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Student-to-Student Sexual Harassment and Discrimination

*Dennie D. Butterfield**

I. THE PROBLEM

Much has been reported and litigated on sexual harassment between faculty and students in education, yet there have been very few student-to-student sexual harassment claims despite the general consensus that such harassment is a critical problem in schools throughout the country. Until recently, the problem of sexual harassment was not a sensitive issue and little was done to eliminate it from the public schools. Recent Supreme Court decisions, however, have redefined the scope of Title IX, and created an impetus for students and families to bring suits. These suits have increased concerns over school district liability and the need for policies to address student-to-student sexual harassment at the individual school and district level.

While the Supreme Court decisions have clarified student rights against harassment by school employees, there is still no federal level legal remedy for student-to-student sexual harassment. Some states, including Utah and Minnesota, have passed sexual harassment legislation which includes relations between students. But until the law develops further, the yeoman work of curbing sexual harassment among students must be done in the schools and in the home. The purpose of this article is to explore the relationship of student-to-student sexual harassment and discrimination to current law as well as school and university policies. The article will further explore relevant aspects of current federal, Utah and Minnesota laws, and recommend

* Associate Professor of Educational Leadership, Brigham Young University. Personal insights related to the topic of this article were gained through 5 years teaching in public school, 4 years service as a building principal, and 10 years service as a district superintendent. The author appreciates the contributions of many individuals who have helped refine this article; special gratitude is expressed to Henning Olsen and Brick Powers.

policies to assist educators in recognizing, limiting, and preventing sexual harassment and discrimination between students.

A. *Sexual Harassment Defined*

Sexual harassment may be defined as the legal equivalent of sexual discrimination and includes inappropriate behaviors such as physical abuse, emotional abuse, and acts of violence. Such inappropriate behaviors are becoming ever more common in educational settings. Students engaging in these behaviors interfere with the ability of school officials to maintain order and discipline, endanger persons and property, and violate standards of civility and propriety required in a normal and productive school environment.

Sexual harassment in the school context is basically the same as sexual harassment as defined by the Equal Employment Opportunity Commission (EEOC). The EEOC has promulgated regulations that define sexual harassment in the workplace as any "unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical contact of a sexual nature."¹ The regulations further require that these activities be part of one of the following circumstances to be actionable: (1) the treatment is an implicit or explicit term or condition of employment; (2) a willingness to submit to such treatment is a basis for employment advancement or a favorable progress decision; (3) or the treatment has the purpose or effect of unreasonably interfering with the harassed person's work performance or has the effect of creating an intimidating, hostile or offensive work environment.² In essence, victims of workplace harassment must show that the conduct is so severe or pervasive that it alters the conditions of employment or creates an abusive work environment.

The standard for claims in school situations is less clear. One thing is clear, however, student-to-student sexual harassment is more difficult to define and even more difficult to prove than employment harassment. Perhaps the difficulty in defining and proving student-to-student sexual harassment has prevented many valid claims from being reported and pursued.

Although the EEOC standards relate to employees, students in schools are certainly more vulnerable than employees in the

1. Guidelines on Discrimination Because of Sex, 29, C.F.R. §1604a.11(a) (1986).

2. *Id.*

workplace.³ This is because students are more easily intimidated by offensive harassing behavior and less likely to feel they have effective ways to address harassment. Fear is a second and possibly even more restrictive reason students are more vulnerable. This fear is caused by an adolescent concern that causing a situation which will get a fellow student in trouble will alienate them from their peers. Many at this age are more concerned with peer relationships than with harassment itself. This attitude is defeating, however, because once started and left uncorrected, sexual harassment not only continues but grows more intense and insulting. A further concern over the extreme vulnerability of students in school is the concern that even though a young girl may experience anger resulting from student-to-student sexual harassment, she may eventually believe that she is somehow to blame for the harassment. This is particularly damaging and has the potential to create serious, long-lasting damage to a developing self-image.

Situations and specific examples within the definition of student-to-student sexual harassment include abusive language such as making suggestive remarks, lifting skirts, staring at or touching another students' hair, wearing mirrors on the tips of shoes, and references to oral sex made by boys when girls are applying lipstick.⁴ Lewd comments, requests for sexual favors, grabbing or touching body parts and the use of descriptive or foul language are other aspects of sexual harassment.

B. Sexual Stereotyping

The use of language that attempts to gender stereotype people with statements such as, "Women are supposed to stay home and be mothers," is a further example of sexual discrimination which may rise to the level of harassment.⁵ Prompted by an increasing interest in legal remedies for improper student-to-student behavior in the 1990's, public schools, universities and state legislators are beginning to grapple with the problem of gender stereotyping, and to develop policies protecting students and institutions.

3. John H. Dise, *School and Management RISK MGMT.*, Oct. 1992, at 38 (citation omitted).

4. *Id.*

5. Matthew Hilton, Adjunct Professor of Educational Leadership, Brigham Young University, Classroom Lecture, (July, 1993).

Although this form of sexual discrimination has existed for many years, the growing awareness that it is improper is relatively new. This growing consensus is creating a further shift in legal emphases, and trends and definitions of sexual harassment and discrimination by legislatures at the state and national level.

II. CALLS FOR REFORM

The issue of sexual harassment has been kept before the public eye by numerous events. Below, a few major news stories are noted. These reports and events, along with many others, have raised the public's consciousness and encouraged those who have been harassed to seek redress. They have also spurred policy makers, especially in educational institutions, to address misconduct more effectively.

A. *American Association of University Women*

In 1991 the American Association of University Women (AAUW) issued a report regarding gender bias against female students in American schools.⁶ Citing the dramatic increase in sexual harassment in education as well as a parallel increase in the number of female students who charge male classmates with sexual harassment, the report strongly suggested that school administrators, teachers, parents and students must become better informed about present laws defining and prohibiting sexual harassment in educational institutions because of the need for vigorous enforcement to avoid litigation.⁷

B. *Wellesley College Center for Research on Women*

Another study revealed that 89 percent of the women enrolled at Wellesley College reported they had been subjected to sexual comments, gestures or looks and that 83 percent of them had been touched, pinched or grabbed by male students while at Wellesley. The director of the Wellesley College Center for Research stated that these startling revelations should serve as a wake-up call. He urged the public to listen to the concerns

6. Beth Wickum, *Sexual Harassment in School: Protecting Students From Their Peers*, J. OF INTERGROUP REL., Vol. 19, No. 3, Fall 1992, at 13.

7. *Id.*

expressed by these female students and resolve that sexual harassment is a problem that can no longer be ignored.⁸

C. *Clarence Thomas Confirmation Hearings*

One of the highly visible and well publicized reports that brought the seriousness of sexual harassment to the attention of a national audience, was the 1991 sexual harassment charge against Clarence Thomas, a Supreme Court nominee, by Anita Hill. Although Thomas denied the accusations and was later confirmed as a Justice of the U.S. Supreme Court, the accusation created a national awareness of the implications and seriousness of sexual harassment, and made Anita Hill a national spokeswoman for the cause of sexual harassment in the workplace.

A law professor at the University of Oklahoma, Anita Hill, later returned to her alma mater at Yale Law School to speak about the number of sexual harassment incidents involving women. Her strong advice encouraging victims of sexual harassment to "speak up" and her statement that "silence and denial are part of the behavior of the victim, the abuser, and the society at large,"⁹ created a nationwide awareness of sexual harassment and abuse. Her statements served as a warning as well as a rallying cry for women throughout the country encouraging them to take a stand when they had been sexually harassed.

D. *University of Pennsylvania Water Buffaloes*

Late one night in January, 1993, a group of African-American University of Pennsylvania sorority sisters, in high spirits and volume, disturbed the peace of some male classmates. The report of the incident revealed that a few male midnight scholars went to their windows and began yelling for quiet, hurling epithets at the women. It was reported that one student bellowed, "Shut up you black water buffaloes. Go back to the zoo where you belong."¹⁰

The offended women took their grievance privately to the university charging racial and sexual bias and harassment.

8. *Girls Harassed Often at School: Study Says*, DESERET NEWS, United Press, March 24, 1993, at A1.

9. *Staff, Victims Urged to Speak Out*, DESERET NEWS, April 3, 1992, at A6.

10. *Five Blacks Drop Racism Claim Against Student*, DESERET NEWS, Associated Press, May 25, 1993, at A3.

Responding to the charges, Eden Jacobowitz, a freshman Israel-born student, admitted his involvement and went public through the press. His defense was based on his insistence that the term "water buffalo" in his native Hebrew language "was an equal opportunity insult, not a racial slur."¹¹ Four months later, the incident ended when the women withdrew their charges stating "we have been disappointed by a judicial process which has failed us miserably."¹²

They asserted that Jacobowitz and his university faculty adviser had circumvented the judicial process by trying the charges of bias and harassment through the national media, making them an issue of freedom of speech and political correctness. The offended students felt that Jacobowitz's counter-charges had blanketed the real issues of racial and sexual harassment.¹³ Although the incident did not result in litigation, it did cause great embarrassment to University President Sheldon Hackney, who soon after became President Clinton's choice to head the National Endowment for the Humanities.

Claire Fagin, the new interim president of the university regarded this occurrence as a case of "political correctness run amok."¹⁴ She felt that the entire situation portrayed an unusual level of pathos and felt that in the future, colleges would become a proving ground for the many issues of societal changes, diversity and shifting power in the wider society. She stated that this would be even more critical because universities will be forced to struggle to hold together communities and at the same time support individual rights. Fagin predicted that this concern would ultimately evolve into a "see-you-in-court" syndrome among many both in and outside of education. Thus, it becomes likely that the increasing litigiousness of many Americans outside of academia will also be found on the campuses of colleges and universities in the future.¹⁵ Just as the problem reaches beyond schools, so must the solution.

11. *Id.*

12. *Id.*

13. Ellen Goodman, *With Water Buffaloes Corralled Maybe Humans Can Start Talking*, *DESERET NEWS*, May 27, 1993, at A10.

14. *Five Blacks Drop Racism Claim Against Student*, *supra* note 10, at A3.

15. *Id.*

III. SEXUAL HARASSMENT IN SCHOOLS

One lawyer for the National Association of Secondary School Principals stated that he would be surprised if the courts did not see a rash of new sexual harassment cases resulting from the AAUW report.¹⁶ Reports such as these have increased educators' interest in sexual harassment and discrimination and the need for preventative action. Because of the increased need and interest, several states—including California, Massachusetts, Minnesota, Pennsylvania,¹⁷ and Utah¹⁸—have recently passed legislation increasing liability for sexual discrimination and harassment of students by teachers and between students in educational settings.

In a recent telephone conversation, Brent McBride, the principal of a school in the Nye County School District of Nevada, stated that the current situation concerning student-to-student harassment and discrimination has teachers and administrators "walking on eggs." He indicated that boys in the Tonopah elementary and middle schools have knocked girls down in the halls, repeated vulgarities and innuendoes such as "humm 'em" and had been generally abusive to female students. McBride also indicated that incidents such as these are not only increasingly reported, but may be vividly observed simply by walking down the halls of many schools during recess.¹⁹

The increase of such occurrences has created a deep awareness on the part of local school boards, administrators, school personnel, parents and students—as well as state and federal legislators—that the problems of student-to-student sexual harassment and bias are growing and becoming more serious each year. Along with this awareness, concern about and recognition of the many legal issues facing educators has increased. In order to understand the nature and depth of this problem, educators must gain a thorough understanding of state and federal legislation, how legislative mandates affect education, and the implications they have for everyone involved in education.

16. John H. Dise, *School and Management*, RISK MGMT., Oct. 1992, at 38.

17. *Id.*

18. Utah Code, §53A-13-101 (1993).

19. Brent McBride, Personal Telephone Conversation, July 7, 1993.

IV. CURRENT FEDERAL LAW OF SEXUAL HARASSMENT

Federal law regarding sexual harassment in educational institutions is governed by Title IX of the Civil Rights Act. State officials who deprive individuals of their rights may also be sued under Section 1983. However, to date, neither Title IX nor Section 1983 has served as the basis of a successful student-to-student sexual harassment suit. Litigants must, therefore, turn to state laws in their search for remedies for such harassment.

A. *Title IX*

The Civil Rights Act of 1964 determined that a hostile work environment claim is actionable under Title VII if unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are so pervasive that one can reasonably say they create a hostile or offensive work environment.²⁰ As the problem of sexual harassment became clearer in education, the 1964 ruling—originally designed to protect employees in the workplace—was recognized as inadequate to protect students in educational institutions.

In 1972, Title IX was enacted to define sexual harassment as it related to education. The new definition stated 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."²¹ Although Title IX was originally intended to constrain sexual harassment in admission practices of federally funded educational institutions,²² its scope was later extended to protect beneficiaries and potential beneficiaries of educational institutions receiving federal aid.²³ Because of Title IX, educators, parents and students may now file suit in federal court when students are subjected to unwanted sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature from school employees. The

20. The Civil Rights Act of 1964 §701 et seq., as amended, 42 U.S.C.A. §2000e et seq. (1964).

21. Title 20 §1681 (1972).

22. H.R. Rep. No. 554, 92d Cong., 1st Session. at 51-52 (1971).

23. *Canon v. University of Chicago*, No. 441, U.S. at 677, (1979) ("The purpose of Title IX . . . [was] to eliminate discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.").

extended scope, however, does not yet include institutional liability for the actions of students.

Although the number of sexual harassment cases filed throughout the United States doubled from 1990 to 1991, relatively few students actually filed harassment suits during that time. The *Franklin v. Gwinnett County Public Schools*²⁴ decision and other successful legal actions that have been nationally publicized may signal that this trend will change.²⁵

A news release regarding the U.S. Supreme Court's decision in the *Franklin* case stated that students sexually harassed by school employees may sue their schools and school officials for monetary damages, and that Congress intended to allow students to sue for such compensation when it passed Title IX. The decision was a victory for Christine Franklin, a former Gwinnett County, Georgia, high school student who sued over her alleged sexual encounters with a teacher she said pursued her ardently. The suit was remanded to the trial court because it had ruled that Title IX, which bars sexual bias in educational programs receiving federal funding, did not allow alleged victims of intentional sex discrimination to sue for monetary damages.

At the appeals level, the U.S. Court of Appeals, 11th Circuit, had interpreted sexual harassment as the equivalent of sexual discrimination and ruled that suits filed under Title IX can seek to halt some illegal practice through injunctive relief.²⁶ In addition, the appeals court, like the Supreme Court, had ruled that the lower court had erroneously denied a sexual harassment victim monetary damages.

Clarence Thomas, who was himself accused of sexual harassment, wrote his first opinion for a sexual harassment case in *Franklin v. Gwinnett County*. Writing for the court, Justice White stated that damages are available for an action brought to enforce Title IX. While the reasoning of the Court and that of Thomas' concurring opinion was based on Title IX, the acceptance of monetary damages as a form of relief will likely be persuasive in student-to-student sexual harassment cases, too.²⁷

24. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

25. John H. Dise, *School and Management*, RISK MGMT., Oct. 1992, at 38.

26. *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, (11th Cir. (G.E.) 1990).

27. John H. Dise, *School and Management*, RISK MGMT., Oct. 1992, at 38.

In 1993, a student-to-student sexual harassment case, *Doe v. Petaluma*,²⁸ was brought before a federal court, by parents claiming that their junior high school-aged child had been harassed by male and female peers. Because of the duration and severity of the harassment, the family sought civil remedies claiming that the junior high school employees took only minor disciplinary actions against the students in spite of repeated complaints by both the victim and her parents over a period of two years. The brief stated that the parents had been forced to withdraw their child from the junior high and place her in a private all-girl school, and that she had required medical and psychological treatment that would probably continue for years.²⁹ The suit, based on Title IX, sought to recover damages from the school district, the school, its officials who dealt with the victim and her family, and the harassing students.

The Court ruled in favor of the defendants, reasoning that Congress intended that Title IX be modeled after Title VII which prohibits sexual harassment in the workplace only. While the relationship between a student and a teacher may parallel that between an employee and an employer, student to student harassment was determined to be too dissimilar—and therefore Title IX did not apply to peer student harassment.³⁰ This reasoning flowed from the *Meritor Savings Bank, First Savings Bank v. Vinson* case in which hostile environment and sexual harassment were defined as harassment that alters the victim's employment condition resulting in an abusive work environment.³¹

In finding for the defendants the court applied several Supreme Court cases which establish that Title IX compensatory relief requires a showing of discriminatory intent and inaction on the part of officials.³² Apparently, claimants in student-to-student sexual harassment cases must not only show that school administrators intended to sexually discriminate, but also prove inaction on the part of school officials.

28. *Doe v. Petaluma City School Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993).

29. *Mother Files Harassment Suit Over Wild Riders on School Bus*, DESERET NEWS, Associated Press, October 21, 1992, at A2.

30. *Canon v. University of Chicago*, 441 U.S. 677, 694-96 (1979).

31. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 57, (1986). Laurie LeClair, *Sexual Harassment between Peers Under Title VII and Title IX: Why Girls Just Can't Wait to be Working Women*, VT. L. REV., Vol. 16, 1990, at 303.

32. *Franklin v. Gwinnett*, 1026 S.Ct. 1037 (1992).

In peer sexual harassment cases such a standard is difficult, if not impossible, to meet. Determining intent to discriminate on the part of school officials is exceedingly difficult because schools and officials cannot select which students attend public school (legally every school age child must attend school), and they cannot completely and continuously control each student throughout the day. When discriminatory intent cannot be proven, or it cannot be shown that a school official clearly intended to discriminate against the victim through failure to discipline offending students, it is unjust to ascribe guilt to the school or its officials.

In *Doe v. Petaluma*, the court construed the actions of school officials to punish the students doing the harassing as light and ineffective. However, even their light and ineffective attempts to control the behavior indicated the officials did not intend to discriminate against the victim. It is obvious that the court was unwilling to extend the protections against teacher sexual harassment guaranteed by Title IX to peer student sexual harassment cases.

Before the *Petaluma City School District* case, the question of student-to-student sexual harassment had not been addressed by any court at the federal level. The ruling in favor of the defendants, however, demonstrates that nothing has yet been done on the federal level to prevent students from sexually harassing their peers. This means that the responsibility for controlling and preventing student-to-student sexual harassment rests with the individual states and local school districts. Because the federal courts have failed to recognize Title IX as an avenue to address cases between students, it is necessary for states to develop, pass and enforce legislation that will protect student victims from peer abuse. Further responsibility to prevent such actions rests with local school boards who must establish policies that will prevent these types of abuses, protect victims and provide relief.

B. Section 1983 of the Civil Rights Act

In addition to sexual harassment suits brought under Title IX, suits also have been filed under section 1983 of the Civil Rights Act.³³ In addition to normal damages, when the plaintiff

33. See, e.g., *Doe v. Taylor Independent Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3rd Cir. 1989); *Bougher*

prevails, the Act requires that the defendant pay the plaintiff's attorney fees.³⁴ The theory for recovery under Section 1983, as under Title IX, requires that school officials—not just student peers—deprive the victim of some right under color of state law. While many see student-to-student sexual harassment as ripe for action by plaintiffs' attorneys "with awards easily reaching six figures,"³⁵ under either Title IX or Section 1983 student plaintiffs must overcome the difficulty of ascribing responsibility for peer harassment to school officials.

V. STATE DEVELOPMENTS

The hearings regarding the nomination of Clarence Thomas to the Supreme Court in 1991, as well as other sexual harassment cases focused the attention of a national audience on the problems and legal implications of sexual harassment. This heightened awareness provided an opportunity for civil rights organizations and women's rights advocates to initiate an intense education of the public about sexual harassment. As a result, legislators at the federal and state levels recognized the seriousness of the problem, as well as their obligation to pass legislation that would create an environment in the workplace and schools free from sexual harassment. Based on new state legislation, educators also began to develop written policies that clearly defined and addressed student-to-student harassment in the schools.

A. Utah

Recognizing the seriousness of student-to-student harassment in public schools, Utah Stat House of Representatives passed House Bill 44. The bill, which failed in the state senate, would have required school districts throughout the state and each school within the districts to establish disciplinary rules regarding student-to-student sexual harassment.

v. Univ. of Pittsburgh, 882 F.2d 74 (3rd Cir. 1989); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 74 (1st Cir. 1988); *Parks v. Wilson*, 872 F.Supp. 1467 (D.S.C. 1995); *Mann v. Univ. of Cincinnati*, 864 F.Supp. 44 (S.D.Ohio 1994); *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F.Supp. 363 (M.D.Ga. 1994); *Black v. Indiana Area Sch. Dist.*, 1991 WL 477699 (W.D.Pa. 1991); *Bougher v. Univ. of Pittsburgh*, 773 F.Supp. 139 (W.D.Pa. 1989); *Brenner v. Sch. Dist. 47*, 1987 WL 18819 (E.D.Mo. 1987).

34. John H. Dize, *School and Management*, RISK MGMT., Oct. 1992, at 38.

35. *Id.*

A second statute passed in February 1, 1993,³⁶ requires statutory clarification of constitutional freedoms and curriculum content. Two of the areas covered by this legislation, passed primarily for secondary schools, state that:

The State Board of Education shall establish curriculum requirements under Section 53A-1-402, that include instruction in: Honesty, *temperance, morality, courtesy*, and obedience to law, . . . *in connection with regular school work.*³⁷ . . . freedom of speech by students during discretionary time shall not be denied *unless the conduct unreasonably interferes with the ability of school officials to maintain order and discipline, unreasonably endangers persons or property, or violates concepts of civility or propriety appropriate to a school setting.*³⁸

The statute further states that preserving on school grounds concepts of civility and propriety appropriate to the school setting are compelling governmental interests.³⁹ This language demonstrates one effort by Utah legislators to replace harassment and mistreatment with civility and courtesy.

Following the intent of House Bills 44 and 85, districts throughout the state have developed written policies designed to confront and eliminate abusive patterns of student relationships and behavior in the schools. These policies were developed, not only because of the influence of legislation mandating policies, but because of a recognition by school districts of the critical and harmful nature of student-to-student sexual harassment. These concerns led to the development and implementation of stringent policies that define specific patterns of harassment, as well as procedures to be followed by school and district employees in cases of harassment between students. The following policies from selected school districts exemplify how Utah districts have responded to the problem.

1. *Alpine School District Policy*

Alpine School District, one of the larger school districts in the state of Utah, recognized the need for schools within the district to provide students the same protection from sexual

36. Utah Code, 53A-13-101 (1993).

37. Utah Code, 53A-13-101 (1) (4) (1993) (Emphasis added).

38. Utah Code, 53A-13-101.3 (1993) (Emphasis added).

39. *Bethel v. Frazer*, No. 478 U.S. 675, 682-4 (1986).

harassment as provided for district employees under Title IX.⁴⁰ A new district policy defines sexual harassment as any unwanted conduct or communication of a sexual nature: set-role stereotyping, display of posters and cartoons which are sexual in nature or demeaning to one gender, sexual jokes, offensive jokes about gender, and requesting sexual favors in exchange for educational opportunities.⁴¹ Through this policy, the district intended to promote a deeper understanding of what kinds of behaviors are unacceptable, and to reduce student and teacher liability through effective communication between students, parents, teachers, administrators and other district employees.

2. *Davis School District Resolution on Violence*

Davis School District was one of the first school districts in Utah to implement a "unity of all mankind" program that encourages cooperation and understanding. Board members stated that because of their anti-harassment policies and the "unity of all mankind" program, it is clear that Davis District will not tolerate teacher or student harassment based on "gender, race, religious or 'individual differences.'"⁴² Soriano, a member of the advisory committee that drafted the resolution, confirmed the intent of these policies by forcefully stating that, "There's a Say No to Drugs Campaign. Why not have a Say No to Violence Campaign?"⁴³ Thus, through the recognition of the probability that student violence may result from student harassment and discrimination, Davis School District, approached this major concern through a policy and campaign against specified factors that contribute to violence in the schools.

3. *Sevier Sexual Harassment Policy*

In addressing the problem of student-to-student sexual harassment and abuse, administrators and school board members in the Sevier School District developed a sexual-harassment policy that specifically includes students as well as

40. 20 U.S.C. § 1681-86 (1988).

41. Paul C. Parkinson, *Resolution Against Violence Urges Schools to Promote Unity*, DESERET NEWS, March 20, 1992, at B3.

42. *Id.*

43. *Id.*

teachers, administrators and other district employees.⁴⁴ In commenting on this policy, a member of the development committee concluded:

The policy also has important ramifications that give teachers some recourse when students submit essays or other written work containing offensive vulgarity or profanity. One teacher said he has seen "X-rated stuff" in student work obviously written for its shock value and voiced concern that such work is often submitted with the approval of parents who call it "self-expression." "Sexual harassment is inappropriate in the district and will not be tolerated by the board in matters over which it has jurisdiction," the policy outlined by the board of education stated. It specifies that such action won't be tolerated by "board members, administrators, certificated and support personnel, or students. It was emphasized that school district administrators and teacher supervisors must be sensitive to community standards and to the community's expectations of public schools."⁴⁵

The present Sevier School District harassment policy is the result of revisions to an earlier sexual harassment policy made after the dismissal of a teacher who was allegedly involved in sexual harassment of a student. Recognizing the need for the district to ensure that all students and employees would have a safe place to learn and work, the district revised the policy to include harassment by students, as well as by teachers or administrators.

4. Higher Education

The seriousness of this problem has also been recognized and addressed by institutions of higher learning in Utah. For example, on March 1, 1993, Brigham Young University adopted a student-to-student harassment clause in its "Unlawful Sexual Harassment and Inappropriate Gender-Based Behavior Policies." The opening paragraph states:

Unlawful sexual harassment is contrary to the teachings of The Church of Jesus Christ of Latter-day Saints, the University's Honor Code and applicable civil rights laws and regulations. . . . Brigham Young University's Honor Code requires that

44. Reed L. Madsen, *Revised Sevier Sex-Harassment Policy Includes Students as Well as Teachers and Administrators*, DESERET NEWS, March 26, 1993, at E1.

45. *Id.*

University personnel and students abide by the standards of Christian living taught by the Church. These include living a chaste and virtuous life, obeying the law, using clean language, and respecting others. In addition, Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972 prohibit sexual harassment.

Consistent with its purpose to provide a University education in an atmosphere in harmony with the restored gospel of Jesus Christ and the exemption granted to it by the United States Department of Education from certain Title IX regulations, Brigham Young University is committed to maintain an environment free of unlawful sexual harassment, where the dignity of each individual is recognized and respected.⁴⁶

Although Brigham Young University has had an Honor Code for many years, it was recognized by administration, faculty and students that additional policies would be required if the concern and reaction to student-to-student harassment were to be addressed effectively and adequately.

B. Minnesota

Utah is not the only state to address the issue of student-to-student sexual harassment in the schools. Because of the intense effort to educate the public about sexual harassment by civil and women's rights advocates, some states stepped to the forefront in legislative enactments in an effort to address this problem.

Minnesota addressed the problem of sexual harassment by passing The Minnesota Human Rights Act, one of the more stringent and controversial laws affecting sexual harassment. This law was passed as a result of an alleged case of discrimination and harassment filed with the Minnesota Department of Human Rights on behalf of Katherine Lyle a seventeen year old senior at Duluth Central High School.⁴⁷ An investigation revealed that Katherine had been subjected to sexually offensive graffiti in one of the schools' boys bathrooms. The investigation further revealed that school officials failed to take timely and appropriate action to remove, monitor, or discourage this form of

46. Brigham Young University, *Unlawful Sexual Harassment and Inappropriate Gender-Based Behavior Policies*, March 1993.

47. Beth Wickum, *Sexual Harassment in School: Protecting Students From Their Peers*, J. OF INTERGROUP REL., Vol.19, No. 3, Fall 1992, at 15.

sexual harassment despite having been repeatedly notified of the graffiti by Katherine and her mother for a period of almost one-and-a-half years. The school also failed to inform students, or educate employees about its sexual harassment policies.⁴⁸ Finally, the investigation revealed that the high school took insufficient measures to address Katherine and her mother's concerns until after the charges were filed.

The critical nature of student-to-student sexual harassment was reinforced in the settlement agreement between Duluth Central High School and Katherine. Besides awarding Katherine \$15,000 for alleged mental anguish and suffering, the school district adopted a new agreed-upon sexual harassment policy. It was further stipulated that the district would post the new policy in each school district building where employees and students were regularly present. The new policy states:

[The District will report to the Minnesota Department of Human Rights on two future dates regarding the implementation of this policy, and the immediate instruction of the school district's custodians to check daily for graffiti, to remove any graffiti within twenty-four hours, and to report any sexual graffiti in accordance with the sexual harassment policy.⁴⁹

The settlement, with the attention it engendered, spurred other harassed students to file complaints and increased awareness on the part of schools and school districts throughout the nation concerning the legal implications of sexual and harassment, especially between students. The Minnesota Human Rights Act, which served as the basis for Katherine Lyle's complaint, defines sexual harassment to include "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when submission to that conduct or communication is made a term or condition, either explicitly or implicitly, or obtaining employment, public accommodations or public services, *education* or housing."⁵⁰

48. *Id.*

49. *Id.*

50. *Id.* (citing Minn. Human Rts. Act §363.01 *et seq.* (1994)).

VI. FUTURE DEVELOPMENT OF SEXUAL HARASSMENT LAW

"Sexual Harassment Between Peers Under Title VII and Title IX: Why Girls Just Can't Wait to be Working Women," an article addressing the problem of sexual harassment between peers in secondary schools, appeared in the Summer, 1991, Vermont Law Review.⁵¹ At that time, no statutory remedies existed for sexual harassment that occurred between students.⁵² While the article's reasoning has not been followed by courts to date, it does point out potential changes that would provide legal recourse to victims of student-to-student sexual harassment.

The minority status of adolescent victims and harassers presents difficulties under present statutory schemes. Because these schemes do not classify them as either children or adults, it is difficult to objectively evaluate both responsibility for actions and the actual harm to students. While there is a statute in place that protects adults in the work place from sexual harassment by their peers,⁵³ as well as a corresponding statute addressing sexual discrimination in schools,⁵⁴ the latter does not protect adolescents who experience student-to-student sexual harassment.

The parameters of legal protection under Title IX could be expanded so that the federal law protects students to the same degree that Title VII protects working adults from peer sexual harassment. Legally, this could be done through the doctrine of negligent supervision when sexual harassment between students is so egregious that a teacher knew, or should have known about it. Thus, the burden on teachers to protect against sexual harassment would differ little from the burden they already carry to protect students from physical harm.⁵⁵

LeClair's examination of current legal remedies for sexual harassment in education includes a description of procedural hurdles that a student faces in pursuing a case of sexual harassment against a school. While the Equal Employment Opportunity Commission has adopted guidelines to address

51. Laurie LeClair, *Sexual Harassment Between Peers Under Title VII and Title IX: Why Girls Just Can't Wait to Be Working Women*, 16 VT. L. REV. 303 (1990).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

sexual harassment in the workplace, the Office of Civil Rights (OCR), a division of the U.S. Department of Education, has declined to take a firm position on the issue of sexual harassment between students and has failed to follow the example of the Equal Employment Opportunity Commission (EEOC) in formulating guidelines. Differences in the ways Title VII and Title IX are enforced are related to differences between the groups each Title seeks to protect. While Title VII specifically addresses sexual harassment in the workplace, Title IX prohibits sex discrimination in education.

The OCR has defined the differences between education (Title IX) and the workplace (Title VII) that determine its reticence to apply EEOC guidelines to sexual harassment in education. Because students in schools are more transient, their interest in pursuing the reform of a school or school district would not be as great a concern as employees' would have in reforming their workplace. The ORC further stated that few students would have the same financial incentive to pursue litigation as would workplace employees, and that the courts have traditionally been more likely to intervene in the affairs of nonacademic than academic institutions.⁵⁶

A suit filed under Title IX could be successful if the institution (school or school district) failed to establish reasonable and adequate procedures for addressing sexual harassment complaints. Also, since sexual harassment claims by students have been successful only when the claims have involved an unfair power advantage between students and teachers, student-to-student claims involving a similar power advantage might be more successful.⁵⁷ Students might also pursue a Title IX action against an institution when it fails to follow an established grievance procedure in response to student complaints.⁵⁸

Students' claims are in much the same position today as women employees's claims of sexual harassment in the first years after Title VII became law; claims remain extremely difficult to pursue and prove. Finally, even though sexual harassment creates a hostile environment, current laws fail to recognize school officials' responsibility for this kind of injury.

56. *Id.*

57. *Id.*

58. *Id.*

Although there is a general consensus that the sexual harassment of students is widespread, very few students have initiated sexual harassment cases under Title IX. Female students, for instance, are reluctant to complain of sexual harassment for a number of reasons. Some feel, somehow, a degree of responsibility for encouraging the sexual harassment. They also fear that school leaders will not find their claims credible, or that they will fail to take any action in response to their complaints. Others fear reprisals from fellow students and are reluctant to pursue litigation because of fear of exorbitant expenses and delays in completing their education.⁵⁹

LeClair summarizes her analysis of student-to-student sexual harassment by recommending that the OCR adopt guidelines to provide guidance for sexual discrimination and harassment litigation and for controlling sexual harassment between students in secondary education. She recommends that the OCR adopt the following guidelines:

- a) Harassment on the basis of sex is a violation of §1681 of Title IX. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive academic environment.
- b) With respect to conduct between fellow students a school is responsible for acts of sexual harassment in school or on school grounds where the school board (or teachers or administration) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.⁶⁰

Petitions under Title VII have provided limited definitions of injuries in the workplace. Again, although the lower courts have recognized the problem, the Supreme Court has not yet addressed co-worker or student-to-student sexual harassment. Under present coverage provided by Title IX, the problem of student-to-student harassment is not adequately addressed.

VII. CONCLUSION

The problem is not just student-to-student sexual harassment or violence. The issue is achieving the civility and

59. *Id.*

60. *Id.*

propriety appropriate to a school setting. At the University of Pennsylvania, the "Water Buffaloes" harassment was a racial slur. Alpine school district policy refers to stereotyping, sexual and offensive jokes, language and vulgarity or profanity and specifically mentions offensive posters and cartoons demeaning to one gender. While Davis School District Resolution speaks of gender based violence, the Sevier School District Sexual-Harassment policy speaks of "X-rated stuff" as self-expression.

Today we stand in a transitional period in relation to student-to-student sexual harassment. LeClair indicates that Title VII of the Civil Rights Act provides legal protection to co-workers in addition to employees from supervisors, and that Title IX of the Education Amendments provides protection to school employees and students from supervisors. Yet, neither of these two federal laws addresses the problem of student-to-student sexual harassment effectively or appropriately.

Although victims of teacher-to-student sexual harassment are recognized and plaintiffs may now receive monetary damages, very few sexual harassment cases were filed prior to 1992. Today, student-to-student problems are at a stage of legal development reminiscent of where worker-to-worker discrimination and abuse laws were several years ago. Although there is increased national awareness because of institutions like the American Association of University Women and Wellesley College Center for Research on Women, it appears that the rumblings of litigation are more prevalent in the kindergarten through grade twelve than at the college level.⁶¹

This article has explored the relationship of student-to-student sexual harassment to current federal and state legislation, and recommended procedures and policies which will assist educators in recognizing and meeting the need to limit and prevent future sexual harassment and discrimination between students. Impropriety in student-to-student relationships is at the root of such behavior, and should be the focus of a school or district's response.

The solutions to these problems are not simple. While legislation and school policies have always had a broad impact on school boards, schools, teachers, administrators, parents and students, the social objectives of preserving free speech and

61. Del Wasden, Professor of Educational Leadership, Brigham Young University, Class Lecture, July, 1993.

action must be delicately balanced with the need to protect against harmful behaviors. Experience has shown that students cannot learn if their lives are in disruption. Therefore, policies designed to protect students from harassment must protect students from profanity, vulgarity, lewdness and other improper student-to-student activities that degrade their personal ethics and values, as well as sexual harassment.

A more fundamental question than how to address student-to-student sexual harassment and discrimination is how to achieve a legally and morally safe school environment. This can only be accomplished when schools, school officials, teachers, parents and students recognize the critical nature of the problem, and initiate preparation in the schools and at home. Additionally, there must be meaningful and appropriate federal and state legislation that will focus attention and provide information to everyone involved or concerned about the effects of sexual harassment on students.

This is not only a school problem. It is instead, a societal problem of enormous importance that must be addressed at home, as well as in the schools. While schools have a responsibility to teach proper and acceptable cultural values. It is critical that the same values of respect, civility, temperance, morality, courtesy and recognition of the rights and feelings of others be taught to and exemplified for every student entering the school system before he or she arrives. It is only through the development of these basic ethical standards that define personal character that we will be able to curb feelings of aggression and recognize the dignity and worth of each human being, regardless of gender or ethnicity.

Only when these ethical standards are taught and internalized as personal values will legislation have an impact on the behavior of students in the school setting. The internalization of these values is of far greater import than all the laws that can be passed in an effort to remedy or restrict student-to-student sexual harassment. Such laws will make a difference only to the degree that the more fundamental issue is addressed.