because girls suffer more incidents of harassment, they suffer the most devastating effects. Peer sexual harassment appears to be a serious problem not only in the number of cases, but also in the damage it causes.

THE LEGAL BASIS FOR A SEXUAL HARASSMENT CLAIM AGAINST THE SCHOOL

As noted above, Title IX prohibits gender-based discrimination in federal funded educational programs and it has long been held that an individual who believed he or she was subject to gender-based discrimination in a federal funded educational program could privately sue and claim damages against the educational institution which had discriminated. This rule of law was established in Cannon v. University of Chicago, wherein the United States Supreme Court agreed there was an implied private cause of action under Title IX. More recently, in Franklin v. Gwinnett County Public Schools, the United States Supreme Court allowed a student to sue a school district for a Title IX gender discrimination claim on account of harassment by a teacher/coach. The student claimed the school did nothing to halt the harassment and encouraged the student not to press criminal charges against the teacher.

When the issue is peer sexual harassment, the school's responsibility is more problematic. Why should the school be liable for the act of a student? Many, if not most, of the acts of harassment do not occur in the classroom under direct supervision of a teacher or other authority; instead most acts of sexual harassment take place in hallways, cafeterias, playgrounds or school buses. In those locations, the school cannot continuously and directly control behavior. Though Title IX speaks of a school's responsibility for the acts of its agents, it is hard to claim a student is the school's agent when the student is not within

59. Dolan, 63 FORDAM L. REV. at 222.
60. Id.
61. Id.
63. 441 U.S. 677 (1979)
64. Cannon v. University of Chicago, 441 U.S. 677, 717 (1979). In Cannon, petitioner claimed that she was denied admission to a private university medical school program because she was a woman. Cannon, 441 U.S. at 680.
65. 503 U.S. 60 (1992)
67. Franklin, 503 U.S. at 63-64.
the direct control of school authorities at the time the harassment occurs. Moreover, Title IX does not on its face offer a remedy to a victim of peer sexual harassment. The school is not the actor in the harassment claim. Even if the school does not respond properly to the harassment claim, this is not necessarily the result of gender discrimination (though if the school responded in one fashion to a male student's complaint, and in another, different fashion, to a female student's complaint, that would be an act of discrimination). In most cases which have been litigated, however, the school's mistake is not discriminating on the basis of gender in the imposition of punishment or provision of a remedy, but simply not responding and not taking action following complaints of students of either gender.

Recently, the federal courts of appeal have heard cases on whether a "hostile environment" is sufficient ground to hold a school liable for peer sexual harassment. If "hostile environment" becomes the accepted standard of liability, then schools would have to do much more to actively prevent peer sexual harassment from occurring and take immediate steps to stop peer sexual harassment when it occurs; if a school does not properly respond to complaints and allows a "hostile environment" to continue, then the school faces financial liability to the victimized student. The United States Court of Appeals for the Eleventh Circuit was the first federal appellate court to address this issue directly. In Davis, a fifth grade student alleged a pattern of sexual harassment by a fellow fifth grader over a six-month period, including attempts to fondle and the use of offensive language. Ultimately the student-harasser was charged with and plead guilty to criminal sexual battery. Virtually every incident of harassment was reported to teachers and to the principal. The school did not remove the harassing student or discipline him for the behavior. At the trial court level, the court dismissed the student's sexual harassment claim, holding that the school did not discriminate on the basis of gender because the student-harasser was not an employee of the school district and the harassing activity was not part of a school program or activity. The trial court took the position that the school was simply not responsible for the acts of the student. The Eleventh Circuit reversed the decision of the trial court and held the student need only

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68. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), reh'g granted, decision vacated, rev'd on reh'g, 120 F.3d 1390 (1997).
69. Davis, 74 F.3d at 1188-89.
70. Id. at 1189.
71. Id.
72. Id.
73. Id. at 1188.
show the school permitted a "hostile environment" in order to recover damages against the school.\textsuperscript{74}

The Eleventh Circuit in \textit{Davis} applied the United States Supreme Court's rule in \textit{Meritor Savings Bank, FSB v. Vinson}.\textsuperscript{75} \textit{Meritor} was an employment discrimination case which established the rule that where an employer tolerates a "hostile environment" which affects the work of women (as opposed to men), the employer has engaged in a violation of the Title VII prohibition on gender discrimination in employment and is responsible for damages to the affected women.\textsuperscript{76} The appeals court in \textit{Davis} noted that:

a student should have the same protection in school that an employee has in the workplace. . . .\textsuperscript{77} \textit{Just} 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.

In order to prove a case of peer sexual harassment against the school, the Eleventh Circuit in \textit{Davis} ruled that the complaining student must prove all the following:

1. Membership in a protected class [which in a Title IX case is imminently simple as it is simple to prove one's gender - and gender is the protected class in a Title IX case];
2. Being subject to unwelcome sexual harassment (such as unwelcome sexual advances, requests for sexual favors or other sex-based verbal or physical conduct that unreasonably interfere with the educational process or which creates a hostile, intimidating or offensive educational environment);
3. The harassment was based on sex;
4. The harassment was sufficiently severe or pervasive that it altered the conditions of education and created an abusive educational environment for the complaining student; and
5. A basis for institutional liability has been established [i.e., the school has been told of the harassment and has not taken steps to stop the harassment or has taken inadequate steps].\textsuperscript{78}

If the student proves these elements, then the school district is liable in damages.\textsuperscript{79} The Eleventh Circuit noted that institutional lia-

\begin{thebibliography}{9}
\item 74. \textit{Id.} at 1194-95.
\item 75. 477 U.S. 57 (1986).
\item 77. \textit{Davis}, 74 F.3d at 1192-1193.
\item 79. \textit{Davis}, 74 F.3d at 1195.
\end{thebibliography}
bility can be established in two ways: evidence of a direct complaint to
duty or constructive knowledge because of the pervasiveness of
the harassment. The constructive knowledge test makes the case
against the school an easier one to prove, as a school is assumed to
know of the harassment when the harassment is frequent, even if
school officials truly had no actual knowledge of the wrong-doing.
Upon rehearing en banc, however, the full federal court of appeals for
the Eleventh Circuit affirmed the district court, holding that a claim
cannot be stated under Title IX for peer sexual harassment.

Less than two months after Davis, the United State Court of Ap-
peals for the Fifth Circuit also addressed the same issue in Rowinsky
v. Bryan Independent School District. The Fifth Circuit considered
the ruling in Davis but rejected it, concluding “Title IX does not im-
pose such liability [for peer hostile environment sexual harassment]
absent allegations the school district itself directly discriminated on
the basis of sex.” In Rowinsky, an eighth grade girl complained of
harassment by a fellow student, including being hit on her bottom and
being subjected to vulgar sexual comments, and unwelcome touching
of a sexual nature. The behavior took place on the school bus and
the student and her parents repeatedly complained to the bus driver,
a school district employee. When the behavior did not stop, the stu-
dent and parents complained to the assistant principal, who sus-
pended the harassing student from riding the bus for three days and
required that he sit immediately behind the driver thereafter. The
behavior continued and the parents continued to complain to the as-
istant principal, the assistant director of the transportation office and
the director of secondary education. A new driver was finally as-
signed and while no additional incidents took place on the bus, there
were additional incidents that occurred in the classroom.

The court in Rowinsky, however, refused to hold the school liable
to the student for the school’s inability to prevent the harassment.
The court stated “importing a theory of discrimination from the adult
employment context [the ”hostile environment theory“] into a situa-
tion involving children is highly problematic.” The court was con-

80. Id.
81. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997).
82. 80 F.3d 1006 (5th Cir. 1996).
84. Rowinsky, 80 F.3d at 1008-09.
85. Id.
86. Id. at 1008.
87. Id. at 1008-09.
88. Id. at 1009.
89. Id. at 1016.
90. Id. at 1011 n.11.
cerned about the unfairness of holding schools liable for acts of students it could not control or may not even know about. The court found that the school's responses were limited in nature; a school cannot easily expel a student even if the student continues to misbehave, while a private employer can fire a misbehaving employee without any due process. Even when a union is involved, the private employer can terminate an employee if there is ample evidence of misbehavior or misconduct.

The Rowinsky court concluded that a school district cannot be held liable for peer sexual harassment itself (directly contrary to the holding in Davis), but did hold that a school would violate the gender discrimination provisions of Title IX if the school responded to sexual harassment claims by females differently than those by males, because the different response - as opposed to the underlying behavior - would constitute gender discrimination. The court stated that "a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.'

Following the Davis and Rowinsky decisions, other federal courts have ruled on the same legal issues. For example, in Burrow v. Postville Community School District, a female student alleged a pattern of sexual harassment for several years by both male and female students, including use of sexually offensive obscenities, sexual touching and threats against her life. The student and her parents made numerous complaints to the principal, to the superintendent of schools and to school counselors, as did their legal counsel, both orally and in writing. The superintendent met with some of the harassing female students and their parents, but no disciplinary action was taken. The Burrow court took a middle road, and held that mere existence of a hostile environment was not enough, but that the school must know of the harassment and intentionally fail to take proper remedial measures because of the student's gender. In Burrow, the school authorities had been made aware of the harassment, so it was up to the student to show the school had failed to take proper remedial meas-

91. Id. at 1013.
92. Id. at 1016.
93. Id.
96. Id. at 1197.
97. Id. at 1198.
98. Id. at 1205.
ures. The student had to show some intent behind the school's inaction.

In *Bruneau v. South Kortright Central School District*, the court was more sympathetic to the *Davis* rule, and agreed a student had a claim for "hostile environment" if he or she could show the school district had actual knowledge of the harassment and failed to take appropriate remedial action. The "intentional failure" rule of *Burrow* was absent. This is an easier standard to meet as the student or parents need only put the school administration on notice (preferably in writing) and, if following the school's attempts to stop the harassment, it continues, the victimized student can claim the school failed to take appropriate remedial action. A jury later ruled against the student on all the student's claims as noted in the plaintiff's appeal of the denial of a new trial following the defense verdict.

Though the United State Supreme Court has not yet ruled on whether a "hostile environment" is grounds for school liability to student victims of peer sexual harassment, it seems likely the "hostile environment" cause of action should ultimately succeed based on the Supreme Court's history of permitting hostile environment cases in employment discrimination cases and its willingness to allow private causes of action under Title IX. It is logical to anticipate that if or when the Supreme Court considers the issue, the Court will apply the Title VII "hostile environment" analysis in permitting a school district to be held liable for monetary damages to a student victim of peer sexual harassment under a Title IX Claim. The Supreme Court has already demonstrated in *Franklin* that, unlike the Fifth Circuit, the Supreme Court does not find use of a Title VII hostile environment analysis "problematic" in considering Title IX issue, as peer harassment in an educational setting is not conceptually unlike peer harass-

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99. *Id.* at 1206.
100. *Id.* at 1207.
103. *See Bruneau*, 935 F. Supp. at 177 (giving the standards for possible liability).
104. *Id.*
105. *Bruneau v. South Kortright Cent. Sch. Dist.*, 962 F. Supp. 301, 302 (N.D.N.Y. 1997). Under any court's interpretation of Title IX, schools must treat claims of sexual harassment without gender discrimination. If a school treats one gender's claims more seriously than the other's, the school will clearly be subject to liability under any court's interpretation of Title IX.
106. See supra notes 63-68 and accompanying text.
107. At present a seemingly very conservative appeals court; the same Fifth Circuit court also eliminated affirmative action in college selection processes in Texas, Louisiana and Mississippi.
ment in the employment setting. In fact, not only did the Supreme Court rely on Meritor, a Title VII case, in finding that a Title IX plaintiff can seek money damages in Franklin (though Franklin involved a student/employee versus an employee/professor), the Court specifically acknowledged in Franklin that a student should have the same protection in school that an employee has in the workplace. Given that Title IX was patterned after Title VI (part of the Civil Rights Act of 1964) and that Title VI is part of the legislation which included Title VII, there is little statutory history which would oppose broadening a school's liability for peer sexual harassment. In addition, the Court appears to favor liberal application of Title IX's prohibition against sexual discrimination, having stated "[t]here is no doubt that if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." More recently, the Supreme Court declined to review a lower court ruling on a Title IX case brought against Brown University involving expenditure of funds for intercollegiate sports. That lower court decision found against Brown and imposed a more liberal reading of Title IX than Brown or practically any university athletic department wanted. The Supreme Court's decision not to review the case, while not legally meaning outright approval of the lower court's opinion, may indicate the Supreme Court's willingness to uphold a liberal, broad interpretation of Title IX.

There are also policy considerations militating in favor of granting students the same broad protection from harassment as an employee receives in the workplace. Several courts have noted the psychological damage to a sexually harassed child may be more severe than that suffered by an adult employee. One court has argued that a school may be in a better position than an employer to control such behavior. Moreover, while it may be difficult for an adult to leave a hostile employment environment, given that parents are legally obligated to send their children to school, it is impossible to simply remove the victimized child from a public school unless the parents intend to home school the child. Most school districts are not

108. Franklin, 503 U.S. at 63-64.
109. Tukel, 75 Mich. B. J. at 1157. See Davis, 74 F.3d at 1192-93 (discussing the United States Supreme Court decision in Franklin).
114. Davis, 74 F.3d at 1193.
going to allow transfer to another public school within the district and the student cannot attend a public school outside the district unless there is space available and the parents are willing to pay tuition. The only other likely option is private school and many parents simply would not have the financial means to send their child to a private school.

Critics of expanding Title IX to encompass peer harassment claims, and especially hostile environment claims, argue that doing so would expose schools to massive and unprecedented financial liability. One commentator suggested that “[m]any school districts are already in financial trouble; the additional expense of paying monetary damages to victims of peer sexual harassment only adds to the financial burden of properly educating children.” Arguably, however, the schools are already at great financial risk for Title IX violations, as such violations risk the termination of federal funding, and few school districts could survive without federal funds. Of course, the threat of loss of federal funds is less serious, given the history of the OCR’s failure to invoke this penalty, than the threat of a court case and a large unfavorable verdict.

Most schools enjoy “sovereign immunity” under their state constitution or state statute from liability for traditional torts against persons (negligence, slander, etc.), thus school liability insurance usually excludes coverage for these types of personal injuries. Title IX liability can be imposed because federal law pre-empts the sovereign immunity provided by state law; liability for those claims is not covered by liability insurance, nor is the cost of defense. Proponents of broader liability argue schools are in a position to take appropriate action to remedy sexual harassment. Furthermore, proponents contend the threat of litigation heightens a school’s incentive to take the appropriate action and, except in the most radical definitions of “hostile environment”, a school has to know about the alleged harassment before it can be held liable, so the school should not be “surprised” by a valid claim. In responding to claimed harassment, however, schools face an additional risk; disciplining the misbehaving students also opens up the schools to claims by the harassing student if the harassing student is not given appropriate due process in the punishment phase or is mistakenly accused of the bad behavior.

Some critics have raised First Amendment or free speech issues as well. Schools do, however, have broad powers to regulate stu-

116. Id.
117. Id. at 1818.
118. Id. at 1819.
dents' speech, especially to the extent the speech is unrelated to the school's educational mission. A school certainly has the authority to regulate and discipline student behaviors even though it cannot regulate or control student speech. The issue becomes more delicate in multicultural schools, where certain behaviors or words might be acceptable within some cultures but not in others. “In an inner city school that is 100% or predominantly black,” says Marvin Adams, the affirmative action officer in the largest school district in Colorado Springs, “if that language was used [referring to African-American students’ use of the word ”nigger“ amongst themselves or the use of the word ”bitch“ as a term of endearment], I'd say okay. Schools are part of their communities and need to reflect community values and attitudes.” An African-American professor, Reginald McKnight, at the University of Maryland disagrees:

What if the students said, “It’s okay for me to cut another black person with a razor - it’s a black thing.” You can't allow that. It's not morally relative. It’s wrong. Degrading language may be specific to the culture, but it doesn't make it right. ...no self-respecting person anywhere wants to be called a “nigger.” “Bitch” is not a term of endearment - ever. These words always remain attached to their pejorative meanings.

Certainly, there should be little argument that the offensive touching, sexual threatening, sexual gossip or the other more egregious examples of sexual harassment is inappropriate behavior and can be disciplined by schools, but the punishment of verbal sexual harassment by a public school might conflict with the offending student’s free speech rights.

HOW CAN SCHOOLS LIMIT THEIR RISK OR SPREAD THE LIABILITY?

Clearly, a school district can be held liable for sexual harassment of a student by one of its employees. The real risk, based on the apparent prevalence of student on student sexual harassment, is a school's liability to the victims of such behavior. Just as employers take certain steps to prevent and eliminate a hostile workplace environment, school districts and schools should implement the following procedures suggested by one commentator:

119. Id.
120. Yaffe, 77 PHI DELTA KAPPAN at 10.
121. Id. at 10-11.
122. Id. at 11.
123. See Franklin, 503 U.S. at 76 (holding monetary damages are available under Title IX for teacher to student sexual harassment).
1. Adopt an anti-harassment policy, including guidelines for preventing, reporting and investigating claims of student against student harassment. The regulations of Title IX require recipients of federal funding to establish and publish procedures for resolving student grievances regarding any actions prohibited under Title IX and to appoint a coordinator to monitor compliance efforts;

2. Train students and employees in the district on how to monitor the educational environment, to recognize potentially harassing behavior, and to respond to complaints of harassment and investigate the claims that are made;

3. Establish an internal investigatory process, which includes the right to progress up the chain of command if the victim is not satisfied with the proposed resolution; and

4. Address any claims of harassment that are found to be meritorious swiftly and surely. Harassers should be disciplined, although appropriate discipline will vary according to the number of factors including past history of harassing behavior, the severity of the situation, and its frequency. Appropriate discipline, depending on the situation, can include verbal or written warning, suspension or expulsion. It may be appropriate to remove the harasser - but not the victim - from the environment.\(^\text{124}\)

As noted above, in disciplining the harasser, the school must also insure the harasser receives the procedural due process owed that student before any punishment is doled out. What “due process” is required in order to punish, is of course, a larger topic beyond the scope of this paper, but generally, the more serious the prospective punishment, the more due process (by way of presentation of evidence, a hearing, the right to face accusers, etc.) is required.\(^\text{125}\) These procedures frustrate the desire for swift punishment of the harassers and in fact make it appear the school is doing little if anything to eradicate the harassment. The bad behavior may continue pending imposition of punishment or may even accelerate in seriousness; for example, the harasser might threaten the victim with more harm if the victim continues to press his or her claim.

School districts are trying to educate their students and staff in a variety of ways.\(^\text{126}\) Students from Stevens Point High School in central Wisconsin, annually revise and perform a play entitled “Alice in Sexual Assault Land.” A seventh grade program in Detroit includes

\(^{124}\) Tukel, 75 Mich. B. J. at 1157.


\(^{126}\) Yaffe, 77 Phi Delta Kappan at 16.
"videotapes in which local high school students act out everyday encounters involving harassment and flirtation." After each scene, an on-screen discussion covers whether or not the depicted behavior could be construed as sexual harassment and why. The most common approach that school districts have taken is to set up workshops either district wide or at individual schools. These school districts provide information on state and federal laws, on what behavior constitutes sexual harassment, and on the district's policies and procedures.

Experts who have studied this issue maintain that, when schools get involved in training, it is important to identify unacceptable behavior and to enjoin students from engaging in it, and at the same time it is important to urge students to report the behavior. This imposes a responsibility on schools to designate and train personnel. Unfortunately, training costs money which the schools may have to divert from other equally worthy programs. If students are urged to come forward, "school personnel must know precisely what the law says, what students' rights and options are, how to conduct investigations and what strategies are available for resolving the situation." The real problem with many programs is that students are told to report the harassment to the school, but if the school does not have a policy to follow up on complaints and has not trained its employees on how to implement investigation and punishment, then this failure may actually increase the school's liability more than if it never had an express anti-sexual harassment policy in the first place. This is clearly true when the courts apply the hostile environment theory in a Title IX claim; a school's indifference to the complaint or ineffectual handling of the complaint is what causes the school's liability notwithstanding the school's published policy statements. One commentator suggested, "If the person the student reports to has not been told what to do, that can put the student who is complaining in a difficult psychological position [with his or her peers] and put the school in a difficult legal position."

Given the frequency of peer sexual harassment in schools, it can perhaps be assumed students simply do not understand that certain

127. Id.
128. Id.
129. Id. Many districts require that all employees attend including the bus drivers and janitors. Id.
130. Yaffe, 77 PHI DELTA KAPPA at 16.
131. Id.
132. Id.
133. Id.
134. Id. at 16-17.
135. Id. at 17.
behavior is inappropriate. In part, this stems from teachers' and administrators' inability to teach morals or values to students; if there is no moral basis for good or bad behaviors, it can be difficult to impress on students why certain behavior is wrong and not acceptable. Silence, in the face of inappropriate behavior, is treated by students as acceptance of such behavior by teachers. With students, a Colorado Springs principal suggests dealing with sexual harassment instantly and directly. Jackie Provenzano says,

I say to kids “what would happen if Mr. Smith walked down the hall and said, ‘Hi bitch!’ to me?” The kids say “He wouldn’t do that” And I say, “No, and I don’t think you will say that to each other anymore either. You will not do that.” I always use myself. “What would happen if I walked down the hall and one of the male teachers was standing there and I gave him a big smack on the rear end?” and then they see how ludicrous that is. I often work with girls about what they can do to avoid these situations. I tell them, “Say stop it. And don’t do it again.” I tell them, “It’s perfectly okay to say you are not comfortable with something.”

Teaching the students that such behavior is morally wrong is often overlooked in the literature. Commentators lament the prevalence of sexual harassment, demand that schools stop the behavior, require proper discipline of the offender, yet never suggest there is a moral basis for teaching why the behaviors are wrong. The schools are required to react, but are not given the tools to prevent the bad behavior. The schools are to have a policy opposing the behavior, but are not required to teach that it is wrong. Yet, if students are to know from an early age what behavior is proper or improper, right or wrong, they must be given rules of behavior, not merely guidelines or indoctrination in the equality of the sexes.

Parent involvement can be crucial. Parents must be made to understand the rules of the school. Parents frequently meet and agree on rules such as not permitting drinking at their children's parties. Parents can also be taught to understand that sexual harassment is not only against school rules and the law, but dangerous for their children. Getting parental consensus is not always easy. They may have different ideas regarding sexual harassment. "People still take this behavior as natural" says an administrator in Colorado Springs,

136. Theresa Gavila, Classroom Discussion, Contemporary Issues, Webster University, Kansas City, Missouri campus (Spring, 1997).
137. Yaffe, 77 PHI DELTA KAPPAN at 16.
138. See id. at 17 (discussing why parent involvement is necessary).
139. Id. at 17.
"Boys will be boys. Teenagers will be teenagers. People look at you like you're crazy; they say we're trying to change nature."140

Given the threat of financial damage to schools on account of peer sexual harassment, school districts should not only look to parents as helpers in preventing sexual harassment, but also as potential co-defendants. The harassing student could be held liable for his or her bad acts under any number of traditional tort claims: assault, battery, libel, slander or intentional infliction of emotional distress. If the student's bad acts cause the school's liability, the school can demand and win judgment for contribution from the student. Few students, however, have any assets which could be collected to satisfy a judgement. The judgment would remain and could be collected in the future if the student began working or won the lottery, but practically, it does little to help the schools in their present predicament. Actual lawsuits, though, against the harassing students could have some long term effect on other students' behavior. If parents could also be held financially responsible for their child's actions, this might be a better incentive to parents to exercise control over their children or cooperate in the school's disciplinary actions. Many parents would have financial assets at risk and at least would have to pay the cost of defending the action.

In many states, parents are held statutorily responsible for certain acts of their children: vandalism and auto accidents caused by a child's negligence are two common examples.141 Parents are also liable for a child's tortious act when the parent consents to the act, where the parent's negligence makes the tortious act possible, or where the parent does nothing to prevent the injury, but has knowledge of the threat of injury.142 In Louisiana, a parent is always responsible for any torts of a child until the child reaches the age of majority or is otherwise emancipated.143 If the United States Supreme Court ultimately determines that school districts are liable for Title IX damages because a hostile environment existed in the school, school districts should sue the parents and lobby for statutes permitting them to join parents as co-defendants and reimburse schools for damages caused the school by those parents' students. Procedurally, when a sexual harassment complaint is filed by a student, the school should immediately put the parent or guardian of the harasser on notice that the behavior has been reported and that the parent must take action to

140. Id.
142. Id. at 624-26.
143. Id. at 617-19.
stop the behavior or risk being held financially liable for the injury caused by the son or daughter. It hardly seems unfair to hold a parent responsible after the parent has notice. If a parent is under a duty to exercise reasonable care so as to prevent his or her child from intentionally harming others or from engaging in conduct creating an unreasonable risk of harm to others, then, if the parent knows or has reason to know, of the harassment and the harm caused by the harassment, the parents should be responsible for controlling the child so as to prevent the harm. The parents’ failure to do so should at least make them partially responsible to the injured student and liable to the school district for the financial loss to the district.

CONCLUSION

The battle over liability for peer sexual harassment is taking place at a time when society is relying less on morality based restraints or teaching of good behaviors, and turning more and more to official outside reminders of what is acceptable and relying on the same authorities to enforce the rules. At the supermarket counter, patrons are asked to “Please be considerate of others.” Movie goers have to be reminded not to talk during the show and not to throw trash on the floor. Concert goers are asked to turn off cell phones and beepers. Newspapers and television news shows cite increasing numbers of problems from impolite drivers causing traffic safety problems. The absence of concern for others and, at the school level, the absence of teaching or inability to teach the importance of concern for others based on a set of moral values is leading society and students, as a part of society, to increasingly rely on litigation and other forms of “rule enforcement” to regulate and punish behavior. In the past, the courts would have been the avenue of last resort; now the courts are the first.

Peer sexual harassment is now recognized as a serious problem in schools. Behavior that might previously have been ignored by teachers and administrators can now constitute gender discrimination by the school if the school fails to properly prevent or remedy acts of peer sexual harassment. Without doubt, the incidents described in the literature are appalling and the students responsible should be strongly disciplined.

Though some critics may have a point that minor incidents of sexual harassment are inevitable, this does not mean schools should ig-
nore even those incidents. If no one teaches the student that minor acts of sexual harassment are wrong, why should the harasser change his or her behavior as an adult? Because of the legal liability placed on schools resulting from sexual harassment claims, schools must also train teachers and administrators to acknowledge, recognize and discipline this problem.

A more difficult task is to teach students what behavior is proper and what is not; given the number of incidents of sexual harassment reported in the various student surveys, it seems clear many students are coming to school without having learned which behaviors are acceptable and which are inappropriate from their parents or guardians. Missing throughout the literature and the court cases is any examination of how to teach students good and bad behavior based on a coherent set of values before the bad behavior begins. Also missing is any examination of whether or not other parties should be jointly responsible for the harassing student’s actions. To protect themselves and perhaps to find a source of financial reimbursement, schools should take advantage of laws which already hold parents liable for their children’s bad acts and work for stronger laws reinforcing this parental obligation, just as the victimized students have done in working to hold schools liable for peer sexual harassment.