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LIABILITY FOR STUDENT-TO-STUDENT SEXUAL HARASSMENT UNDER TITLE IX IN LIGHT OF *DAVIS V. MONROE COUNTY BOARD OF EDUCATION*

I. INTRODUCTION

Student-to-student sexual harassment is not new to our public school system. It is a growing concern and has attracted attention from legal commentators as well as the national media.[1] Although peer harassment in public schools is not a recent phenomenon, cases addressing the issue have only recently appeared. Three circuits in particular have dealt with these cases: the Fifth, Tenth, and Eleventh. Although the Tenth and the Fifth Circuits have not held educational institutions liable for peer sexual harassment,[2] the Eleventh Circuit has struggled with the question.[3]

Sexual harassment has been defined as "verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX."[4] Educational sexual harassment, on the other hand, has been defined by the National Advisory Council on Women's Educational Programs to mean "the use of authority to emphasize the sexuality or sexual identity of the student in a manner which prevents or impairs the student's

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1. *See, e.g.*, NAN STEIN ET AL., SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 2 (1993)(cosponsored by NOW Legal Defense and Education Fund and Wellesley College for Research on Women); Karen M. Davis, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123 (1994); Edward S. Cheng, *Boys Being Boys and Girls Being Girls—Student-To-Student Sexual Harassment From the Courtroom to the Classroom*, 7 UCLA WOMEN'S L.J. 263 (1997); *Phil Donahue: Six-Year-Olds Sexually Harassing* (NBC television broadcast, Jan. 5, 1994) (transcript No. 3897).

2. *See* Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Rowinsky v. Bryan Independent Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996).

3. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996) *rev'd en banc*, 120 F.3d 1390 (11th Cir. 1997), *partial cert.*, 67 U.S.L.W. 3187 (U.S. Sept. 29, 1998) (No. 97-843).

4. 29 C.F.R. § 106.2 (1995).

full enjoyment of education[al] benefits, climate, or opportunities."[5]

Until the 1992 Supreme Court decision in *Franklin v. Gwinnet County Public School,*[6] the only remedy available against an educational establishment for a sex discrimination claim under Title IX was the denial of federal funding to the institution.[7] Because of this limitation, most suits brought before *Franklin* under Title IX were by women seeking equality in athletic and vocational programs.[8] In *Franklin,* the Court held educational institutions liable to students for monetary damages under Title IX for intentional teacher-to-student sexual harassment. This decision, while providing a remedy for teacher-to-student sexual harassment, did not directly address the issue of student-to-student sexual harassment.

Claims of hostile learning environments caused by peer sexual harassment are beginning to multiply, but the courts have not yet fully addressed student-to-student sexual harassment. In response, some states have passed laws requiring schools to distribute anti-sexual-harassment policies to students.[9] Unless the Supreme Court reverses the Eleventh Circuit, however, the Title IX road to holding educational institutions liable for peer sexual harassment seems to be closed.[10] All the cases which have reached the courts of appeal arguing institutional liability for peer sexual harassment have held that Title IX does not provide a basis for this type of suit.[11]

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5. Jill Suzanne Miller, *Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 707 (1995) (citing Massachusetts Bd. of Educ., WHO'S HURT AND WHO'S LIABLE: SEXUAL HARASSMENT IN MASSACHUSETTS SCHOOLS 9 (1986) (curriculum and guide for school personnel, quoting the Advisory Council on Women's Educational Program's definition of sexual harassment in education)).

6. 503 U.S. 60 (1992).

7. 20 U.S.C. §§ 1681-1688 (1980).

8. *See, e.g.*, Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Yellow Springs Exempted Village Sch. Dist. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981); O'Connor v. Bd. of Educ., 645 F.2d 578 (7th Cir. 1981); Bednar v. Nebraska Sch. Activities Ass'n, 531 F.2d 922 (8th Cir. 1976); Canterino v. Barber, 564 F. Supp. 711 (W.D. Ky. 1983).

9. *See* Cal. Educ. Code § 212.6 (West 1994); Minn. Stat. § 127.46 (1994).

10. *See supra* note 3.

11. *See, e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996); Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1997).

This article will analyze the various federal decisions culminating in *Davis v. Monroe County Board of Education* and will then discuss why these courts are correct in finding that schools are not liable for student-to-student sexual harassment. Part II outlines the statutes that are relevant to this type of liability: Title VII of the Civil Rights Act of 1964,[12] Title IX of the Education Amendments of 1972,[13] and Title VI of the Civil Rights Act of 1964.[14] Part III shows the evolution of sexual harassment in the field of education. Part IV then discusses the line of cases that has led to the Eleventh Circuit's most recent decision in *Davis v. Monroe County Board of Education*[15] and similar holdings such as *Rowinsky v. Bryan Independent School District.*[16] Part V argues that *Davis v. Monroe County Board of Education* and similar cases have reached the right result under Title IX as it presently stands then offers some other alternatives to holding educational institutions liable for student-to-student sexual harassment.

II. RELEVANT STATUTES

A. TITLE VI

Title VI was enacted by Congress "to make sure that funds of the United States are not used to support racial discrimination."[17] Congress enacted Title VI under the Spending Clause of the Constitution,[18] which does not allow direct regulation of the program.[19] Rather, the remedy for a violation under the statute

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12. 42 U.S.C. §§ 2000e-2000n (1988). Title VI reads in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

13. 20 U.S.C. §§ 1681-88 (1988). Title IX provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1988). A "program or activity" includes "all of the operations of . . . a local educational agency . . . or other school system." 20 U.S.C. § 1687.

14. 42 U.S.C. § 2000(d) (1988).

15. 120 F.3d 1390 (11th Cir. 1997).

16. 80 F.3d 1006 (5th Cir. 1996).

17. 110 CONG. REC. 7062 (1964)(statement of Sen. Pastore).

18. U.S. CONST. art. I § 8.

19. *See* Rosado v. Wyman, 397 U.S. 397, 420-21 (1970).

is withholding federal funding.[20] In Title IX, which was patterned after Title VI, Congress replaced the words "race, color, or national origin" with "sex" to give sexual discrimination the same protection.[21]

B. TITLE VII

Sexual harassment was first addressed by laws seeking to eliminate the problem in the work place. In this context, there are two categories of harassment: *quid pro quo* and hostile environment harassment.[22] *Quid pro quo* harassment is an offer of a job-related benefit such as a raise or promotion in exchange for sexual favors.[23] As may be inferred from the context of this type of harassment, an uneven power relationship exists between the person harassing and the person being harassed. This type of harassment corresponds directly with teacher-to-student harassment, and the Supreme Court in *Franklin* has ruled that educational institutions are liable in monetary damages for *quid pro quo* of sexual harassment.[24]

The Supreme Court has also recognized hostile environment harassment.[25] Hostile environment harassment is concerned with an abusive atmosphere, most often created by employees with similar standing in the workplace. The Supreme Court, as of the 1998-1999 term, still had declined to decide whether Title IX provided a remedy for student-to-student harassment.[26] For now, the question of hostile environment harassment remains unsettled.

C. TITLE IX

Like Title VI, Title IX was passed under the Spending Clause of the Constitution.[27] The purpose of Title IX was to prevent sexual discrimination in federally funded programs by

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20. *See id.*

21. *See id.*

22. *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986).

23. *See id.* at 65-66.

24. 503 U.S. 60 (1992).

25. *See id.* at 73. The Court reasoned that several circuits' decisions and the Equal Employment Opportunity Commission guidelines supported the conclusion that Title VII coverage was not limited to just the economic aspects of employment.

26. *See* Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S.Ct. 165 (1996); *supra* note 3.

27. U.S. CONST. art. I § 8.

withholding federal funding[28]—an idea lifted from Title VI.[29] Title IX was intended to close a loophole in federal legislation that allowed educational institutions (mainly colleges and universities) to discriminate against female students and faculty.[30] The Eleventh Circuit panel that reheard *Davis, en banc*, looked to a Title VII case, *Meritor Savings Bank, F.S.B. v. Vinson*,[31] to establish a prima facie case of discrimination under Title IX. The panel determined that a plaintiff must show the following:

> (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.[32]

These requirements are borrowed to a large degree from Title VII principles.[33]

III. THE EVOLUTION OF SEXUAL HARASSMENT LIABILITY UNDER TITLE IX

In *Cannon v. University of Chicago*,[34] one of the Supreme Court's first evaluations of sexual harassment under Title IX, the Court implied a private right of action for sexual harassment claims. The Court in *Cannon* noted that denying financial support to institutions that discriminate, although a severe remedy, did not go far enough to protect the individual. In order to accomplish Title IX's objectives, the Court borrowed case law from Title VI.[35]

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28. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

29. 117 CONG. REC. 39, 252 (1971) (statement by Sen. Bayh, sponsor of the bill) ("This is identical language, specifically taken from Title VI of the 1964 Civil Rights Act.").

30. *See Davis*, 74 F.3d at 1193. Senator Bayh commented that this legislation "closes loopholes in existing legislation relating to general education programs." 118 CONG. REC. 5803 (1972).

31. 477 U.S. 57 (1986).

32. *Davis*, 74 F.3d at 1194.

33. *Id.* at 1190.

34. 441 U.S. 677 (1979).

35. *See id.* at 717.

A. *QUID PRO QUO* HARASSMENT CLAIMS

In *Alexander* v. *Yale University,*[36] the Federal District Court of Conneticut was the first federal court to recognize a sexual harassment claim under Title IX.[37] But this court only recognized a certain kind of sexual harassment claim: *quid pro quo.* In *Alexander,* former students sought an order requiring Yale University to implement a grievance procedure to deal with claims of sexual harassment.[38] The students alleged that Yale's lack of a grievance policy interfered with the educational process and denied them educational opportunities under Title IX.[39] One female student alleged *quid pro quo* harassment by a professor who offered her a high grade in exchange for sexual favors. When she refused, she received a low grade.[40] Other plaintiffs brought hostile environment claims.

The *Alexander* court held that the hostile environment claims neither denied the participation in nor the benefits of a federally funded program or activity.[41] The court, however, did recognize *quid pro quo* harassment, stating that "it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education."[42] Despite recognizing *quid pro quo* sexual harassment, the court dismissed the suit because the plaintiff failed to prove that the harassment actually occurred.[43] On appeal, the Second Circuit, while affirming the dismissal, also recognized a Title IX claim for *quid pro quo* harassment.[44]

B. HOSTILE ENVIRONMENT CLAIMS

Not until *Moire v. Temple University School of Medicine* did a federal court recognize a hostile environment claim as harassment.[45] In *Moire,* a medical student alleged that her supervisor had created an environment of sexual harassment and discrimi-

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36. 459 F. Supp. 1 (D. Conn. 1977), *aff'd,* 631 F.2d 178 (2d Cir. 1980).
37. *See id.* at 3-4, 7.
38. *See id.* at 2.
39. *See id.*
40. *See id.* at 3-4.
41. *See id.*
42. *See id.* at 4.
43. *Id.*
44. *See* Alexander, 631 F.2d at 185.
45. 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd,* 800 F.2d 1136 (3d Cir. 1986).

nation, which resulted in her failing her third year of school.[46] The court found that the guidelines adopted under Title VII for the employment setting were applicable to similar situations between a student and a teacher under Title IX.[47] However, the court held that the plaintiff had failed to prove that the alleged behavior had created a hostile environment.[48]

After recognizing a hostile environment claim, courts began defining the standard to be used in employment cases. Although the First Circuit in *Lipsett v. University of Puerto Rico*[49] held that Title IX prohibits hostile environment sexual harassment in an educational setting, the holding was limited by the facts to employment-related claims under Title IX.[50] The plaintiff in *Lipsett* was a female medical resident who was both an employee and a student at the university.[51] She alleged that while she was a resident at the university hospital her supervisors and co-residents sexually harassed her and that she was ultimately expelled from school because of her sex.[52] Borrowing standards from the *Meritor*[53] case, the First Circuit held that an educational institution would be liable for hostile environment sexual harassment perpetrated by a supervisor upon an employee if an official of the institution knew or should have known of the harassment, unless it can be shown that appropriate steps were taken to stop it.[54]

The next step in the evolution of hostile environment harassment law was taken by the Supreme Court in *Franklin v. Gwinett County Public Schools*.[55] In this case a high school student alleged that a teacher had "engaged her in sexually oriented conversations . . . , forcibly kissed her . . . [and] subjected her to coercive intercourse."[56] Although school officials were aware of and had investigated the allegations, they failed to take any action to remedy the situation.[57] The lower courts de-

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46. *See id.* at 1365-66.
47. *See id.* at 1366-70.
48. *See id.*
49. 864 F.2d 881 (1st Cir. 1988).
50. *See id.* at 897.
51. *Id.*
52. *See id.* at 884.
53. 477 U.S. 57 (1986).
54. *See id.* at 901.
55. 503 U.S. 60 (1992).
56. *Id.* at 63.
57. *See id.* at 63-64.

nied the plaintiff monetary damages.[58] The Supreme Court reversed, holding that monetary damages were available for intentional violations of Title IX where a hostile sexual environment was created by a teacher and allowed to continue.[59]

Doe v. Petaluma City School District[60] represents the last step in the federal court system's expansion of Title IX. For the first time the Court recognized a claim for student-to-student sexual harassment,[61] but held that in order to obtain monetary damages, the plaintiff had to demonstrate that an employee of the educational institution intentionally discriminated based on sex.[62] The plaintiff averred that she had been sexually harassed throughout the seventh and eighth grade and that school officials were aware of the harassment but did not take appropriate action to prevent it.[63] The *Petaluma* court looked to the *Franklin* decision and concluded that although *Franklin* involved teacher-to-student sexual harassment, the Court had implied that hostile environment was generally applicable to Title IX.[64] They reasoned that because Title VII recognized employee-to-employee sexual harassment, a student-to-student sexual harassment claim could also be implied under Title IX.[65] When the court considered liability, it noted that the *Franklin* court required intent and that Title IX was modeled after Title VI, which also requires a finding of intent if liability is to attach.[66] In sum, the court reasoned that the "knew or should have known" test did not apply in the Title IX context and that liability would only affix if the school intentionally discriminated on the basis of sex.[67]

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58. *See id.*
59. *See id.* at 75-76.
60. 830 F. Supp. 1560 (N.D. Cal. 1993), *aff'd,* 54 F.3d 1447 (9th Cir. 1995); *See* 949 F. Supp. 1415 (N.D. Cal. 1996) (different result upon reconsideration).
61. *Id.* at 1571-73.
62. *See id.* at 1571.
63. *See id.* at 1563.
64. *See id.* at 1575.
65. *See id.* at 1574-75.
66. *See id.* at 1574-76.
67. *See id.*

IV. VARIOUS TESTS PROPOSED BY CIRUIT COURT AND THE DEPARTMENT OF EDUCATION

A. THE FIFTH CIRCUIT: *ROWINSKY V. BRYAN INDEPENDENT SCHOOL DISTRICT*

In *Rowinsky*, a suit was brought by the mother of two middle school students (Jane and Janet Doe) alleging that the school district and its officials condoned and caused hostile environment sexual harassment.[68] The complaint alleged that Janet was sexually harassed at school by one of her peers, and that both Jane and Janet were sexually harassed by peers while riding the bus to school.[69] The plaintiffs sought injunctive and declaratory relief as well as monetary damages and attorney fees under Title IX.[70] The district court ruled that Rowinsky had failed to state a claim under Title IX because she did not provide evidence that sexual harassment was treated less severely toward girls than toward boys.[71]

The court of appeals phrased the question before them as, "whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents."[72] Rowinsky argued that the word *under* means *in* and not *by* in the Title IX phrase "[n]o person . . . be subjected to discrimination under any educational program or activities. . . ."[73] The Court of Appeals rejected this argument, reasoning that scope and structure, legislative history, and agency interpretations of the statute all weighed in favor of not imposing liability for the acts of third parties.[74] The court went on to state that "[i]mposing liability for the acts of third parties would be incompatible with the purposes of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX."[75] Furthermore, the court said that in the legislative history both supporters and opponents of Title

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68. *Rowinsky*, 80 F.3d at 1009-10.
69. *See id.* at 1010.
70. *See id.*
71. *See id.*
72. *Id.*
73. *Id.* at 1011.
74. *See id.* at 1012.
75. *Id.* at 1013.

IX focused exclusively on acts by the grant recipients.[76] Finally, the court asserted that a definition of sexual harassment found in an Office of Civil Rights Policy Memorandum only addressed harassment by "employees or agents of the recipient" and, therefore, did not cover acts by peers.[77]

B. THE TENTH CIRCUIT: *SEAMONS V. SNOW*

The *Seamons* case stands out because it involved a male student who was involved in a high school football hazing incident.[78] Brian Seamons alleged that his teammates forcibly bound him (including his genitals) with tape to a towel rack and then brought a girl that he had dated into the locker room to see him.[79] Seamons reported the incident to his coach who, rather than disciplining the perpetrators, demanded that Seamons apologize to his teammates for turning them in. When he refused, he was kicked off the team.[80] Despite continued complaints, the school did nothing until the school district finally canceled a playoff game. The district's action led to more harassment, because some students considered Seamons responsible for ending the team's season.[81]

Seamons did not allege that the original assault was based on sex. Instead, he alleged that the school's response to the incident was "sexually discriminatory and harassing."[82] The district court dismissed the suit, holding that Seamons had failed to state a claim for intentional discrimination.[83]

When the case came before the Tenth Circuit, the court applied the five part test articulated by the Eleventh Circuit in *Davis v. Monroe County Board of Education*.[84] Despite using a *Davis* analysis, the court found that Seamons had not alleged sufficient facts to establish that the harassment was based on his sex.[85] The court reasoned that team loyalty and toughness, qualities school officials had urged Seamons to adopt in response

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76. *See id.* at 1014.
77. *Id.* at 1015.
78. Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996).
79. *See id.* at 1230.
80. *See id.*
81. *See id.*
82. *Id.*
83. *See id.* at 1231.
84. *Id.* at 1232 (citing *Davis*, 74 F.3d at 1194) (before the rehearing en banc).
85. *Id.*

to the harassment, are not uniquely male; girls at the high school had experienced the same types of hazings, which had also been ignored.[86] Notwithstanding the application of Title VII principles to this case, the Tenth Circuit expressed doubt as to whether a school district could be liable for a student's actions.[87] Ultimately, the Tenth Circuit resolved this case without deciding whether a cause of action exists under Title IX for this alleged harm.

C. THE DEPARTMENT OF EDUCATION INTERPRETS TITLE IX

In 1996, the Office of Civil Rights for the United States Department of Education issued an interim policy statement and request for comment on student-to-student sexual harassment.[88] Under this policy, student-to-student "sexual harassment can be the basis for a Title IX violation if the conduct creates a hostile environment and the school has notice of the hostile environment but fails to remedy it."[89] The Department of Education has also adopted regulations that are similar to Title IX's language, prohibiting institutional discrimination.[90] On March 13, 1997, the Department of Education issued final policy guidelines on student sexual harassment.[91] According to these guidelines, schools are liable for failing to eliminate sexually harassing conduct by another student "that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment."[92]

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86. *See id.* at 1233.

87. *Id.* at 1232 n. 7.

88. *See* Sexual Harassment Guidance: Peer Sexual Harassment; Draft document Availability and Request for Comments, 61 Fed. Reg. 42,728 (1996).

89. *Id.*

90. 34 C.F.R. § 106.31(a)(1996). Section 106.31(a) provides in relevant part that, "no person shall, on the basis of sex . . . be denied the benefits of, or be subjected to discrimination under any academic, extracurricular . . . or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance."

91. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).

92. *Id.* at 12,038.

D. THE ELEVENTH CIRCUIT: *DAVIS V. MONROE COUNTY BOARD OF EDUCATION.*

In *Davis,* a mother brought an action on behalf of her fifth-grade daughter, LaShonda Davis, alleging student-to-student sexual harassment under Title IX and section 1983.[93] The plaintiff's complaint for injunctive relief and compensatory damages alleged that the defendants knew that a male fifth-grade student[94] continuously harassed her and that the school failed to take the appropriate steps to protect her.[95] Davis further alleged that the defendants' failure to act not only discriminated against her, but denied her the benefits of a public education.[96] The district court dismissed the Title IX claim, arguing that the fellow student's behavior was not part of a school program or activity.[97] The district court also dismissed the section 1983 claim against the defendants.[98]

On appeal, a panel of the United States Court of Appeals for the Eleventh Circuit found that the Davis' due process and equal protection claims were without merit and refused to discuss them.[99] However, the panel reversed the district court as to the Title IX hostile environment sexual harassment claim.[100] The *Davis* court cited the "sweep as broad as its language" test from *United States v. Price*[101] and noted that in *Franklin* the Eleventh Circuit had not applied a Title VII analysis and had been overturned.[102] The court also noted the gradual expansion of liability under Title IX, culminating in *Doe v. Petaluma School District*, as well as a letter of findings from the Department of Education's Office of Civil Rights[103] and concluded that it was appropriate to apply Title VII hostile environment princi-

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93. *Davis*, 74 F.3d at 1188.

94. Prior to the decision in this case, LaShonda's harasser was charged with and plead guilty to sexual battery. *See id.* at 1189.

95. *See id.*

96. *See id.*

97. *See id.* (citing Aurelia D. v. Monroe County Sch. Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994)).

98. *Id.* at 1188.

99. *See id.*

100. *See id.*

101. 456 U.S. 512, 521 (1982).

102. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

103. Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992), Docket No. 09-92-6002.

ples to a Title IX case.[104] Finally, the court concluded that Davis had alleged sufficient facts to support a prima facie case of sexual harassment and remanded the case to the district court for further proceedings.[105]

In August of 1996, a rehearing *en banc* was granted, and the panel's decision was vacated.[106] The court began its analysis by noting district court cases that had recognized a student-to-student hostile environment cause of action under Title IX.[107] The court then noted that the courts of appeal had been far less enthusiastic about finding hostile environment liability under Title IX.[108] It also observed that Davis was seeking an extension of liability under Title IX.[109] The Eleventh Circuit recognized that the Supreme Court had not directly addressed the peer sexual harassment issue, but only allowed a private right of action under Title IX if there was intentional discrimination by the school's administration or agents.[110] Davis, the plaintiff-appellant in this case, did not allege that the school board had personally participated in the discrimination against her daughter. She alleged only that the board did not adequately respond to the complaints.[111] Therefore, the court looked at the legislative history of the bill to see if Congress intended to provide for this type of action under Title IX.[112]

In June and July of 1970, under the direction of representative Edith Green, the House Committee on Education and the House Subcommittee on Education and Labor held hearings on gender discrimination in federally funded-educational programs.[113] The committee's work focused on eliminating gender discrimination in school admissions and on the employment

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104. *See Davis*, 74 F.3d at 1190-93.

105. *See id.* at 1195.

106. *Davis*, 91 F.3d 1418.

107. *See Davis*, 120 F.3d 1390, 1394-95 (11th Cir. 1997).

108. *Id.* The court cited *Rowinsky*, 80 F.3d at 1016, where the court ruled that there was no cause of action under Title IX for peer sexual harassment, and several other cases that did not hold educational institutions liable but also did not decide whether a cause of action exists under Title IX. Seamons v. Snow, 84 F.3d 1226, 1232-33 (10th Cir. 1996); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250 (2d Cir. 1995); Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1994).

109. *Davis*, 120 F.3d at 1395.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

decisions of school administrators.[114] None of the testimony before the committee concerned student-to-student sexual harassment.[115] Although legislation addressing the issue was proposed, it did not pass. In 1971, the Senate Committee on Labor and Public Welfare also produced a bill that focused on gender discrimination in school admissions and employment opportunities for female teachers.[116] Because of irreconcilable differences between the House and Senate versions of the bill, it was referred to a conference committee.[117] The conference committee produced what is now known as Title IX; it passed both houses and was signed into law on June 23, 1972.[118] The majority in *Davis* is quick to point out that none of the legislative history of Title IX discusses student-to-student sexual harassment.[119]

The court also points out that Title IX was enacted under the Spending Clause of Article I and argues that the legislative history of the law "shows that Congress intended Title IX to be a typical contractual spending-power provision."[120] The court further asserts that the similarities between Title IX and Title VI indicate that Title IX was enacted pursuant to the Spending Clause.[121] Title VI was enacted under the Spending Clause and the language of Title IX is practically identical to that of Title VI. Finally, the court points out that the Supreme Court has determined that Title IX was patterned after Title VI.[122]

The constitutional source of congressional power is important in *Davis* because it limits how the law can be enforced. The court analogizes legislation enacted under the Spending Clause to a contract between Congress and the recipients of federal funds.[123] A recipient of federal funds is free to decline a grant or withdraw from the program if it so chooses.[124] Furthermore, in order to ensure that participation in the programs is voluntary, the Supreme Court requires that Congress give potential recipi-

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114. *See id.* at 1396.
115. *See id.*
116. *See id.*
117. *See id.* at 1397.
118. *See id.*
119. *See id.*
120. *Id.* at 1398 (internal quotation marks omitted).
121. *Id.* at 1398.
122. *See id.* at 1399 (citing *Cannon*, 441 U.S. at 694).
123. *See id.*
124. *See id.*

ents unambiguous notice of the conditions they are assuming.[125] By requiring that the conditions attached to the money be unambiguous, the states are allowed to make an informed decision regarding whether they want to participate in a particular program.

The court quotes one of its recent cases that makes this point in the context of money offered to school districts: "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds."[126] Having established that the states must be given notice of the strings that are attached to federal money provided under the Spending Clause, the court then considered whether the Monroe County Board of Education (the Board) had received unambiguous notice that they would be liable for failing to stop student-to-student sexual harassment.

On this point, both the appellant (Davis) and the United States Department of Justice (as amicus curiae) argued that the Board had clear notice of this type of liability under Title IX.[127] They argued that the *Franklin* Court suggested that notice is not a problem in a case where intentional discrimination is alleged.[128] Appellant further argued that a school district intentionally discriminates on the basis of sex if it fails to prevent one student from sexually harassing another. Therefore, Appellant argued, the Board had sufficient notice under the Spending Clause.[129]

The majority of the Eleventh Circuit disagrees.[130] In the opinion of the court, the terms of Title IX only give educational institutions notice that they must prevent their employees from engaging in intentional gender discrimination.[131] The court notes that the complaint did not allege any discrimination by an employee of the district and concludes this part of its analysis by finding that the Board did not have notice that they would be held liable in this situation.[132]

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125. *See id.* (citing Pennhurst v. Halderman, 451 U.S. 1, 17 (1981)).

126. *Id.* at 1399 (citing Cantutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398 (5th Cir. 1996), *cert denied*, —U.S.—, 117 S.Ct. 2434, 138 L. Ed. 2d 195 (1997)).

127. *See id.*

128. *See id.* (citing *Franklin*, 503 U.S. at 74-75).

129. *See id.* at 1399-1400.

130. *See id.* at 1400.

131. *See id.* at 1401.

132. *See id.*

Judge Tjoflat argues against liability under Title IX because of "whipsaw" liability. "Whipsaw" liability entails a school district facing lawsuits from both the alleged harasser and the alleged victim.[133] In Tjoflat's opinion, the only way for a school to avoid liability under the appellant's standard would be to isolate the accused student through suspension or expulsion.[134] Because a student has a property interest in his or her education, granted by the state and protected by the Fourteenth Amendment, he or she cannot be deprived of this interest without due process of law.[135] The educational institution is thus faced with a choice of lawsuits. Tjoflat further argues that faced with this choice, an administrator would have an economic incentive to punish the harasser in order to protect the receipt of federal moneys. This incentive would render the administrator impermissibly prejudiced.[136]

Tjoflat also posits that in addition to the "whipsaw" liability, an expansion of liability under Title IX would result in extensive litigation costs.[137] To support this contention, he cites a study that indicates that 65% of public school students in grades eight to eleven were victims of student-to-student sexual harassment.[138] The expansion of liability combined with the staggering statistics of the study, Tjoflat concludes, would materially affect a school district's decision whether to accept federal funding.[139]

The dissent, written by Judge Barkett, insists that the majority's holding would allow school officials to knowingly ignore, without risk of liability, the most egregious harassment and discrimination—even if observed directly by a school official.[140] The dissent further avers that the plain meaning of the statute allows an educational institution to be liable for student-to-student sexual harassment; the identity of the perpetrator is irrelevant.[141] In fact, the Department of Education's Office of Civil

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133. *See id.*
134. *See id.* at 1402.
135. *See id.*
136. *See id.* at 1403.
137. *See id.* at 1404.
138. *See id.* at 1405 (citing AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATION FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICAN SCHOOLS 11 (1993)).
139. *See id.*
140. *See id.* at 1412.
141. *See id.*

Rights has interpreted Title IX to impose liability for hostile environment sexual harassment.[142] Furthermore, the mere fact that student-to-student sexual harassment was not discussed in the Congressional debates does not mean that it was not encompassed within Congress' broad intent of preventing students from being subject to discrimination.[143] Accordingly, even teacher-to-student sexual harassment recognized by the *Franklin* Court would not be supported by the majority's view of the legislative history.[144] The dissent counters the majority's notice of liability argument by arguing that the plain meaning of the statute was sufficient to give the Board notice of potential liability.[145] Finally, the dissent urges that the court should follow the lead of other federal courts, which have expanded liability under Title IX by continuing to adopt principles from Titles VII and VI to allow hostile-environment sexual harassment under Title IX.[146]

V. ANALYSIS: THE MONROE COUNTY BOARD OF EDUCATION SHOULD NOT BE LIABLE UNDER TITLE IX

A. *DAVIS* REACHED THE PROPER CONCLUSION

The majority clearly reached the correct decision in the *Davis* case. The argument that the majority opinion finds most persuasive is that the Board lacked sufficient notice of liability for student-to-student sexual harassment. The notice given to the Board was ambiguous at best. At the time of LaShonda's alleged harassment, there was no federal case law allowing a claim for student-to-student sexual harassment.[147] Furthermore, the Department of Education's interim guidelines on sexual harassment did not issue until after the harassment allegedly took place in this case.[148] To date, there have been no circuit

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142. *See id.* at 1412-13 (citing Sexual Harassment Guidance: Harassment of Student by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,034, at 12039-41 (1997)).

143. *See id.* at 1413.

144. *See id.* at 1413-14.

145. *See id.*

146. *See id.* at 1414-19.

147. *Doe* was the first federal court case to recognize this type of harassment in 1995. The alleged harassment occurred in 1992-93.

148. *See* Sexual Harassment Guidance: Peer Sexual Harassment; Draft document Availability and Request for Comments, 61 Fed. Reg. 42,728 (1996).

court cases that have extended Title IX liability to student-to-student sexual harassment. Moreover, the Supreme Court had declined to decide the issue.[149] Although it could be argued that the new Department of Education Guidelines give schools notice of liability for suits of this kind, the argument is moot without case law to support it. However, the new guidelines and recent case law severely weaken the lack of notice argument for school districts faced with this type of litigation in the future.

There are other reasons that the courts should not extend liability under Title IX. First, those who advocate holding schools liable for the acts of third parties seem to start from a faulty presumption: school officials do not care and will not voluntarily act to alleviate the problem. Generally, however, people who enter the educational field do so because they care about the welfare of children.

B. ALTERNATIVE SOLUTIONS

There seems to be a mindset in the legal community and perhaps in the nation as a whole that the only thing that will motivate action or prevent behavior we want to eradicate is the fear of litigation and liability. It would be far more productive to start from the presumption that a vast majority of administrators and teachers want to and will try to solve the problem. Schools under the present system lack the tools to handle the problem of sexual harassment. Many of the problems that Judge Tjoflat raised are real. School administrators face a Hobbesian choice when dealing with this type of issue: face liability if one takes action against an accused harasser or face liability if one does not. If schools are given the tools they need, clear policy and procedures, and the power to enforce them without the constant specter of litigation hanging over their heads, schools will be much more effective in combating sexual harassment.

In order to arm school administrations to combat this problem, Congress or the Department of Education should outline a clear set of procedures for dealing with sexual harassment in schools. If they follow the procedures, administrators should be allowed immunity for actions taken within the scope of their authority, unless the action was an abuse of discretion or mali-

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149. *See* Rowinsky, 80 F.3d 1006 (5th Cir.), *cert. denied*, —U.S.— 117 S.Ct. 165 (1996).

cious in nature. If society wants schools to combat sexual harassment, then schools need to be equipped with the power and the immunity necessary to take action. This approach, if taken, will eliminate the extremes at both ends of the spectrum: by ignoring sexual harassment or overreacting by expelling a seven-year-old boy for kissing a classmate.

Another weakness of extending Title IX liability to student-to-student sexual harassment is that it does not necessarily punish the perpetrator of the harassment. Any solution to the sexual harassment problem in our school has to include some sort of punishment for the person perpetrating the harassment. If harassers are not personally affected, there is little hope of solving the problem. If there are clear procedures to be followed in response to accusations of sexual harassment combined with immunity from suit when an administrator takes action against harassers, harassers will be more likely to receive the punishment they deserve.

VI. CONCLUSION

This article has traced the evolution of Title IX by addressing the statutes that have affected its interpretation of the title: Title VII of the Civil Rights Act of 1964,[150] and Title IV of the Civil Rights Act of 1964.[151] It has also discussed the response of the Office of Civil Rights to the problem as well as the line of cases leading to the Eleventh Circuit's most recent decision in *Davis v. Monroe County Board of Education*[152] and the Fifth Circuit's similar holding in *Rowinsky v. Bryan Independent School District.*[153] Finally, this article argues that both the Eleventh and Fifth Circuits have reached the right result under Title IX as it presently stands and contends that holding school liable for student-to-student sexual harassment is not the most effective means of combating the problem in our schools. The answer is to give school administrators and faculty the correct tools to solve

150. 42 U.S.C. §§ 2000e-2000n (1988). Title VI reads in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

151. 42 U.S.C. § 2000(d) (1988).

152. 120 F.3d 1390 (11th Cir. 1997).

153. 80 F.3d 1006 (5th Cir. 1996).

the problem: clear guidelines and procedures that would allow the school officials to punish the perpetrators of sexual harassment with the security of greater immunity from liability.

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