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Title IX and Same-gender Sexual Harassment: School District Liability for Damages

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TITLE IX AND SAME-GENDER SEXUAL HARASSMENT: SCHOOL DISTRICT LIABILITY FOR DAMAGES

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INTRODUCTION

The Supreme Court recently decided three important cases concerning sexual harassment.[1] This trilogy of cases is key to understanding the current judicial position regarding employer liability for sexual harassment involving co-workers of the same gender, institutional liability for the sexual misconduct of teachers with students, and school district liability for student to student sexual harassment.

With *Oncale v. Sundowner Offshore Services, Inc.*, [2] *Gebser v. Lago Vista Independent School District*, [3] and more recently *Davis v. Monroe County Board of Education*, [4] the Supreme

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1. *See* Oncale v. Sundowner, 523 U.S. 75 (1998); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999).

2. 523 U.S. 75 (1998). Joseph Oncale was repeatedly subjected to sexual taunts and mock sexual acts by his co-workers. Despite Oncale's complaints to his supervisor about the conditions in the workplace caused by his co-workers' acts, Oncale's supervisors took no action to stop the harassment. Ultimately, Joseph Oncale quit his job because of the ongoing sexual harassment.

3. 524 U.S. 274 (1998). A female high school student, Alida Gebser, had a sexual relationship with a male teacher. Gebser did not report the relationship to school officials, but when officials discovered the relationship, the teacher was fired. Contrary to federal regulations, the district did not have a "formal antiharassment policy" or an "official grievance procedure" at the time of the sexual relationship. *Id.* at 282. Gebser sued the district for damages under Title IX.

4. 526 U.S. 629 (1999). LaShonda Davis alleged that the school district's deliberate indifference to her complaints of sexual harassment by a male student "created an intimidating, hostile, offensive, and abusive school environment," in violation of Title IX of the Education Amendments of 1972. *Id.* at 1668. The Supreme Court held that there is a private cause of action for damages under Title IX for student to student sexual harassment, "but only where the funding recipient is deliberately indifferent to

Court has begun the process of clarifying the various judicial approaches used to determine employer and institutional liability for different forms of sexual harassment. Existing precedents indicate that courts are generally quite hesitant to hold school districts liable for hostile environment sexual harassment. And in the area of peer sexual harassment between students of the opposite sex, the result is the same. Courts consistently hold that school districts will not be liable under the pre-*Davis* standard for harassment that occurs between private individuals who are not employed by the school district.[5]

Student victims of peer sexual harassment have tried several approaches in their attempts to hold school districts monetarily responsible for harm done by third party non-employees.[6] Virtually all of these cases have failed under a variety of legal theories. *Oncale v. Sundowner Offshore Services, Inc.*[7] offers yet another approach in cases where individuals are subjected to sexual harassment by their co-workers of the same gender. But based on all the legal theories previously considered by various courts, *Oncale* does not appear to offer much assistance to students subjected to sexual harassment by another student of the same gender. Additionally, the effect of *Oncale* was that the standard of liability for sexual harassment, based on Title VII agency principles, was no longer the standard by which students could seek to hold school districts responsible for sexual harassment where the perpetrator was either a school district employee or another student. In other words, the Supreme Court made it clear in *Oncale* that the Title VII agency standard applies only to sexual harassment in the workplace.[8] Prior to 1998, most lower courts agreed that the appropriate standard of liability in Title IX cases was based on Title VII agency principles.

Despite a significant increase in the number of cases of sexual harassment in schools over the last ten years, courts con-

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sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 1675.

5. *See* Deshaney v. Department of Soc. Servs., 489 U.S. 189 (1989) (holding that there is no agency liability for private conduct).

6. Third party non-employees are any individuals not employed by the school district, including other students, who may sexually harass or abuse students at school.

7. 523 U.S. 75 (1998).

8. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

sistently have provided an escape from liability for school districts seeking to avoid paying monetary damages to student victims of peer sexual harassment. *Gebser v. Lago Vista Independent School District*[9] and *Davis v. Monroe County Board of Education*[10] offer the first look at how post-*Oncale* courts deal with same-gender sexual harassment cases where both perpetrator and victim are students. Beyond the unwillingness of most lower courts to hold school districts liable for sexual harassment of students, lower courts will have to determine how the new standard applies in peer sexual harassment cases brought under Title IX[11] in the wake of *Gebser* and *Davis*. The prevailing approach has been to adopt the Title VII[12] standard and apply it in Title IX cases.[13] Recently, however, some courts have held that the Title VII standard only applies in the employment context.[14] Courts appear to have accepted this new

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9. 524 U.S. 274 (1998).

10. 526 U.S. 629 (1999).

11. Title IX provides 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 . . . ." 42 U.S.C.A. § 1681(a) (1999).

12. Title VII of the Civil Rights Act of 1964 provides: "[I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.S. § 2000e-(a)(1) (1999).

13. *See* Nelson v. Almont Community Sch., 931 F. Supp. 1345 (E.D. Mich. 1996); Pallett v. Palma, 914 F. Supp. 1018 (S.D.N.Y. 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); "[T]he court determined that Title VII is 'the most appropriate analogue when defining Title IX's substantive standards." Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022 (W.D. Mo. 1995), quoting Mabry v. State Board of Community Colleges and Occupational Education, 813 F.2d 311, 317, n. 6 (10th Cir. 1987), *cert. denied*, 484 U. S. 849; "In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) the court concluded that hostile environment lawsuits by school district employees are permitted under Title IX and adopted Title VII's standards for assessing a hostile environment claim." Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022 (W.D. Mo 1995).

14. Title VII applies only in employment cases: *See* Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp. 2d 991, 998 (M.D. Tenn. 1998) (citing Oona v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998)); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993)(Court adopted Title VI standard, rejecting Title VII standard stating that the Title VII agency standard applies only to employment-related harassment.). Title VII does not apply to sexual harassment cases involving student to student harassment: *See* Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 72 (D.N.H. 1997)("[T]he court looks to Title VII principles for guidance, but adopts a flexible approach sensitive to the differences between peer sexual harassment and employment contexts."). Employers are liable "for failures to remedy or prevent a hostile or offensive work environment of which management-level employers knew, or in the exercise of

approach, thereby closing virtually all existing avenues of recovery for sexual harassment between student peers. The end result under this new paradigm most likely will be to provide protection for adult workers against sexual harassment by coworkers of either sex. Meanwhile, students in public schools will have limited protection, if any, against peer sexual harassment regardless of the perpetrator's gender.

This paper is divided into six parts. Part I traces the existence of a private cause of action for sexual harassment under Titles VI,[15] VII, and IX through landmark Supreme Court decisions in each area. Title VII has shaped most of our understanding of the standard for institutional liability in sexual harassment cases. Therefore, Part I also contains a detailed examination of the Supreme Court's approach to establishing the existence of a private cause of action for sexual harassment in Title VII cases. This includes an analysis of how the meaning of the "because of sex"[16] requirement affects the determination of the existence of a private cause of action for sexual harassment under Titles VI, VII, and IX.

In Part II, the standard of liability under Title VI and Title VII will be examined from a historical perspective beginning with the Supreme Court's decision in *Guardians Association v. Civil Services Commission of New York*.[17] This part will consider the issue of whether discriminatory intent is an essential element to establish liability under either Title VI or Title VII. The availability and type of damages under Titles VI and VII will be discussed to predict the availability of damages under Title IX.

Part III traces the existence of private causes of action under Title IX from *Franklin*[18] to the present, including the Supreme Court's consideration of the issues of intent and damages in Title IX sexual harassment cases. Part IV examines the

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reasonable care should have known." *Id.* at 81 (citing Doe v. Petaluma, 830 F. Supp. 1560, 1572 (N.D. Cal. 1993) (citing Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (quoting EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989)).

15. Section 601 of the Civil Rights Act of 1964 provides: "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. (1999).

16. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (quoting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2(a)(1)).

17. 463 U.S. 582 (1982).

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

application of the Title VI actual knowledge standard and the Title VII constructive knowledge standard in Title IX cases.

Part V suggests that courts are abandoning the Title VII constructive knowledge standard in favor of the Title VI strict liability standard in same-gender sexual harassment cases involving peers. The shift has resulted from a reexamination of the legislative history of Title VI which provides a more accurate guide than Title VII in determining the appropriate standard of liability under Title IX.

Part VI presents a review of the three recent Supreme Court decisions that have separated the issues—same-gender sexual harassment between co-workers, teacher to student sexual harassment, and peer sexual harassment between students. In these cases, the Supreme Court has articulated three separate standards based on the relationship between the perpetrator and the victim.

I. IS THERE A PRIVATE CAUSE OF ACTION FOR SEXUAL HARASSMENT?

This threshold question of whether a private plaintiff has a cause of action against a defendant under a federal statute such as Title IX needs to be answered before a court can determine an appropriate remedy, if any, for alleged wrongdoing. For some time, the Supreme Court has struggled with the issue of determining the existence of a private cause of action. In *Cort v. Ash,* the Court announced a four-part test to determine Congressional intent to create a private right of action under Title VI.[19] In *Meritor Savings Bank, FSB, v. Vinson,* the Court recognized a private cause of action for hostile environment sexual harassment under Title VII.[20] In *Cannon v. University*

19. 422 U.S. 66 (1975). The four-part test is as follows: 1) Plaintiff is a member of the class "for whose especial benefit the statute was enacted;" 2) There is any "indication of legislative intent, explicit or implicit," to support such a remedy; 3) An implied private right of action is consistent with the purposes of the legislative scheme; and 4) The cause of action is not "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78.

20. 477 U.S. 57 (1986). In Meritor, a female employee was sexually harassed by her male supervisor who touched her inappropriately in public, and made sexual demands that she submitted to out of fear of losing her job. *Id. Meritor* was the first Supreme Court case to address hostile environment sexual harassment in the workplace under Title VII. *Id.* The *Meritor* test has been relied on in sexual harassment cases arising in the workplace and in the school setting under Titles VII and IX in deter-

of Chicago, the Court recognized an implied private right of action under Title IX.[21]

In *Regents of University of California v. Bakke*,[22] Justices Powell, Brennan, Marshall, and Blackmun assumed, without deciding, that a private cause of action existed under Title VI. Justice White argued that Title VII provided no private cause of action, but Section 1983 of the Civil Rights Act of 1871 was available to private plaintiffs challenging discriminatory conduct committed under color of state law. Justices Stevens, Burger, Stewart, and Rehnquist concluded that a private cause of action was available under Title VII.[23]

Then in *Cannon v. University of Chicago*,[24] the Court held that there was a private cause of action, based on the *Cort* factors,[25] for gender-based discrimination under Title IX against "any educational program supported by federal funds."[26] In *Cannon*, eight justices agreed that the legislative history of both Title VI and Title VII supported the conclusion that a private cause of action could be implied under Title IX.

The question of a private right of action arose again in the late 1980s as instances of sexual harassment and abuse of public school students came to light. This time the question was whether or not Congress had created an implied right of action under Title IX for the sexual harassment of students by teachers. The issue seemed to be settled in a 1992 case, when

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mining liability. *Id.* The three part test states: (1) "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment," without showing economic effect on the plaintiff's employment, *id.* at 66, (2) "that the fact that sex-related conduct is 'voluntary,' in the sense that a plaintiff was not forced to participate against her will, is not a defense to a sexual harassment suit under Title VII," as the correct inquiry in such cases is whether the plaintiff had indicated by her conduct that the alleged sexual advances were unwelcome, *id.* at 67, and (3) that employers are not "always automatically liable for sexual harassment of employees by their supervisors." *Id.* at 72.

21. 441 U.S. 677 (1979). Supreme Court recognized a private right of action under Title IX for discrimination based on sex. In *Cannon*, a woman was denied admission to certain medical schools on the basis of her sex. She sued the universities and several of the medical schools' officials under Title IX arguing that she had been excluded from participation in the medical school programs because of her sex and that those medical schools were recipients of federal funds at the time of her exclusion.

22. 438 U.S. 265, 281-84 (1978).

23. *See id.* at 420, n.28.

24. 441 U.S. 677 (1979).

25. 422 U.S. 66 (1975).

26. Guardians Ass'n v. Civil Serv. Comm'n of the City of N.Y., 463 U.S. 582, 594 (1983) (quoting Cannon v. University of Chicago, 441 U.S. 677, 694-703 (1979).

the Supreme Court reaffirmed its holding in *Cannon* that "Title IX is enforceable through an implied right of action"[27]

However, sexual harassment cases have undergone at least two metamorphoses since 1992. After the first wave of sexual harassment/abuse cases where teachers harassed/abused students, a new harasser emerged—the fellow student. The question then became whether a private cause of action could exist against a school district when the perpetrator was a private third party. Most recently the question has become, is there a private cause of action against a school district when a student harasser is the same gender as the student victim. Additionally, the related questions of what standard of liability applies to Title IX peer sexual harassment cases and what damages are available to private parties for Title IX violations will be examined.

Previously, several lower courts concluded that a private cause of action exists where the harasser is the victim's superior.[28] Now courts must struggle to determine whether Congress intended to allow private suits against state agents (i.e. public school officials) for same-gender peer sexual harassment. A series of recent Title VII cases has paved the way for our current understanding of the viability of a private, same-gender sexual harassment claim under Title IX.

The fundamental requirement for a Title VII cause of action is "that the discrimination occurs 'because of such individual's . . . sex.'"[29] Applying Title VII principles to cases of same-gender sexual harassment, the threshold question is "whether members of one sex are exposed to disadvantageous terms or

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27. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992). A female student complained the she had been sexually harassed and abused by a male teacher at the school. The student alleged that school officials knew of the sexual harassment and abuse, but they failed to take corrective action to stop the harassment. The Supreme Court recognized a private cause of action for damages under Title IX against school officials for teacher to student sexual harassment.

28. *See, e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995).

29. Fredette v. BPV Management Assocs., 112 F.3d 1503, 1505 (11th Cir. 1997) (citing Meritor Savs. Bank, FSB, v. Vinson 477 U.S. 57, 63 (1986)). This Title VII case involved claims of same-sex harassment under both *quid pro quo* and hostile environment sexual harassment theories. In *Fredette*, a male waiter was propositioned for sex by the restaurant's homosexual maitre d'. Fredette complained that his refusals to accept the sexual propositions resulted in work-related retaliation against him. The question in *Fredette* was whether Title VII provided a cause of action for same-gender sexual harassment in the workplace.

conditions of employment to which members of the other sex are not exposed."[30] Therefore, the only actionable claim under Title VII for sexual harassment is one " that is in some way linked to the plaintiff's sex."[31]

Lower federal courts, relying in part on earlier sexual harassment cases in the workplace, have been grappling with the same-gender sexual harassment issue since 1993.[32] In thirteen cases, lower federal courts have held that same-gender sexual harassment is actionable under Title VII.[33] During that same period, ten lower federal courts held that Title VII provided no cause of action for same-gender sexual harassment.[34] This split in the lower courts led to the Supreme Court decision to hear *Oncale v. Sundowner Offshore Services, Inc.*[35] in order to resolve the conflict. Prior to the March 1998 *Oncale* decision, the

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30. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

31. Doe v. City of Belleville, Ill., 119 F.3d 563, 570 (7th Cir. 1997) (citing Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1009 (7th Cir. 1994)). Two teen boys, who were employed by the City of Belleville, were harassed by their male coworkers in an escalating sexual manner. Verbal taunts turned physical and the boys decided to quit their jobs. The question in *Doe* was whether Title VII created a cause of action for sexual harassment based on sex where both the victim and the harasser were males.

32. *See infra* notes 33 and 34.

33. *See* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997); Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996); McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995); Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994), *cert. denied* 513 U.S. 1082 (1995); Saulpaugh v. Monroe Comm. Hosp., 4 F.3d 134 (2d Cir. 1993), *cert. denied* 510 U.S. 1164 (1994); Purrington v. Univ. of Utah, 996 F.2d 1025 (10th Cir. 1993); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186 (1st Cir. 1990); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977).

34. *See* Torres v. National Precision Blanking Div. of Nat'l Material L.P., 943 F. Supp. 952 (N.D. Ill. 1996); Schoiber v. Emro Mktg. Co., 941 F. Supp. 730 (N.D. Ill. 1996); Larry v. North Miss. Med. Ctr., 940 F. Supp. 960 (N.D. Miss. 1996); Ashworth v. Roundup Co., 897 F. Supp 489 (W.D. Wash. 1995); Sarff v. Continental Express, 894 F. Supp. 1076 (S.D. Tex. 1995), *aff'd without published opinion* 85 F. 3d 624 (5th Cir. 1996); Meyers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995); Pasqua v. Metropolitan Life Ins. Co., No. 94 C 4418, 1995 U.S. Dist. Lexis 17108 (N.D. Ill. Nov. 16, 1995), *aff'd on other grounds*, 101 F.3d 514 (7th Cir. 1996); Fleenor v. Hewitt Soap Co. 67 FAIR EMPL. PRAC. CAS. (BNA) 1625 (S.D. Ohio 1994), *aff'd on other grounds*, 81 F.3d 48 (6th Cir. 1996), *cert denied*, 519 U.S. 863 (1996); Vandeventer v. Wabash Nat'l Corp, 867 F. Supp. 790 (N.D. Ind.1994), *mod. on recons.* 887 F. Supp. 1178 (N.D. Ind. 1995); Dillon v. Frank, 58 FAIR EMPL. PRAC. CAS. (BNA) 90 (E.D. Mich. 1990), *aff'd by unpublished opinion* 952 F.2d 403 (6th Cir. 1992).

35. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

leading case concerning the existence of a cause of action under Title VII for same-gender sexual harassment was *Doe v. City of Belleville, Illinois*.[36] In *Doe*, a case involving conduct between co-workers that the victim claimed amounted to sexual harassment, the Seventh Circuit Court of Appeals had to find a nexus between gender and harassment in order to conclude that same-gender sexual harassment between co-workers was actionable under Title VII.

Establishing the nexus between gender and harassment, for the purpose of establishing a cause of action under Title VII for same-gender sexual harassment, raises two questions:

> 1) Can a man ever establish that he was harassed 'because of' his sex in violation of Title VII, when the harassment he complains of was inflicted by another man? . . .
>
> 2) If sexual harassment of a male by another male is actionable under Title VII, must the plaintiff offer proof, beyond the explicitly sexual nature of the harassment, that his gender motivated the harasser and that a similarly situated female worker would not have been harassed?[37]

The second question inquires whether or not a plaintiff must prove that the harasser is "sexually oriented toward the same gender."[38] That is, does the plaintiff have to prove that the harasser is a homosexual, and therefore attracted to the victim "because of" his sex?

Responding "yes" to the initial inquiry and "no" to the second, the Seventh Circuit concluded that same-gender sexual harassment is actionable under Title VII because "Title VII on its face draws no distinction between men and women, either as plaintiffs or harassers, and the Equal Employment Opportunity Commission (EEOC) describes sexual harassment in gender-neutral terms."[39]

While some recent case law suggests that the victim of same-gender sexual harassment does not have to prove that the harasser is attracted to the victim because of the harasser's attraction to members of the same sex.[40] Judge Niemeyer for

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36. 119 F.3d 563 (7th Cir. 1997).

37. 119 F.3d at 570.

38. *Id.*

39. *Id.*

40. *See* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997);

the Fourth Circuit stated that "where the harasser and the victim are of the same gender, a presumption exists that sexually suggestive conduct . . . [between members of the same gender] is usually motivated by entirely different reasons [than gender]."[41] Therefore, the Fourth Circuit was hesitant to find a cause of action for same-gender sexual harassment unless the harasser was homosexual, "because in that type of case, an employee can prove he was harassed by an employee of the same sex 'because of the harassed employee's sex,' as required by Title VII."[42]

A few courts have held that same-gender sexual harassment is not actionable under Title VII,[43] but the predominant opinion among lower courts is that same-gender sexual harassment is actionable under Title VII.[44] In March 1998, the

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Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997). *Yeary* is a same-gender sexual harassment case where a male worker alleged that he was sexually harassed by a male co-worker. The question in *Yeary* was whether there was a cause of action under Title VII for same-gender sexual harassment.

41. Fredette v. BVP Management Assocs., 112 F.3d 1503, 1508 (11th Cir. 1997) (quoting Niemeyer, J., in Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996), *cert. denied* 519 U.S. 818 (1996) (emphasis added).

42. Wrightson v. Pizza Hut, 99 F.3d 138, 142 (4th Cir. 1996) (quoting McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996), *cert. denied*, 519 U.S. 819 (1996)).

43. *See* Garcia v. Elf Atochem North America, 28 F.3d 446 (1994). *Garcia* is a Title VII same-gender sexual harassment case involving male co-workers. The Fifth Circuit Court did not recognize a cause of action for same-gender sexual harassment under Title VII; Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996).

44. *See* Yeary v. Goodwill Indus.-Knoxville, Inc. 107 F.3d 443 (6th Cir. 1997); Fredette v. BVP Management Assocs., 112 F.3d 1503 (11th Cir. 1997); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996); Caldwell v. KFC Corp., 958 F. Supp. 962 (D.N.J. 1997); McCoy v. Macon Water Authority, 966 F. Supp. 1209 (M.D. Ga. 1997); Gerd v. United Parcel Servs., Inc., 934 F. Supp. 357 (D. Colo. 1996); Williams v. District of Columbia, 916 F. Supp. 1 (D.D.C. 1996); Miller v. Vesta, Inc., 946 F. Supp. 697 (E.D. Wis. 1996); Johnson v. Hondo, Inc. 940 F. Supp. 1403 (E.D. Wis. 1996); Peric v. Board of Trustees of Univ. of Ill., 71 FAIR EMPL. PRAC. CAS. (BNA) 1760 (N.D. Ill. 1996); Shermer v. Illinois Dept. of Transp., 937 F. Supp. 781 (C.D. Ill. 1996); Kaplan v. Dacomed Corp., No. 95C6987, 1996 U.S. Dist. LEXIS 2232 (N.D. Ill. Feb. 27, 1996); Ton v. Information Resources, Inc., 70 FAIR EMPL. PRAC. CAS. (BNA) 355 (N.D. Ill. 1996); Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393 (D. Minn. 1996); Wehrle v. Office Depot, Inc., 954 F. Supp. 234 (W.D. Okla. 1996); Swage v. Inn Philadelphia, 72 FAIR EMPL. PRAC. CAS. (BNA) 438 (E.D. Pa. 1996); Johnson v. Community Nursing Servs., 932 F. Supp. 269 (D. Utah 1996); Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495 (E.D. Va. 1996); Easton v. Crossland Mortgage Corp., 905 F. Supp. 1368 (C.D. Cal. 1995), *rev'd on other grounds*, 114 F.3d 979 (9th Cir. 1997); Raney v. District of Columbia, 892 F. Supp. 283 (D.D.C. 1995); Boyd v. Vonnahmen, 67 FAIR EMPL. PRAC. CAS. (BNA) 1769 (S.D. Ill. 1995); Blozis v. Mike Raisor Ford, Inc., 896 F. Supp. 805 (N.D. Ind. 1995); Griffith v. Keystone Steel & Wire, Div. Keystone Consol. Indus., Inc., 887 F. Supp. 1133 (C.D. Ill. 1995); Sardinia v. Dellwood Food, Inc., No. 94

Supreme Court reversed the Fifth Circuit's decision with *Oncale*,[45] thereby agreeing with the majority of lower courts that same-gender sexual harassment is actionable under Title VII.

The Supreme Court appears to have adopted the *Doe v. City of Belleville*[46] holding in *Oncale:* that same-gender sexual harassment is actionable under Title VII, and that Title VII protects both men and women against discrimination "because of sex."[47] This is a landmark decision for adult co-workers subjected to same-gender sexual harassment in the workplace, but an important question remains: what effect will the *Oncale* decision have on public school students subjected to sexual harassment by same-gender peers? Because the *Oncale* decision is based on Title VII and not Title IX, it may not have much influence on cases of same-gender peer sexual harassment between students. But several courts that have considered sexual harassment cases involving students have followed the Title VII standard in sexual harassment cases involving students.[48] It remains to be seen what impact *Oncale* will have on student to student sexual harassment cases.

II. STANDARDS OF LIABILITY FOR SEXUAL HARASSMENT: IS INTENT REQUIRED?

There has been considerable litigation, both inside and outside the public school context, over whether or not a plaintiff is required to prove discriminatory intent in order to establish a violation of a federal statute and qualify for some remedy. Litigation outside the school context has explored the intent issue

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Civ. 5458 (LAP), 1995 WL 640502 (S.D.N.Y. Nov. 1, 1995); King v. M. R. Brown, Inc., 911 F. Supp. 161 (E.D. Pa. 1995); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd without published op.*, 749 F. 2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981).

45. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996).

46. 119 F.3d 563 (7th Cir. 1997).

47. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (quoting Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983).

48. See Murray v. New York City College of Dentistry, 53 F.3d 243 (2d Cir. 1995); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996); Burrow v. Postville Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Nelson v. Almont Community Sch., 931 F. Supp. 1345 (E.D. Mich. 1996); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Linson v. Trustees of the Univ. of Pa., No. 95-3681, 1996 U.S. Dist. LEXIS 12243 (E.D. Pa. August 21, 1996); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993).

under both Title VI and Title VII. Various courts that relied on these rulings later tried to answer the intent question under Title IX. Therefore, a brief look at whether or not discriminatory intent is required under Titles VI and VII will set the stage for a discussion of the resulting confusion that has arisen over the issue of discriminatory intent in Title IX cases. It also will illustrate the dilemma facing courts when they address the issue of the existence of a cause of action under Title IX for same-gender sexual harassment between students.

The difficulty in attempting to answer the question whether or not discriminatory intent is required to establish a violation of Title IX is that from the very beginning the Supreme Court has not provided clear guidance on this point. The confusion stems from the conflicting approaches the Supreme Court has taken in several key cases which make it difficult to know if applications of Title IX will be guided by interpretations of Title VI, interpretations of Title VII, or some combination of the two.

A. Title VI Standard

Section 601 of the Civil Rights Act of 1964 provides:

> 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. [49]

Some courts have argued that Title IX should follow Title VI requirements because Title IX is modeled after Title VI. In *Guardians Association v. Civil Services Commission of City of New York*,[50] the Supreme Court attempted to clarify whether discriminatory intent was an essential element of a Title VI violation. Five justices agreed that the Court of Appeals erred when it held that a private plaintiff was required to prove discriminatory intent to qualify for relief under Title VI. However, the only thing that a majority of the justices in *Guardians* could agree on was that Title VI relief was not appropriate under the facts presented in *Guardians*.

Justice White, speaking for the majority in *Guardians*, announced that discriminatory intent is not an essential element

49. 42 U.S.C. § 2000d. (1999).

50. 463 U.S. 582 (1982).

of a Title VI violation. This opened the door for a private plaintiff to seek relief for unintentional discrimination under Title VI. Relief for unintentional discrimination could come from a violation of the administrative implementing regulations of Title VI,[51] adopted to enforce the provisions of Title VI.[52] Justice White agreed with Justice Marshall in *Guardians* that the administrative regulations of Title VI, incorporating a disparate impact standard, are valid.[53] As such, discriminatory intent is not an essential element to establish a violation of Title VI, even though "Title VI, in and of itself, does not proscribe disparate-impact discrimination."[54] This means that a plaintiff bringing a private action claiming violations of both Title VI and the administrative implementing regulations will be entitled to relief upon proof of disparate-impact discrimination alone. The issue then becomes: what type of remedy will be allowed where there has been no intentional discrimination? That issue will be discussed in the next section.

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51. The administrative implementing regulations of Title VI state:

> Each federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract or insurance or guaranty, is authorized and directed to effectuate the provisions or section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found, or (2) by an other means authorized by law: *provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the federal department or agency shall file with committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall be come effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1 (1999).

52. *See* Lau v. Nichols, 414 U.S. 563 (1974).

53. *See* Guardians Ass'n v. Civil Servs. Comm'n of the City of New York, 463 U.S. 582 (1982).

54. *Id.* at 584 n.2.

The Court's ruling in *Guardians*, that Title VI reaches both intentional and unintentional discrimination, has found subsequent support in *Alexander v. Choate*,[55] as well as earlier support for the notion that Title VI does not require proof of discriminatory intent.[56] While five justices agreed with the result reached by the Court of Appeals, each justice reached that conclusion for different reasons.

Justice White, speaking for the majority in *Guardians*, held that discriminatory intent is not an essential element of a Title VI violation. Justice Powell and Chief Justice Burger agreed with the Court of Appeals that there is no implied private cause of action under Title VI. Justices Burger and Rehnquist believed that intentional discrimination is a prerequisite to a successful Title VI claim, and Justice O'Connor argued that intentional discrimination is required to establish a valid Title VI claim. As a result, Justice O'Connor concluded that the implementing regulations incorporating the disparate impact standard are not valid. Dissenting Justice Stevens, joined by Justices Brennan and Blackmun, disagreed with Justice O'Connor and concluded that the administrative regulations, incorporating the disparate impact standard, are valid despite the fact that Title VI itself requires proof of intentional discrimination. Justice Marshall was the most lenient of all the justices in stating that a private plaintiff needed only to prove disparate impact discrimination to establish a violation of Title VI.

Therefore, based on *Guardians*, if an individual claims violations of both Title VI and its implementing regulations, then proof of discriminatory intent is not an essential element. The same rule also would apply under Title IX and its implementing regulations if the *Guardians* interpretation of Title VI were followed.[57]

Prior to the Supreme Court ruling in *Davis v. Monroe County Board of Education*,[58] the Title VI standard applied to sexual harassment cases in the public school setting required proof of intentional discrimination as demonstrated by: 1) direct involvement of the school district in the discrimination; or

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55. 469 U.S. 287 (1985).

56. *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Lau v. Nichols, 414 U.S. 563 (1974); Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996).

57. *See* Roberts v. Colorado State Bd. of Agriculture, 998 F.2d 824 (10th Cir. 1993).

58. 526 U.S. 629 (1999).

2) a showing that the school district had actual or constructive knowledge about the sexual harassment of students, and that the school failed to take immediate remedial action.[59] However, *Guardians* established that the implementation regulations of Title VI reach unintentional discrimination. Therefore, the current application of Title VI, requiring proof of intentional discrimination, is contrary to *Guardians* and imposes a higher standard for student victims of sexual harassment than adult victims are required to meet.

B. Damages

It seems fairly well-settled that money damages are available only in cases where the plaintiff has proven intentional discrimination in Title VI and Title VII cases. This rule also is finding acceptance in Title IX cases.

Relying on *Guardians*,[60] most courts have applied the following rule: "where legal rights have been invaded and a cause of action is available, a federal court may use *any available remedy* to afford full relief."[61] The only exception to this general rule is where application of the rule would violate the intent of Congress or frustrate the statute's purposes.[62] But, the Court added that the amount of compensatory damages (money damages) to be awarded for a defendant's intentional misconduct will depend "on the extent of his *knowledge* or *culpability*."[63]

C. Title VII Standard

Title VII of the Civil Rights Act of 1964 provides:

> [I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of em-

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59. *See* Nelson v. Almont Community Sch., 931 F. Supp. 1345, 1355 (E.D. Mich. 1996); Oona v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995); Howard v. Board of Educ., 876 F. Supp. 959 (N.D. Ill. 1995); Letlow v. Evans, 857 F. Supp. 676 (W.D. Mo. 1994); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1576 (N.D. Cal. 1993); Floyd v. Waiters, 831 F. Supp. 867 (M.D. Ga. 1993); R.L.R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526 (W.D. Okla. 1993).

60. 463 U.S. 582 (1982).

61. *Guardians*, 463 U.S. at 595 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)) (emphasis added).

62. *See id.* at 595.

63. *Id.* at 597, n. 20 (emphasis added).

> ployment, because of such individual's race, color, religion, sex, or national origin.[64]

The question of intent also arises under Title VII. In *Regents of the University of California v. Bakke*,[65] the Supreme Court held that disparate impact alone was insufficient to establish a Title VII violation. However, the Court held that disparate impact could be used as a basis for relief under Title VII if the challenged practice was not based on a business necessity, or "if it lacked a manifest relationship to the employment in question."[66]

The leading case applying Title VII principles to a workplace sexual harassment claim is *Meritor Savings Bank, FSB v. Vinson*.[67] In *Meritor* the Court held, for the first time, that hostile environment sexual harassment constitutes a form of sex discrimination. As such, it is actionable under Title VII. This conclusion is based on EEOC Guidelines that provide an "administrative interpretation of [Title VII] by the enforcing agency."[68] The EEOC Guidelines assist the Court in "interpreting the Act's prohibition against discrimination based on 'sex.'"[69]

Relying on the language of Title VII, the *Meritor* Court held that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[70] Further, the Court accepted the Fifth Circuit's interpretation in *Rogers v. EEOC*,[71] that a Title VII cause of action goes beyond the potential economic impact caused by workplace discrimination:

> [T]he phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimina-

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64. 42 U.S.C.S. § 2000e - 2(a)(1) (1999).

65. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

66. *Id.* at 309.

67. 477 U.S. 57 (1986).

68. Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971).

69. Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (citing 100 Cong. Rec. 2577-2584 at 2577 (1964)).

70. *Id.* (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)) (quoting Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (7th Cir. 1971)).

71. 454 F.2d 234 (5th Cir. 1971).

> tion . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .[72]

In *Meritor*, the Supreme Court extended the *Rogers* holding by stating, "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[73]

It is important to note that not all conduct that can be described as harassment, "affects a 'term, condition, or privilege' of employment within the meaning of Title VII."[74] To establish a violation of Title VII for hostile environment sexual harassment, a plaintiff must prove both that the discrimination is based on sex and that the discrimination created a hostile or abusive work environment.

The Supreme Court, in *Meritor*, defined actionable sexual harassment under Title VII to "be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[75] Further, actionable sexual harassment requires the plaintiff to prove that the sexual advances are unwelcome.[76]

With regard to employer liability for hostile environment sexual harassment, the Supreme Court declined to announce a rule for employer liability. The Court did accept the EEOC's conclusion that Congress intended courts to consider agency principles in determining the employer's liability.[77]

While the Supreme Court did not decide in *Meritor* what the standard for employer liability will be, it did discuss the concept of employer notice drawn from agency principles. Traditionally, employers are held liable for the discriminatory conduct of their supervisory personnel even where the employer was unaware (knew or should have known) of the supervisor's discriminatory conduct.

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72. *Id.* at 238.

73. *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (1982)).

74. *Id.* at 67.

75. *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)); *See also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

76. *See Meritor*, 477 U.S. at 68, *noted in* 29 C.F.R. § 1604.11 (a) (1985).

77. "Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* at 72.

The EEOC suggested an alternative standard for hostile environment sexual harassment cases. That standard examines the availability of a complaint process, whether or not the victim of sexual harassment utilized the procedure, and whether or not the procedure was responsive to the victim's complaint.[78] Under the EEOC's rule, where an employer "has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment."[79] Otherwise, an employer will be liable only if "it has actual knowledge of the harassment,"[80] or there was "no reasonably available avenue for making his or her complaint known to appropriate management officials."[81] The first applies where the employer has a complaint process that the victim does not use to report the harassment, thereby failing to notify the employer of the discriminatory conduct. There, the victim is at fault for failing to avail herself of the available remedy. The second applies where the employer has no reporting procedure so the victim is unable to report the conduct. The failure to report is not the victim's fault because the employer never informed potential victims of the reporting process.

III. PEER SEXUAL HARASSMENT: IS THERE A PRIVATE CAUSE OF ACTION UNDER TITLE IX?

Title IX provides 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.[82]

As with each of the preceding federal statutes, it is necessary to determine under Title IX whether or not a private cause of action exists before any remedies can be considered. The is-

78. *See id.* at 71.
79. *Id.*
80. *Id.*
81. *Id.* at 71 (quoting Brief for United States and EEOC as Amici Curiae 26).
82. 42 U.S.C.A. § 1681(a) (1999).

sue of whether there is a private cause of action for student to student sexual harassment has been considered several times in the past three years, but the issue was far from being settled until the May 1999, Supreme Court decision in *Davis v. Monroe County Board of Education.*[83] While the Court held in *Franklin v. Gwinnett County Public Schools*[84] that there is a private cause of action under Title IX for teacher to student sexual harassment, there had not been agreement that a Title IX cause of action existed in cases involving student to student sexual harassment until *Davis.*

There have been a few cases where courts have concluded that a private cause of action exists for student to student hostile environment sexual harassment,[85] but there are other cases on the subject where courts have not addressed the issue of the existence of a private right of action. At least one court concluded that there is no cause of action for student to student sexual harassment.[86] In *Rowinsky v. Bryan Independent School District,*[87] the Fifth Circuit held that there is no cause of action under Title IX "absent allegations that the school itself directly discriminated based on sex." [88] Thus *Rowinsky* would apply the Title VI standard requiring some connection between the alleged discrimination and the actions of school officials.[89] In student to student sexual harassment cases, the *Rowinsky* court concluded there is no such link because the harasser is not a school district employee, and there is no power relationship between the harasser and the victim for which the school

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83. 526 U.S. 629 (1999).

84. 503 U.S. 60 (1992).

85. *See* Doe v. Londonderry Sch. Dist., 32 F. Supp. 2d 1360 (D.N.H. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E. D. Pa. 1997); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995); Oona v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995).

86. *See* Garza v. Galena Park Independent Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) ("a student cannot bring a hostile environment claim under Title IX").

87. 80 F.3d 1006 (5th Cir. 1996) *cert. denied,* 519 U.S. 861 (1996). Title IX, student to student sexual harassment case holding that a school district cannot be held liable under Title IX unless "the school district itself directly discriminated based on sex." *Id.* at 1008.

88. *Id.* at 1006; *See also,* Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995).

89. *Rowinsky,* 80 F.3d at 1008.

district could be held liable. In *Doe v. Petaluma City School District*,[90] the court held that "no damages may be obtained under Title IX (merely) for a school district's failure to take appropriate action in response to complaints of student to student sexual harassment."[91] The Eleventh Circuit, in *Davis v. Monroe County Board of Education*,[92] held that *Franklin* created a private cause of action for victims of teacher to student sexual harassment, but not for student to student sexual harassment. Still other courts have resolved cases of student to student sexual harassment without ever deciding whether or not a cause of action exists.[93] Despite the hesitation among lower courts to address the issue of a private cause of action once and for all, courts in most Title IX cases involving peer sexual harassment between students appear to accept the notion that there is a private cause of action under Title IX. The conclusion that a Title IX cause of action exists is based on the existence of private causes of action under Titles VI and VII.[94]

Two issues, remnants of debates in Title VI and Title VII cases, have created a great deal of confusion in peer sexual harassment cases under Title IX involving public school students. The first issue is whether intentional discrimination is required to establish a violation of Title IX for which a plaintiff can recover money damages. The second issue revolves around the role intent plays in determining the applicable standard of liability for Title IX violations.[95]

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90. 830 F. Supp. 1560 (N.D. Cal. 1993).

91. *Id.* at 1575.

92. 120 F.3d 1390 (11th Cir. 1997).

93. *See* Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) (holding that the plaintiff failed to state a claim for student to student sexual harassment); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 250 (2d Cir. 1995) (holding that even if Title IX created a private cause of action for sexual harassment by a non-employee of the school, Plaintiff failed to allege that school officials knew or should have known of the harassment); and Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1995), (holding that a school counselor is entitled to qualified immunity).

94. *See* Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1380 (N.D. Cal. 1997). A female student reported being sexually harassed by male students in her class. She sued the school district under Title IX alleging that the school district, a recipient of federal funds, discriminated against her on the basis of sex for failing to stop the sexual harassment inflicted on her. In Cannon v. University of Chicago, 441 U.S. 677 (1979), the Supreme Court recognized "that Title IX clearly creates an enforceable right."; Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Oona v. McCaffrey, 122F.3d 1207 (9th Cir. 1997); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997).

95. *See* Franklin v. Gwinnett Pub. Sch., 503 U.S. 60 (1992); Oona v. McCaffrey,

A. Is Intent Required for Compensatory Relief?

There is less discussion of whether or not intent is required to establish a violation of Title IX than there was for Title VI and Title VII violations. Courts seem willing to accept the conclusion reached by the Supreme Court that in Title VI cases intent is required where a victim seeks money damages.[96] Once it has been established that an institution has intentionally discriminated against the plaintiff, the court will award money damages to compensate the plaintiff for injuries suffered as a result of the intentionally discriminatory conduct of the schools that are recipients of federal financial assistance.[97] This rule was extended to Title IX cases in *Cannon v. University of Chicago*.[98]

The Supreme Court concluded in *Cannon* that Congress intended to create remedies under Title IX that were "comparable" to Title VI remedies because Title IX is modeled after Title VI.[99] Therefore, absent a showing of intentional discrimination, courts will award only declaratory and limited injunctive relief.[100]

The reason for restricting compensatory damages to cases of intentional discrimination centers on the presence or absence of notice. If the recipient of federal funds is not a participant in the discriminatory conduct, as in cases of student to student sexual harassment, then the recipient has no knowledge of the wrongful conduct and, therefore, lacks notice of the violation. In such instances, the recipient should not be punished for behavior committed by others. No such notice exists in cases of unintentional discrimination where the institution

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122 F.3d 1207 (9th Cir. 1997); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997).

96. *See* Alexander v. Choate, 469 U.S. 287 (1985); Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582 (1983); Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996).

97. *See id.*

98. *Cannon v. University of Chicago, 441 U.S. 677 (1979).*

99. *See Cannon v. University of Chicago, 441 U.S. 677, 694-698 (1979) ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."). See Franklin v. Gwinnett Pub. Sch., 503 U.S. 60, 66 (1992); Pfeiffer v. Marion Center Area Sch. Dist., 917 F.2d 779 (3rd. Cir. 1990).*

100. *See* Cannon v. University of Chicago, 441 U.S. 677, 694-698 (1979).

is unaware of any discrimination.[101] In those cases, courts agree that institutions should not be held liable for discriminatory conduct of which they were unaware.[102]

The rationale for this rule stems from the legislative history of Title VI discussed at length in *Guardians*.[103] A contrary ruling would frustrate the Congressional intent behind Spending Clause legislation such as Titles VI and IX, and might lead some institutions to refuse to accept federal funds. In Title IX cases, intentional discrimination by recipients of federal funds establishes proof that the recipient had knowledge that discriminatory conduct had occurred. This knowledge stems from the active participation of the recipient in the discriminatory conduct. That is the type of conduct Congress intended to punish by imposing compensatory damages for intentional discrimination.

B. The role of Intent

The rule regarding notice to recipients of federal financial assistance in a Title IX context was further explained by the Eleventh Circuit in *Davis v. Monroe County Board of Education*.[104] In *Davis*, the court stated that "an enactment under the Spending Clause must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding."[105] The *Davis* court concluded that the legislative history of Title IX contains no indication that Congress gave school districts and teachers "clear notice" that by accepting federal funds they also "would accept responsibility for remedying student-student sexual harassment." [106]

The Eleventh Circuit's ruling in *Davis* appeared to foreclose suits against school districts for student to student sexual harassment on the ground that the legislative history contains no notice to school districts that they are subject to liability for

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101. But *see* Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1378 (N.D. Cal. 1997) (where the court stated that the knew or should have known standard "requires actual notice or a severity or pervasiveness of harassing conduct that would ordinarily create notice.").

102. *See* Guardians Ass'n v. Civil Serv. Comm'n of the City of N.Y., 463 U.S. 582 (1983); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996).

103. *Guardians*, 463 U.S. at 602.

104. 120 F. 3d 1390 (11th Cir. 1997).

105. *Id.* at 1406.

106. *Id.*

peer sexual harassment between students. If the *Davis* approach were adopted by other courts, peer sexual harassment suits involving students as harasser and victim would be virtually eliminated as an avenue toward a potential remedy for student victims of peer sexual harassment. But recently some courts have questioned this conclusion, arguing instead that the language of Title IX gives notice to recipients of federal funds to maintain an institution free of discrimination. Therefore, school districts may be held liable for their actions and inactions in response to complaints of sexual harassment because Title IX states that recipients of federal funds are on notice to maintain an environment free from discrimination. Inaction after a student complains to a school official constitutes notice of discriminatory conduct. Failure to act in order to end the discrimination is equivalent to deliberate indifference, which constitutes discriminatory intent.[107]

IV. STANDARDS OF LIABILITY FOR PEER SEXUAL HARASSMENT

The issue of intent is closely tied to the determination of the applicable standard of liability for sexual harassment generally. Which standard is applicable, under Title IX though, has not been quite as clear-cut in cases of student to student sexual harassment.

In the Title IX hostile environment sexual harassment cases, proof of intent may be inferred from the totality of circumstances[108] or from "cumulative evidence of action and inaction which objectively manifests discriminatory intent."[109] While courts readily accept that intentional discrimination is required in Title IX hostile environment sexual harassment cases to hold school districts liable, it was not settled, prior to 1999, what was required to prove an intent to discriminate in

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107. *See* Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp. 2d 991 (M.D. Tenn. 1998).

108. *See* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) ("including evidence of the school's failure to prevent or stop the sexual harassment despite actual knowledge of the sexually harassing behavior of students over whom the school exercised some degree of control.").

109. Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (W.D. Mo. 1995). Jennifer Bosley and other female students were sexually harassed by male students. Bosley asserted that the school district failed to protect the female students from sexual harassment and discrimination and therefore, had intentionally discriminated against her by excluding her from participation in a federally funded program.

Title IX cases.[110] That raised the question of what standard of liability should be applied to hostile environment sexual harassment cases, particularly cases of student to student sexual harassment.

A. Application of Title VI Standard in Title IX Cases

The Title VI standard is known as the "intentional discrimination" or "strict liability" standard. As applied to student sexual harassment cases arising under Title IX, this standard requires proof that the school district had actual or constructive[111] knowledge of the harassing behavior; and that despite that knowledge, school officials took no action to remedy the sexual harassment.[112] This standard differs from the Title VII standard on the element of notice. The Title VI standard is frequently interpreted to require actual knowledge of sexual harassment.[113] But some courts have required victims of sexual harassment to establish that, in addition to actual knowledge of harassment, the school district *intentionally* failed to act to stop the harassment.[114]

The two-pronged Title VI standard is meant to hold institutions liable only where it is clear that the institution had direct knowledge of the illegal conduct, and further, participated in the illegal conduct by purposely (or intentionally) taking no action to stop the misconduct. Where sexual harassment is perpetrated by a student against another student, it is difficult to prove that the school district had actual knowledge of the har-

110. *See* Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996). A female student was verbally harassed by other female students after she had been raped by her ex-boyfriend. The question in this case was whether a student could recover damages from a school district for its failure to stop sexual harassment of which they were aware and whether that failure to remedy constituted intentional discrimination by the school district.

111. The constructive knowledge standard is also referred to as the knew or should have known standard.

112. *See* Nelson v. Almont Community Sch., 931 F. Supp. 1345 (E.D. Mich. 1996); Oona v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995); Howard v. Board of Educ., 876 F. Supp. 959 (N.D. Ill. 1995); Letlow v. Evans, 857 F. Supp. 676 (W.D. Mo. 1994); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993); Floyd v. Waiters, 831 F. Supp. 867 (M.D. Ga. 1993); R. L. R. v. Prague Pub. Sch. Dist. I-103, 838 F. Supp. 1526 (W.D. Okla. 1993).

113. *See* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 169-174 (N.D.N.Y 1996) (holding that constructive notice is insufficient to establish school district liability).

114. *See* Wright v. Mason City Community Sch. Dist., 940 F. Supp 1412 (N.D. Iowa 1996).

assment because no employee, over whom the school district has supervisory authority, has sexually discriminated against a student.

Before 1997, the Title VI standard was rarely invoked in sexual harassment cases occurring in the school setting. Then in 1997, several courts had the opportunity to consider what standard of liability should be applied in Title IX student to student sexual harassment cases.[115] The courts had to determine if the requisite level of intent was present to justify holding a school district liable for the misconduct. In those cases, courts began to back away from the predominant view that Title VII standards governed the Title IX sexual harassment cases. Two significant opinions suggest that a new standard will be applied in future Title IX student to student sexual harassment cases. Those cases will be discussed in detail in the final section.[116]

B. Application of Title VII Principles to Title IX Cases

Many of the courts responding to student to student sexual harassment have applied Title VII principles in Title IX cases because they believed they were following *Franklin* and *Meritor*.[117] This reliance on *Franklin* and *Meritor* has been criticized in recent cases,[118] primarily because Title VII is aimed at discrimination in the workplace, not discrimination against students. Title VII controls the employer/employee relationship with regard to sex discrimination based on agency principles. Recently courts have agreed that the Title VII standard has no applicability in student to student sexual harassment cases because there is no agency relationship between the student har-

115. *See* Rosa H. v. San Elisario, Indep. Sch. Dist., 106 F.3d 648, 656 (5th Cir. 1997); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997); Davis v. Monroe County Sch. Bd., 120 F.3d 1390 (11th Cir. 1997).

116. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

117. See Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996); Nelson v. Almont Community Sch. Dist., 931 F. Supp. 1345 (E.D. Mich. 1996); Burrow v. Postville Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Linson v. Trustees of the Univ. of Pa., No. 95-3681, 1996 U.S. Dist. LEXIS 12243 (E.D. Pa. August 21, 1996).

118. *See* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996).

asser and school officials upon which school district liability could be based.[119] Yet Title VII principles have guided the law in this area in recent years.

Meritor, and later *Franklin,* helped pave the way to our current understanding of the parameters of a Title VII violation. From *Meritor* came the language, "discrimination based on sex,"[120] which helped us understand what behavior "create[s] a hostile or abusive work environment."[121] In *Franklin,* the Supreme Court extended the reach of the *Meritor* language when it applied the "discrimination based on sex"[122] requirement to incidents of "sexual harassment of a student by a teacher."[123] *Meritor* also has been applied to cases of peer sexual harassment in the workplace,[124] while *Franklin* has been extended to include student to student sexual harassment.[125]

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119. *See* Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1023 (7th Cir. 1997) ("Title IX prohibits recipients of funds for a 'program or activity' from discriminating on the basis of sex, while Title VII prohibits employers from discriminating on the basis of sex . . . ." *Id* at 1027); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1396 (11th Cir. 1997) ("The term 'hostile environment' sexual harassment originated in employment litigation under section 703 of the Civil Rights Act of 1964, Public Law No. 88-352, 78 STAT. 241, 255 (1964) (Codified at 42 U.S.C. § 2000 E-2 (1994))("Title VII"). Hostile-environment sexual harassment occurs whenever an employee's speech or conduct creates an atmosphere that is sufficiently severe or pervasive to alter another employee's working conditions."); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 72 (D.N.H. 1997) ("In at least one case of a student-employee who was harassed, the first circuit has concluded that Title VII principles apply to Title IX cases. See *Lipsett,* 864 F.2d at 896-97. However, in that case the circuit explicitly limited its ruling to the facts before it and gave no indication that its analysis could be extended to other Title IX cases absent an employer-employee relationship." Citing Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988)).

120. Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

121. *Id.*

122. *Id.*

123. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).

124. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). Ellison is a Title VII co-worker sexual harassment case where a male employee persistently pursued a personal relationship with a female co-worker over her objections. There were two questions raised in this case. First, the court had to determine the appropriate test to determine when "conduct is sufficiently severe or pervasive to alter conditions of employment and create a hostile working environment." *Id.* at 873. Second, what remedial actions can an employer take to shield itself from liability.

125. *See* Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1375 (N.D. Cal 1997). "[T]he *Franklin* court turned to Title VII law to determine what standard should apply to Title IX sexual harassment claims. The court held: 'unquestionably, Title IX placed on [defendant school system] the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.' Quoting *Meritor Savs. Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986).' We believe the same rule should apply when a teacher sexually harasses a student." *Id.* (quoting Franklin v. Gwinnett County

From the Title VII case law came the notion of employer liability when the employer "knew or should have known" of the sexually harassing behavior, and the employer fails "to take steps reasonably calculated to end the harassment."[126] In *Nicole M. v. Martinez Unified School District*,[127] a California district court added to the confusion over the applicability of Title VII principles to Title IX cases when the court stated that the "knew or should have known" standard is consistent with "*Pennhurst's* explanation of the contractual nature of Spending Clause legislation, Justice White's opinion in *Guardians* and the *Franklin* decision."[128] The California court seems to combine Title VI and Title VII standards in *Nicole M.* with the court's reliance on *Pennhurst*[129] and Spending Clause legislation to explain the Title VII "knew or should have known" standard. Ultimately, the court held that "Title IX does not impose liability on school districts for peer hostile environment sexual harassment 'absent allegations that the school district *itself directly discriminated* based on sex.'"[130] The *Nicole M.* test requires proof "that an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."[131]

It appears that *Nicole M.* would extend Title VII agency principles to cases of peer sexual harassment between students. This would hold school district officials liable for peer to peer sexual harassment where school officials had been notified of the harassing conduct. The court extended the agency relationship found in the employment context to the relationship between teacher and school district in peer sexual harassment cases involving students. The *Nicole M.* court explained:

Pub. Schs., 503 U.S. 60, 75 (1992)). Reworded to apply to students it would read: When [one student] sexually harasses [another student] because of the [student's] sex, that [student] discriminate[s] on the basis of sex.

126. *Nicole M.*, 964 F. Supp. at 1376 (citing Ellison v. Brady, 924 F.2d. 872, 881-82 (9th Cir. 1991); *See also* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996) *vacated, pending reh'g en banc*, 91 F.3d 1418 (11th Cir. 1996).

127. *Id.* at 1369.

128. *Id.* at 1378 (both *Pennhurst* and *Guardians* were Title VI cases while *Franklin* was a Title IX case).

129. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

130. *Nicole M.*, 964 F. Supp. at 1376 (quoting Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1008 (5th Cir. 1996).

131. *Id.* at 1377 (quoting Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 650 (5th Cir. 1997).

> A teacher whose agency status is sufficient to hold the district liable for her harassment of a student, which was the case in *Franklin*, stands in no different position when she knows, or should be on notice with the exercise of reasonable care, of peer sexual harassment. Given the relationship of teachers to students and the duties that inhere in that relationship, this is a reasonable application of *Franklin*.[132]

Title VII principles have been applied to sexual harassment cases arising in the school context. Until recently, factors generated by the Eleventh Circuit in *Davis*[133] have been applied to determine school district liability.[134] The five factors defined in *Davis* represented a compilation of existing Title VII guidelines used to determine if hostile environment sexual harassment existed in the workplace. In *Davis*, the district court applied those factors to determine if the harassing conduct established proof of intentional misconduct by school districts in violation of Title IX.

The first factor, "she belongs to a protected group,"[135] is a preliminary question to ensure that the victim actually falls within the protection of Title IX. The second factor, "she was subject to unwelcome sexual harassment,"[136] as well as the third factor, "the harassment was based on sex" are both derived from *Meritor Savings Bank FSB v. Vinson*.[137] The second factor requires the victim to show that the sexual conduct was not welcome. This is not difficult to prove when the harasser is a teacher and the victim is a student, unless the student is in high school and there is evidence that both teacher and student took steps to conceal the relationship.[138] It is less difficult to

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132. *Id.* at 1378.

133. 74 F.3d 1186 (11th Cir. 1996).

134. *Id.* at 1194 ("1) Plaintiff is a member of a protected group; 2) Plaintiff was subject to unwelcome harassment; 3) harassment was based on sex; 4) sexual harassment was sufficiently severe or pervasive so as to unreasonably alter the conditions of her education and create an abusive educational environment; 5) some basis for institutional liability has been established.") *See also* Wright v. Mason City Community Sch. Dist., 940 F. Supp 1412, 1419-1420 (N.D. Iowa 1996) (In *Wright*, the court added the following to the existing fifth factor: "and intentionally failed to take the proper remedial measures because of the plaintiff's sex." 940 F. Supp. at 1419); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022-1023 (W.D. Mo. 1995) (The *Bosley* court changed the fifth factor to read: "The defendant knew or should have known of harassment and failed to take proper remedial action." 904 F. Supp. at 1022-23.).

135. Harris v. Forklift, 510 U.S. 17 (1993).

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

137. 477 U.S. 57 (1986).

138. See Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997); Marsh v.

show the unwelcomeness of sexual conduct when both harasser and victim are students, particularly when the behavior interferes with the victim's ability to participate in the educational environment. This is especially true when the behavior interferes with the victim's ability to participate in the educational environment.

The factor that has created the most uncertainty is the third factor: "the harassment was based on sex." Some courts have required victims to show that the school district treated boys differently than it treated girls.[139] But this interpretation has been criticized by some courts that have adopted a less restrictive interpretation of intent. For example, one district court concluded that "to be held liable, a school district must have intended to create a hostile environment for the plaintiff."[140]

The fourth *Davis* factor incorporates the *Harris v. Forklift* requirement that the harassing conduct must be "sufficiently severe or pervasive so as to alter conditions of her education."[141] This factor protects the institution from liability when the harassing conduct is not so serious as to interfere with the victim's education. This factor is explicitly designed to protect school districts from liability for "simple horseplay" [142] that merely annoys the victim.

The fifth *Davis* factor requires the victim to show "that some basis of institutional liability" exists. [143] The *Davis* court clearly intended to apply the Title VII agency standard of liability under Title IX with the adoption of the fifth (basis of institutional liability). As applied, the fifth *Davis* factor requires

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Dallas Indep. Sch. Dist., No. 3:94-CV-2255-R, 1997 U.S. Dist. LEXIS 4819 (N.D. Tex. March 10, 1997); Kimpton v. School Dist. of New Lisbon, 138 Wis.2d 226 (Wis. App. 1987).

139. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996).

140. Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997). *See also* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp 1193, 1205 (N.D. Iowa 1996).

141. Harris v. Forklift, 510 U.S. 17, 18 (1993). *See also* Kinman v. Omaha Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (citing Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996)).

142. Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 175 (N.D.N.Y. 1996). *See also* Doe v. City of Belleville, 119 F.3d 563, 575, *cert. granted, vacated* 118 S. Ct 1183 (1998); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1199 (4th Cir. 1996) (Michael, J., dissenting).

143. Kinman v. Omaha Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996) (citing Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996)).

that the school district: "a) knew or should have known of the harassment; and b) failed to take prompt remedial action."[144]

From 1993 through 1996, many lower courts struggled to define the standard of liability that should be imposed on school districts for peer sexual harassment. The growing trend was to move away from the Title VI strict liability standard requiring either actual knowledge of sexual harassment or a hostile environment to prove intentional discrimination by a school district,[145] in favor of the two-pronged, Title VII approach requiring that an employer or officials of an institution "knew or should have known of the sexual harassment and failed to take remedial action."[146]

The problem with the Title VII standard, despite the apparent clarity of the *Davis* factors, is that Title VII was adopted as a means of combating employment discrimination. Adoption of the "knew or should have known" standard, while a seemingly appropriate application of Title VII principles in Title IX sexual harassment cases to determine school officials' intent to discriminate against victims of sexual harassment, has recently been challenged in a series of cases.[147] The Title VII standard is inapplicable to Title IX cases, according to recent courts, because Title VII liability depends on an agency relationship between the institution and the victim and/or the harasser. That agency relationship does not exist in student to student sexual harassment cases primarily because there is no relationship between the school district and the harasser such that the school district could have notice of the sexual harassment or hostile environment arising from an institution/harasser relationship. The harasser does not act on behalf of the school district or in the scope of any employment. Therefore, there is no basis for liability against the school district.

The end result is that those courts that have carefully looked at the legislative history of Title VII have concluded

144. Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); *See* Nicole v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1376 (N. D. Cal. 1997).

145. *See Id.*; Nelson v. Almont Community Sch., 931 F. Supp. 1345, 1355 (E.D. Mich. 1996); Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427 (E.D. Mo. 1996).

146. *Id.*; Nelson v. Almont Community Sch., 931 F. Supp. 1345 (E.D. Mich. 1996); Pallett v. Palma, 914 F. Supp. 1018, 1021 (S.D.N.Y. 1996).

147. *See* Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655-656 (5th Cir. 1997); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1033-34 (7th Cir. 1997); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997).

that Title VII principles do not apply to school districts for student to student sexual harassment. This conclusion calls into question all of the rulings that have applied the Title VII standard to cases of peer sexual harassment between students. It also opens the door for other courts to reconsider the whole notion of school district liability for student to student sexual harassment.

V. SAME-GENDER SEXUAL HARASSMENT BETWEEN PEERS: A NEW DIRECTION

Arguments against application of the Title VII standard in Title IX sexual harassment cases have resurfaced with new strength in the last two years.[148] Two cases, in particular, comprehensively analyze why the application of the Title VII standard in student to student sexual harassment cases is inappropriate and imposes an undue burden on school districts.[149] At the core of this new line of cases is the proposition that Title IX differs significantly from Title VII such that application of Title VII agency principles to Title IX cases cannot be supported by the legislative histories of either statute.

The shift began in earnest with *Rosa H. v. San Elizario Independent School District.*[150] In *Rosa H.,* the Fifth Circuit rejected the agency theory of liability (or vicarious liability)[151] in favor of the stricter "actual knowledge" standard. But the court added a new element. Under *Rosa H.* "school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, *had the power to end the abuse,* and failed to

148. *See* Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997); Floyd v. Waiters, 831 F. Supp. 867, 876 (M. D. Ga. 1993).

149. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997); Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997).

150. 106 F.3d 648 (5th Cir. 1997) (involving teacher to student sexual harassment under Title IX. The question here was whether a school district could be held liable for its failure to prevent teacher to student sexual harassment.).

151. *See also* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997) ("Common law rule is that an employer is vicariously liable for the tort of an employee, even if the tort was outside of the scope of employment, if the employee 'was aided in accomplishing the tort by the existence of the agency relationship.'" *Quoting* Restatement (Second) of Agency § 219(2) (d) (1958)).

do so."[152] The Fifth Circuit rejected the common law agency theory of liability for teacher to student harassment in *Rosa H.* and then further retreated from the Title VII agency theory of liability in *Doe v. Lago Vista Independent School District*,[153] stating that "[w]e follow *Rosa H.* and refuse to allow plaintiffs to use Title IX which was enacted under the Spending Clause, to bring suits based on the mere fact that a teacher's employment status aided in the commission of sexual harassment."[154] The Fifth Circuit again took the lead in shaping the law in the sexual harassment arena with these two cases. *Doe v. Lago Vista Independent School District* marked a return to the discussion of the proper basis upon which liability for sexual harassment should rest. It also marked a return to a discussion of the legislative intent behind Title IX. That led, ultimately, to the Fifth Circuit's conclusion in *Davis v. Monroe County Board of Education* that "Title IX is virtually identical to Title VI."[155] But the court refused to impose liability for student to student harassment because "Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX."[156] The lack of notice, coupled with the absence of any connection between the school and the actions of the student harasser, compelled courts to absolve school districts of liability for peer sexual harassment between students.

In August 1997, the Seventh Circuit continued the discussion of school district liability for student to student sexual harassment under Title IX. In *Smith v. Metropolitan School District*,[157] the Seventh Circuit explained, "while Title VII and Title IX both prohibit sexual harassment as a form of sex dis-

152. *Rosa H.*, 106 F.3d at 650 (emphasis added).

153. 106 F.3d 1223 (5th Cir. 1997).

154. *Id.* at 1226.

155. *Davis*, 120 F.3d at 1398.

156. *Id.* at 1406.

157. 128 F.3d 1014 (7th Cir. 1997). This is a Title IX case where a student sought damages against the school district for discrimination based on sex stemming from a sexual affair between a student and her teacher. The court concluded that Title VII provides guidance in determining "whether the alleged harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX." *Id.* at 1023. The *Smith* Court rejected Title VII agency principles as the basis for the standard of liability applicable to instances of institutional discrimination based on sex. The court adopted the actual knowledge standard set forth in Rosa H. v. San Elizario Independent School District, 106 F.3d 648 (5th Cir. 1997).

crimination, the statutes differ as *to who is prohibited* from engaging in that conduct."[158] The court went on to compare the language of the two statutes to determine if Congress intended Title VII to guide the application of Title IX in sexual harassment cases. A fundamental difference between Title VII and Title IX is that "Title VII prohibits employers from discriminating on the basis of sex,"[159] while "Title IX prohibits recipients of funds for a 'program or activity' from discriminating on the basis of sex."[160]

In *Meritor*, the Supreme Court held that agency principles apply to Title VII "because the statutes at issue explicitly define an employee to include agents of the employer, evincing Congress' intent to hold employers liable vicariously."[161] As a result, the *Meritor* Court concluded that "the 'any agent' language of Title VII . . . provides a statutory basis for applying agency principles"[162] to sexual harassment claims.

Title IX contains no language creating a "statutory basis for applying agency principles."[163] The language of Title IX excludes from liability employees working for a "program or activity" and includes "only those who have administrative control of the school."[164] Clearly, teachers are excluded under this definition of "program or activity" because teachers don't have administrative control of the school. But the question often confronting courts in sexual harassment cases is who has administrative control of the school? Is it the school principal, the superintendent, or the school board? The typical response is that the school board has administrative control of the school.[165] Therefore, unless a victim can prove that the school board has either actual or constructive knowledge of sexual harassment and then fails to take remedial action, the school board will not be held liable for sexual harassment that occurs in public schools. If this new approach to the standard of liability, based

158. *Smith*, 128 F.3d at 1023 (emphasis added).

159. *Id.*

160. *Id.*

161. *Id.* at 1024.

162. *Id.*

163. *Id.*

164. *Id.*

165. See Karen Michaelis, *Theories of Liability for the Sexual Misconduct of Teachers*, VOL 6. NO. 5 J. SCH. LEADERSHIP 540-554 (Sept. 1996) for a discussion of which school officials must have knowledge of abuse and fail to act for liability to attach to school districts in teacher sexual abuse cases.

on Title VI principles, becomes the accepted approach in peer sexual harassment cases,[166] and Title IX restricts liability only to "the acts of the recipients of federal funds,"[167] then student victims of peer sexual harassment will be unable to seek damages against a school district for its failure to prevent or stop student to student sexual harassment.[168]

In light of the almost identical language of Title VI and Title IX, coupled with the recent emphasis on using the legislative history of Title VI to determine the correct standard under Title IX; it is likely that the element of institutional notice not only will become more central in determining the standard of school district liability, but it will also completely foreclose application of Title VII agency principles in Title IX cases. This will further insulate school districts from liability for student to student sexual harassment.[169] The result is not far from becoming reality.

VI. RECENT SUPREME COURT DECISIONS: *ONCALE, GEBSER, AND DAVIS*

A. *Oncale v. Sundowner Offshore Services, Inc.*

Recently, the Supreme Court recognized a private cause of

166. It appears that the Supreme Court has adopted this approach in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997).

167. Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1026 (7th Cir. 1997) (quoting Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 654 (5th Cir. 1997).

168. Students will not have recourse under Title IX for student to student sexual harassment unless courts consider the inaction of recipients of federal funds as discriminatory conduct thereby attaching liability to school districts for their own conduct in ignoring sexual harassment by third parties. *See* Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp. 2d 991, 998 (M.D. Tenn. 1998) ("writing the four-person dissent, Judge Barkett [in *Davis*] rejected the reasoning of Judge Tjoflat's majority opinion, concluding that Title IX provides unambiguous notice to recipients of federal funds that they many be liable for failing to remedy the sexual harassment of one student by other students") (citing Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1412 (11th Cir. 1997) (Barkett, J., dissenting)).

169. Title IX liability for student to student sexual harassment requires a link between the school district and the harasser. "[T]he policy concerns involved in Spending Clause legislation compel the conclusion that agency principles have no place in Title IX litigation because 'there is nothing to give notice to the recipient of federal funds that the funds carry the strings of such liability.'" *Smith*, 128 F.3d at 1031 (quoting Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 656 (5th Cir 1997)).

action under Title VII for same-gender sexual harassment between co-workers. In *Oncale v. Sundowner Offshore Services, Inc.*,[170] the Supreme Court had the opportunity to consider the issue of employer liability in a same-gender sexual harassment case. The Court concluded that under Title VII agency principles, the acts of an employee may be imputed to the employer where the employer had notice of the sexual harassment and failed to prevent or stop the behavior creating the hostile environment. The Court clearly demonstrated the link in *Oncale* between the harassing behavior and the employer's responsibility to maintain a nondiscriminatory workplace. The Court also made clear that Title VII applies to sexual harassment in the workplace. While this decision is important because it clarifies, at least for adult co-workers that same-gender sexual harassment between peers is actionable under Title VII, it leaves unanswered the question whether a student victim of peer-inflicted sexual harassment may recover damages from a school district. The *Oncale* decision also raises a question regarding the Supreme Court's intent to create different standards for sexual harassment between adult co-workers and sexual harassment between students.

In *Oncale*, the Court seemed to have provided a way for lower courts to avoid attaching liability to school districts for student to student sexual harassment while providing a clear message that employers may be held liable under Title VII for same-gender peer sexual harassment between co-workers. Therefore, adult workers would be protected from their co-workers' sexual harassment, while students would continue to have no remedy against the school district where student to student harassment occurs. While this result is the logical conclusion of the statutory analysis of Titles VI, VII, and IX, its practical application is bound to leave many parents and students baffled and angry that Title VII would protect adult victims of same-gender, peer sexual harassment, but not student victims of same-gender, peer sexual harassment.

B. Gebser v. Lago Vista Independent School District

Gebser v. Lago Vista Independent School District[171] illustrates the Court's willingness to abandon the Title VII stan-

170. 523 U.S. 75 (1998).

171. 524 U.S. 274 (1998).

dard relied on by lower courts to determine school district liability for sexual harassment. This shift clarifies the standard of liability for sexual harassment in the workplace outside of educational institutions. It also clarifies the standard of liability for sexual harassment in schools. Moreover, this shift aligns the rationale for applying the Title VI standard in school sexual harassment cases with the legislative history of Title IX recently analyzed in student to student sexual harassment cases. This shift also retains the Title VII standard for sexual harassment perpetrated by a school district employee against another employee, but not where an employee sexually harasses a student. In an unusual move, the Supreme Court concluded that even teacher to student sexual harassment will be governed by the Title VI standard.[172]

Yet to be answered is the question, what are the limits of liability? The answer to this question hinges on the notice and action elements already explored extensively in earlier sexual harassment cases applying Title VII or Section 1983 standards. Specifically, school district liability will depend on a) what constitutes sufficient notice to the school district that peer sexual harassment is occurring; and b) what action is the school district required to take to end the harassment.[173]

In *Gebser*, the Supreme Court articulated a new standard of liability based on the stricter Title VI standard. There the Court stated:

> [D]amages may not be recovered [from a school district based on sexual harassment of a student by one of its teachers] unless an official of the school district who at a minimum has

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172. *See* Gebser v. Lago Vista Indep. Sch. Dist, 524 U.S. 274 (1998) (concluding that "it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice.") (quoting Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 71 (1992); *See also* Smith v. Metropolitan Sch. Dist. Township, 128 F.3d 1014, 1027 (7th Cir. 1997) ("rejecting agency standard of institutional liability in Title IX cases") (quoting Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127 (10th Cir. 1998)).

173. *See* Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp. 2d 991 (M.D. Tenn. 1998). A female student was sexually harassed and sexually abused by two male students at school. The female student sought damages from the school board for their failure to stop the harassment. The court applied the recently adopted *Gebser* standard limiting a damage remedy under Title IX to cases where "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.* at 999 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U. S. 274, 292 (1998).

> authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.[174]

The higher standard for teacher to student sexual harassment does not square with the rationale offered by the Court justifying Title VI as the appropriate standard in the educational institution when the school district is governed by the lower Title VII standard for employee-employee sexual harassment because of the agency relationship between the district and the perpetrator. That agency relationship does not disappear when the victim is a student. The result, however, is to make it even more difficult for students to establish school district liability even where teachers are the perpetrators.

The *Gebser* standard severely restricts a student's ability to recover damages from a school district, particularly in cases where the student alleges that the school district failed to protect the student from sexual harassment inflicted by another student. Post-*Gebser* courts will have to help clarify the components of the *Gebser* standard. As it stands, it is not clear which school officials have "authority to institute corrective measures on the district's behalf."[175] Additionally, it is not clear if that authority is something more than simply being an employee of the school district who knows the chain of command for reporting such things as child abuse and sexual harassment.[176] The notice element of the *Gebser* standard will continue to be debated. The questions are, how many reports of sexual harassment are necessary to establish actual notice, and which official of the school district must be informed in order to satisfy the actual notice prong?

The real surprise in *Gebser* was the adoption of the deliberate indifference element from Section 1983, first mentioned in *Nicole M.*, to the *Gebser* standard. Deliberate indifference has created problems in Section 1983 cases in two ways. First, how much action is enough to indicate that a school district is attempting to resolve a sexual harassment complaint? Second,

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174. *Gebser*, 524 U.S. at 284.

175. Gebser, 524 U.S. at 284.

176. *See Haines*, 32 F. Supp. 2d at 999 (noting that child abuse reporting statutes make teachers mandatory reporters of suspected child abuse, but courts considering school district liability for sexual harassment by another student or even a teacher have been reluctant to conclude that a classroom teacher is vested with sufficient authority to "institute corrective measures") (quoting *Gebser*, 524 U.S. at 284).

how effective must the action be, if at all, to overcome a charge of deliberate indifference? To date, there are no definitive answers to either of these questions.

Further, as the stricter Title VI standard is applied to same-gender sexual harassment cases where both harasser and victim are students, the conflict between the current state of the law and the expectation held by parents and students that school officials will protect students from sexual harassment will lead to more conflict over who will be held liable for the damage caused by hostile environment sexual harassment in public schools.

Prior to the Supreme Court's decision in *Davis*, several issues remained unresolved concerning a school district's potential for liability in cases of student to student sexual harassment.[177] First, would the Court recognize a private cause of action for student to student sexual harassment? And second, if a cause of action were recognized, what standard of liability would be imposed on school districts for student to student sexual harassment? The recent movement away from the Title VII standard by lower courts indicated a growing acceptance of Title VI as the appropriate standard of liability in Title IX cases. Prior to *Gebser*, it was not clear that the Supreme Court would agree with that emerging minority view in determining school district liability for student to student sexual harassment. However, one of the remaining issues sure to cause debate concerns a determination of which school officials "ha[ve] authority to institute corrective measures on the district's behalf."[178] Some have argued recently that a classroom teacher should be considered to have such authority when a student is victimized by another student.[179]

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177. The Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), addressed several of the questions that had been debated among the lower courts without definitive resolution. The *Davis* decision has laid to rest the debate over the existence of a private cause of action for student to student sexual harassment holding that there is a private cause of action for student to student sexual harassment. The Court also identified the appropriate standard of liability under Title IX for student to student sexual harassment when it adopted the Title VI standard. *Id.*

178. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998).

179. *See* Brzonkala v. Virginia Polytech Inst., 132 F.3d 949, 958 (4th Cir. 1997), *reh'g en banc granted, vacated* (Feb. 5, 1998); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir.) *cert. Denied*, 519 U.S. 861 (1996); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467-68 (8th Cir. 1996); Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996); Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 540 (1st Cir. 1995); *See also* Oona v. McCaffrey, 143 F.3d 473, 476 (9th Cir 1998); Doe v. Clai-

Several post-*Gebser* cases have adopted the stricter *Gebser* Title VI standard in both teacher to student and student to student sexual harassment cases.[180] But, despite *Gebser*, questions remain. One issue sure to occupy the courts for some time concerns the circumstances under which school districts will be held liable for sexual harassment under Title IX, particularly when the harasser is not an employee of the school district. During 1998, before and after *Gebser* was decided, several lower courts considered the scope and meaning of Title IX in cases of student to student sexual harassment.[181] Those courts agreed with Judge Barkett's dissent in the Eleventh Circuit's decision in *Davis*[182] "that Title IX authorizes a cause of action for student-on-student sexual harassment."[183]Further, the Fourth, Seventh, and Ninth Circuits agree that while employers and school officials cannot be held "vicariously liable for the actions of others,"[184] all three circuits agree that Title IX imposes on educational institutions the duty to maintain an educational environment free of discrimination. As such, the educational institution would be required to "safeguard[] individual students' rights."[185]

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borne County Tenn., 103 F.3d 495, 515 (6th Cir. 1996) (noting "the elements to state a supervisory hostile environment claim under Title VII equally apply to Title IX"); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) ("using Title VII legal standards to review claim of discrimination under Title IX") (quoting *Haines*, 32 F. Supp. 2d 999); Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp.2d 991, 999 (M.D. Tenn. 1998) ("applying Title VII standards to Title IX hostile environment claim").

180. *See X v. Fremont County Sch. Dist., 162 F.3d 1175 (10th Cir 1998) (noting that "[t]he Supreme Court has ruled that Title VII's employer liability principles do not apply in the Title IX context.") (citing Gebser, 524 U.S. at 283); Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998); see also Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998)* (pre-*Gebser* case adopting Title VI standard); *Smith v. Metropolitan Sch. Dist.* Perry Township, 128 F.3d 1014, 1027 (7th Cir. 1997) (pre-*Gebser* case adopting Title VI standard); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997) (pre-*Gebser* case adopting Title VI standard); Davis v. DeKalb County Sch. Dist., 996 F. Supp. 1478 (N.D. Ga. 1998) (pre-*Gebser* case adopting Title VI standard).

181. *See* Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp. 2d. 991 (M.D. Tenn. 1998); Oona v. McCaffrey, 143 F.3d 473 (9th Cir. 1998); Brzonkala v. Virginia Polytech Inst., 132 F.3d 949 (4th Cir. 1997); Doe v. University of Ill., 138 F.3d 653 (7th Cir. 1998).

182. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1411 (11th Cir. 1997) (Barkett, J., dissenting).

183. *Haines*, 32 F. Supp. 2d at 998 (M.D. Tenn. 1998).

184. *Id. quoting Oona*, 143 F.3d at 477.

185. *Haines*, 32 F. Supp. 2d at 998 (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982).

C. Davis v. Monroe County Board of Education

The third Supreme Court decision in this recent trilogy of cases concerning the various forms and contexts of sexual harassment occurred on May 24, 1999. In *Davis v. Monroe County Board of Education*,[186] the Court addressed the issue of the existence of a private cause of action for student to student sexual harassment. The *Davis* decision represents the culmination in this series of Supreme Court decisions on sexual harassment which, in combination with the two earlier decisions, provides the clearest guidance to date in this area of law.

In *Davis*, the Court answered the outstanding questions occupying the lower courts for the past decade. First, the Court emphasized its decision in *Franklin v. Gwinnett County Public Schools*[187] where the *Franklin* Court concluded that there is "an implied private right of action for money damages"[188] but added that such damages "are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue."[189]

Next, the Court addressed the issue of school district liability for the sexual harassment of a student by another student, during the school day and on school property. After reiterating Title IX's proscription against institutional liability for the acts of individuals or third parties, the *Davis* Court concluded that the plaintiff, LaShonda Davis, had properly stated a private cause of action against the school district. This conclusion was based on the district's own misconduct; namely its failure to take any remedial or disciplinary steps to stop the harassing conduct to which LaShonda Davis was subjected. As such, Davis's complaint sought to hold the school district liable for its deliberate indifference to known acts of sexual harassment,[190] and not the acts of a private third party (i.e. the student perpetrator).

The *Davis* Court also considered the applicability of the *Gebser* standard in cases of student to student sexual harass-

186. 526 U.S. 629 (1999).

187. 503 U.S. 60 (1992).

188. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

189. *Id.* (1999) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 17 (1981)).

190. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (The *Gebser* standard is directed at intentional discrimination by the educational institution itself, not individual employees.).

ment. In *Gebser*, the Court held that liability attaches "where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge."[191] The question in *Davis* concerned whether a school district's deliberate indifference to know acts of harassment amounted to an intentional violation of Title IX when the harasser was a student. The answer to that question hinged on Title IX's notice requirement, the "recipient's degree of control over the harasser and the environment in which the harassment occurs."[192] Relying on *Franklin* and *Gebser*, the Court concluded that "sexual harassment is a form of discrimination"[193] under Title IX, and Title IX's proscription against harassment is clear enough both to meet the notice requirement in *Pennhurst* and to provide "a basis for a damages action."[194] Further, *Franklin* and *Gebser* required the Court "to conclude that student-on-student sexual harassment, if sufficiently severe, can . . . rise to the level of discrimination actionable under" Title IX.[195]

The Court, using the language of Title IX, linked the district's duty to protect students from harassment to the protection Title IX provides students against being "'excluded from participation in' or 'denied the benefits of' any 'educational program or activity receiving Federal financial assistance.'"[196] The new standard of liability for student to student sexual harassment is taken from the *Gebser* standard, but tailored to the unique responsibilities of school districts toward their students. Under the new standard, liability will attach where recipients of Federal financial assistance "are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[197] However, the Court distinguished between schools and adult workplaces. This distinction leaves open the question of whether the Court

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191. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (quoting *Gebser*, 524 U.S. at 290).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* (quoting 20 U.S.C. § 1681(a) (1972)).

197. *Id.*

has created different standards of liability based on the setting in which the harassment occurs and the age of the victims and perpetrators. In qualifying the *Davis* standard, the Court gives the impression that it is not eager to provide the same level of protection to students that adults can expect after *Oncale*. Further, the Court seems hesitant to clearly define the types of behaviors between students that constitute sexual harassment. Instead, the Court stated that "[d]amages are not available for simple acts of teasing and name-calling among school children, . . . even where these comments target differences in gender."[198] The *Davis* Court left to school administrators the task of drawing the line between innocent teasing and actionable sexual harassment. That is a task that school administrators are ill equipped to address.

CONCLUSION

The Eleventh Circuit's 1996 ruling in *Davis*[199] created a framework based on Title VII principles, subsequently used by a number of courts[200] to determine school district liability for hostile environment sexual harassment. But the recent ruling by the Eleventh Circuit in *Davis v. Monroe County Board of Education*[201] has revealed an entirely new approach for student to student sexual harassment cases, particularly those involving same-gender sexual harassment. The Supreme Court's decision in *Davis* also fits well with the recent Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.* and extends the *Gebser* standard. The combination of these opinions, as well as a handful of other recent student to student sexual harassment cases, could upset the majority of existing student to student sexual harassment rulings.

In these recent cases, courts have taken care to explain the rationale behind the standard they have chosen to apply in the same-gender, co-worker, teacher-student, and student to stu-

198. *Id.* The Court went even further when it stated that "Courts, . . . must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Id.*

199. 74 F.3d 1186 (11th Cir. 1996).

200. *See* Doe v. Claiborne County, 103 F.3d 495, 513, 515 (6th Cir. 1996); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467-69 (8th Cir. 1996); Seamons v. Snow, 84 F.3d 1226, 1232-22 (10th Cir. 1996).

201. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997).

dent sexual harassment cases. Unfortunately, the standard chosen by these courts is not the standard that the majority of lower courts have applied. Moreover, the new standard makes it even easier for courts to protect the resources of school districts at the expense of student victims of sexual harassment. While this has always been true, the *Davis* Court has painstakingly presented its reasons for selecting the Title VI standard for determining school district liability for student to student sexual harassment.

Very few students have ever been successful in sexual harassment cases. Frequently, the explanation offered by courts to justify a holding of no school district liability seems contrived and contrary to the evidence offered. Parents expect their children to be safe from abuse when they send their children to school. When a child is sexually harassed by other students, parents expect school officials to know about the abuse and to take the necessary steps to stop the abuse. Under the existing standards of liability, it is unlikely that students will be able to prove that school district officials knew of the harassment because it is not clear which school officials must know in order to establish the requisite notice of discriminatory conduct. Even if the proper notice is established, courts have concluded that whatever action school officials take is sufficient to overcome the deliberate indifference requirement in virtually every instance, even where the abuse is not stopped. The future direction of student sexual harassment case law is uncertain at best. But even though post-*Davis* courts will apply the new, stricter approach to school district liability, it will be beneficial to finally know what the accepted standard of liability is in this evolving area of law.