Brigham Young University Education and Law Journal

Volume 2000 | Number 2 Article 6

Fall 3-2-2000

Responding to Public School Peer Sexual Harassment in the Face of *Davis v. Monroe County Board of Education*

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INTRODUCTION

Peer sexual harassment has existed in our elementary, secondary, and post-secondary schools for decades.[1] Recently, it has surfaced as a ubiquitous legal dilemma. In the past, schools have largely ignored peer sexual harassment claims. "Most often, schools responded to complaints by suggesting that the victim 'did something' to provoke the harassment or [by] shrugging off the complaint as evidence that 'boys will be boys.'"[2] There has been a pervasive view that peer sexual harassment is merely the result of social and sexual child development, that it is "an innocuous emergence of sexual curiosities and attractions among adolescent students. The behavior, however, even if innocent, is dangerous."[3]

In 1993, the American Association of University Women (AAUW) published a peer sexual harassment study. The study showed that 81% of students surveyed "had experienced some form of sexual harassment, ranging from sexual remarks to physical contact.[4] A surprising 85% of girls and 76% of boys reported experiencing 'unwanted and unwelcome sexual behavior

1. *See Should Schools Be Held Liable for Peer Sexual Harassment Under Title IX of the Education Amendments of 1972?* 20 AM. J. TRIAL ADVOC. 219 (Fall 1996).

2. *Id.* (quoting Doe v. Petaluma School District, 830 F. Supp. 1550, 1565 (N.D. Cal. 1993)).

3. Laura M. Sullivan, *An Evolutionary Perspective of Peer Sexual Harassment in American Schools: Premising Liability on Sexual, Rather Than Power Dynamics*, 3 WM. & MARY J. WOMEN & L. 329 (Spring 1997).

4. *See* Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123 (Fall 1994) (discussing the American Association of University Women Educational Foundation, "Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools" 7 (June 1993)).

that interferes with their lives.'"[5] Such sexual harassment can take place at any school activity, in the hallways, the classroom, the cafeteria, on field trips, or at any other school sponsored area or event.[6] Schools must prevent and respond immediately and reasonably to peer sexual harassment. If left unchecked, sexual harassment will but worsen. In fact:

> The impact of sexual harassment on a student's educational progress and attainment of future goals can be significant and should not be underestimated. As a result of sexual harassment, a student may, for example, have trouble learning, drop a class or drop out of school altogether, lose trust in school officials, become isolated, fear for personal safety, or lose self-esteem.[7]

Because schools have a responsibility to provide a safe educational environment, and because peer sexual harassment can have negative long-term psychological effects on student victims, schools "should not accept, tolerate or overlook sexual harassment."[8] School officials, administrators, and teachers must educate themselves on sexual harassment law. They must then implement programs and policies responding to the current law in order to prevent and respond to peer sexual harassment, not only so that they may insulate their school boards and districts from liability, but so that they may also protect their students and provide them with the safe school environment students deserve.

Part I of this note discusses the controversy that existed within the circuit courts prior to and contemporaneously with the Supreme Court's decision in *Davis v. Monroe County Board of Education*.[9] Part II sets forth the facts, the Court's holding, and reasoning in *Davis*. Part III continues to analyze the reasoning of the Court and discusses the rationale behind holding schools responsible and the impact *Davis* has on public school districts. Part IV discusses why schools should be held responsible. Part V suggests methods, policies, and procedures that school administrators can implement in order to shield themselves from liability under *Davis* and protect students from

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5. *Id.*

6. *See* Department of Education, Office of Civil Rights, *Sexual Harassment: It's Not Academic* (visited Oct. 30, 1999) <http://www.ed.gov/offices/OCR/ocrshpam.html>.

7. *Id.*

8. *Id.*

9. 119 S. Ct. 1661 (1999).

peer sexual harassment.

I. THE CONTROVERSY IN THE CIRCUITS

A. The Eleventh Circuit

In February 1996, the Eleventh Circuit decided *Davis v. Monroe County Board of Education*.[10] The court held that peer sexual harassment is a cognizable claim under Title IX.[11] The court analogized the school peer sexual harassment situation to a co-worker hostile work environment claim under Title VII. The Court first looked at the language of Title IX[12] and stated that the issue in the case was "whether the Board's alleged failure to take action to stop G.F.'s sexual harassment of LaShonda 'excluded her from participation in, . . . denied her the benefits of, or . . . subjected her to discrimination under' the Monroe county educational system on the basis of her sex."[13]

The court stated that Title IX was enacted in order to protect people within the education system from discrimination based upon their sex.[14]

> To accomplish this goal, employees and students of federally funded educational institutions who are discriminated against on the basis of sex have a private right of action under Title IX for injunctive relief and compensatory damages. Moreover, in interpreting Title IX, 'there is no doubt that if we are to give it the scope that its origins dictate, we must accord it a sweep as broad as its language.'[15]

In order to accord such a sweep, the court reviewed this

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10. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996).

11. *See id.* at 1195.

12. "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 educational program or activity receiving Federal financial assistance. . . ." *Id.* at 1189 (quoting 20 U.S.C. §1681(a) (1988)).

13. *Davis*, 74 F.3d at 1189.

14. *See id.* at 1190. Enacted in 1972, Title IX was designed to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices. *See id.* Note that previously the only remedy available for Title IX claims was the denial of federal funding to the institution. However, in 1992, the Supreme Court allowed monetary damages to private plaintiffs for intentional violations of Title IX. *Id.* (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992)).

15. *Davis*, 74 F.3d at 1189 (citations omitted).

peer sexual harassment claim under Title VII principles, rationalizing that other courts have done so, and that these principles are applied to sex discrimination claims made by teachers and other school employees. The court also explained that the legislative history of Title IX "'strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII.'"[16]

Furthermore, the court justified its application of Title VII to the Title IX context by saying that it had been specifically authorized by an extension of the Supreme Court's decision in *Franklin v. Gwinnett County Pub. Schs.*[17] and by the Department of Education's Office of Civil Rights.[18] Moreover, the court felt that "application of these principles to Title IX claims by students recognizes, as the Supreme Court acknowledged in *Franklin*, that a student should have the same protection in school that an employee has in the workplace."[19]

Of course, there are differences between the workplace and school. The court acknowledged this by stating that these differences only supported the need for greater protection against harassment in schools.[20] The court also emphasized that teachers have greater control and influence upon school children and that children also look to these authorities for protection.[21] Another reason given for granting this protection is that harassment in school can be more damaging to a child than similar behavior occurring to adults in the workplace.[22] The court also recognized that it is much harder for a child to change schools than for an adult to change jobs in order to escape the harassment.[23] Furthermore:

> [a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed stu-

16. *Id.* (quoting Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988)).

17. 503 U.S. 60, 76 (1992). Subsequently, several courts have understood *Franklin* to authorize the application of Title VII standards to a student's Title IX sexual harassment claim against her school. *See Davis*, 74 F.3d at 1191.

18. *See Davis*, 74 F.3d at 1191-92.

19. *Id.*

20. *See id.* at 1193.

21. *See id.*

22. *See id.*

23. *See Davis*, 74 F.3d at 1193.

> dent from developing her full intellectual potential and receiving the most from the academic program.[24]

Thus, the court concluded that just as Title VII allows monetary damages for a hostile work environment, so Title IX should allow a private action for monetary damages for a hostile school environment due to peer sexual harassment.[25] In order for the school district to be held liable, they must "knowingly [fail] to take action to remedy a hostile environment caused by a student's sexual harassment of another. [The rationale being that] the harassed student 'has been denied the benefits of, or been subjected to discrimination under' that educational program in violation of Title IX."[26]

B. The Fifth Circuit

In April 1996, the Fifth Circuit in *Rowinsky v. Bryan Independent School District*[27] "concluded that Title IX was enacted pursuant to Title VI, and found that Title IX requires proof of intentional conduct on the part of the educational institution

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24. *Id.* (quoting Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993)).

25. *See Davis*, 74 F.3d at 1193.

26. *Id.* at 1194 (quoting 20 U.S.C. § 1681(a)).

27. 80 F.3d 1006 (5th Cir. 1996), *overruled* by Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 638 (1999). The case involved two eighth grade girls, Janet and Jane, at Sam Rayburn Middle School. Janet was allegedly physically and verbally abused by G.S. on the school bus. He would swat her bottom and ask her questions about her bra and panty size. He also called her a whore. Janet complained to the bus driver several times, but to no avail. On another occasion, G.S. grabbed Jane's genital area and her breasts. Jane, Janet, and their parents complained to the school Assistant Principal. G.S. was suspended from riding the bus, and was later reassigned to sit behind the bus driver. This did not deter G.S. and he continued to harass the girls. At another time, another male student L.H. harassed Janet by lifting up her skirt and making crude remarks. Janet complained to the bus driver, but he did not acknowledge her. Janet's mother complained to the assistant principal and gave him names of other victims; he said he would investigate and take action. L.H. was suspended for three days. A new bus driver was assigned and G.S. discontinued the harassment. Jane was assigned to sit next to G.S. Both girls were removed from the bus by their mother. Mrs. Rowinsky requested that G.S. be removed from the bus. Further action was refused by school authorities until there was proof of the alleged assaults from juvenile records. Yet another male student, F.F., unfastened Janet's bra by reaching under her shirt. He was suspended for the rest of the day and the day after, but his conduct was not considered sexual. Mrs. Rowinsky and her lawyer later met with the superintendent to complain about G.S.'s behavior. The superintendent said that the bus suspension had been sufficient action. They were not informed about Title IX or Title IX complaint procedures. Mrs. Rowinsky then filed the instant action, alleging that the school district and its officials condoned and caused hostile environment sexual harassment. *Id.* at 1006-1009.

before monetary liability could be imposed."[28]

In so finding, the court looked to the statutory language of Title IX, as the Eleventh Circuit had done in *Davis*.[29] The court determined that the language of Title IX does not apply to the conduct of third parties; rather, it only applies to discrimination by the funding recipient. The court justified its position with the statute's structure, legislative history, and the Department of Education's Office of Civil Rights ("OCR") interpretation of the statute.[30]

OCR's interpretation "considers peer hostile environment racial harassment a violation of title VI," but fails to comment upon whether such an interpretation applies to third parties and not solely to the recipient's actions.[31] Analogizing Title IX principles, the court concluded that in order for a plaintiff to successfully bring a peer sexual harassment action, she "must demonstrate that the school district responded to sexual harassment claims differently based on sex."[32] Rowinsky thus failed to show that the school had responded differently to her daughters' assault claims than to those allegations made by boys at the school.

C. The Conflict

Taking into consideration the Eleventh Circuit's decision in *Davis* and the Fifth Circuit's decision in *Rowinsky*, the circuits were not only in conflict as to the standard of liability for a successful peer sexual harassment claim, but also as to the rationale and applicable principles underlying such claims. While one circuit allowed third-party actions to constitute claims as long as the school district knowingly failed to take action, the other circuit only allowed such an action if the school's treatment of peer harassment allegations was different based upon the complainer's sex. Additionally, the circuits' interpretations of Title IX and the Congressional intent behind the statute varied. Because the approaches to peer sexual harassment were varied and conflicting, the Supreme Court granted certiorari to *Davis*

28. Megan Healy, *Responding to Students' Pleas for Relief: The Need for a Consistent Approach to Peer Sexual Harassment Claims*, Comment, 17 N. ILL. U. L. REV. 479, 501 (1997).

29. *See Rowinsky*, 80 F.3d at 1011.

30. *See id.* at 1011-16.

31. *Id.* at 1016.

32. *Id.*

in order to resolve the conflict.

II. *DAVIS V. MONROE COUNTY BOARD OF EDUCATION* IN THE SUPREME COURT

LaShonda Davis, a fifth grader at Hubbard Elementary in Monroe County, Georgia, was allegedly sexually harassed repeatedly by one of her fellow classmates, G.F.[33] The harassment allegedly began in December of 1992, when G.F. told LaShonda, "I want to get in bed with you," and "I want to feel your boobs," while attempting to touch her breasts and genital area.[34] Comparable actions allegedly occurred on or about January 4 and 20, 1993.[35] LaShonda reported these actions to her mother and to her teacher, Diane Fort.[36] Her mother in turn also contacted Ms. Fort and was told that the principal, Bill Querry, knew of the reported conduct.[37]

Allegedly, G.F. continued to harass LaShonda for months. In early February, during their physical education class, G.F. reportedly placed a door stop in his pants and acted in a sexually suggestive manner toward LaShonda.[38] She allegedly reported the incident to her physical education teacher, Whit Maples.[39] About a week later, G.F. harassed LaShonda again. LaShonda reported the occurrence to another supervising teacher, Joyce Pippen, and the petitioner again contacted the teacher to follow up.[40]

Petitioner alleged that another incident of sexual harassment occurred in early March in physical education class, and that the incident was again reported by LaShonda to both Maples and Pippen.[41] In April 1993, G.F. purportedly rubbed his body in a sexually suggestive manner against LaShonda in the school hallway, which she again reported to Fort.[42] The harassment ended in May, when G.F. was charged with, and

33. *See Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1666 (1999).
34. *Id.* at 1667.
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See Davis*, 119 S. Ct. at 1667.
40. *See id.*
41. *See id.*
42. *See id.*

pleaded guilty to, sexual battery.[43]

Petitioner alleged that during these months of harassment, LaShonda suffered greatly.[44] Specifically, her grades dropped due to an inability to concentrate on her school work.[45] In addition, her father reported having found a suicide note in April 1993.[46] Moreover, petitioner further alleged that LaShonda told her that she "didn't know how much longer she could keep G.F. off her."[47] Petitioner alleged that the school failed in these months of harassment to take any disciplinary action in response to G.F.'s behavior.[48] Additionally, petitioner alleged that she not only spoke with the teachers, but that in May she also spoke with Principal Querry, asking him what action would be taken against G.F. In response, Querry said, "I guess I'll have to threaten him a little bit harder," and asked her why LaShonda "was the only one complaining."[49]

The complaint alleged that other girls fell victim to G.F.'s harassment.[50] Allegedly a group of girls, including LaShonda, attempted to speak with Querry about G.F.'s conduct. However, the girls were denied their request by a teacher who said, "If Querry wants you, he'll call you."[51]

Although LaShonda had reported G.F.'s harassment for months, the school made no effort to separate them.[52] According to the complaint, it was only after more than three months, that LaShonda was even allowed to change her seat so that she would no longer have to sit next to G.F.[53] Furthermore, the petitioner alleged that the Monroe County Board of Education ("Board") had not instructed its personnel on responding to peer sexual harassment, nor had it issued a policy on the matter.[54]

Petitioner filed suit on May 4, 1994 in the United States District Court for the Middle District of Georgia, against the

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43. *See id.*
44. *See id.*
45. *See Davis*, 119 S. Ct. at 1667.
46. *Id.*
47. *Id.*
48. *See id.*
49. *Id.*
50. *See Davis*, 119 S. Ct. at 1667.
51. *Id.*
52. *See id.*
53. *See id.*
54. *See id.*

Board, the school superintendent, and Principal Querry, seeking compensatory and punitive damages, attorney's fees, and injunctive relief. The complaint alleged that under Title IX, the Board was a recipient of federal funds and that:

> 'the persistent sexual advances and harassment by the student G.F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities,' and that '[t]he deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX.'[55]

The defendants filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted.[56] The district court granted the motion, stating that under Title IX only federally funded institutions could be sued and that the individual defendants could not.[57] As to the Board, the court stated that Title IX only provided a basis for liability if the Board or an employee of the Board had any role in the harassment.[58] Petitioner appealed the district court's decision and an Eleventh Circuit panel reversed.[59]

The panel analogized Title VII law and a majority concluded that under Title IX failure to stop peer sexual harassment was an actionable claim against the Board. The Board's motion for rehearing *en banc* was granted by the Eleventh Circuit.[60] The District Court's decision was affirmed.[61] The en banc court concluded that "Title IX . . . provides recipients with notice that they must stop their employees from engaging in discriminatory conduct, but the statute fails to provide a recipient with sufficient notice of a duty to prevent student-on-student harassment."[62]

The Supreme Court granted *certiorari* in order to resolve the circuit conflict.[63] In reversing the Eleventh Circuit, the Court held that a private action for damages exists under Title

55. *Id.* at 1668.
56. *See Davis*, 119 S. Ct. at 1668.
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *Davis*, 119 S. Ct. at 1668 (discussing *Davis*, 120 F.3d at 1401).
63. Davis v. Monroe County Bd. Of Educ., 119 S. Ct. 1661 (1998).

IX against a school board for peer sexual harassment if the funding recipient is deliberately indifferent to the harassment, the recipient has actual knowledge of the sexual harassment, and the harassment is so severe, pervasive, and objectively offensive that it deprives the victims access to the educational opportunities or benefits the school provides.[64]

III. THE SUPREME COURT'S REASONING

The Court recognized the conflict within the circuits and set out to resolve "whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment . . ."[65] The Court had previously recognized a private right of action for money damages under Title IX.[66] However, such money damages are only available if the Title IX federal funding recipient has adequate notice of liability for the action.[67] Such notice must be clear and unambiguous in the language of the statute, as Congress is acting through its spending power.[68] In so generating legislation, Congress has effectively invoked a contract with the states and "in return for federal funds, the States agree to comply with federally imposed conditions."[69] Under such power, Congress can therefore only hold funding recipients liable for their own actions and not the actions of third parties.[70]

Respondents argued that the petitioner sought to hold the Board liable for the actions of a third party, G.F.'s, and not their own.[71] The Court disagreed, stating that "petitioner attempted to hold the Board liable for its own decision to remain idle in the face of known student-on-student harassment in its schools"[72] and not for G.F.'s harassing conduct. The bar on liability concerns the *Gebser* adequate notice requirement. In

64. *See Davis*, 119 S. Ct. at 1669-76.

65. *Id.* at 1668.

66. *See id.* at 1669 (citing Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S. Ct. 1028 (1992)).

67. *Davis*, 119 S. Ct. at 1670.

68. *See id.*

69. *Id.* (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).

70. *See Davis*, 119 S. Ct. at 1670.

71. *See id.*

72. *Id.*

Gebser, the court found that the school had notice because it clearly violated the terms of the statute by deliberately remaining indifferent in the face of discrimination.[73] This deliberate indifference standard rejected any notions of agency principles (imputing the actions of others on the Board) or negligence. Instead, it imposed upon the school district liability for its own official decision to remain indifferent to the harassment.[74] Additionally, the court stated that public schools have long been on notice that they can be held liable for their failure to respond to the discriminating actions of third parties.[75]

The common law as well as state courts have put schools on notice for "failure to protect students from the tortious acts of third parties," including their peers.[76] However, not any third party will trigger liability. The deliberate indifference standard only applies when the school has some degree of control over the harassing party.[77] The funding recipient must have been able to take action against the third party; otherwise, its indifference would not allow for liability.[78]

This deliberate indifference must subject the students to harassment, or at a minimum, "'cause' students 'to undergo' harassment or 'make them liable or vulnerable' to it."[79] In order for the school to be liable, the harassment must occur in an area or at an event which is under the funding recipient's control.[80] The analysis is as follows:

> These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs.[81]

As applied to the case at bar, the sexual harassment took place on school grounds, mainly in the classroom, and under the supervision of school teachers. In this case, the funding re-

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73. *See id.*
74. *Davis*, 119 S. Ct. at 1671.
75. *Id.*
76. *Id.* at 1671-72.
77. *See id.* at 1672.
78. *See id.*
79. *Davis*, 119 S. Ct. at 1671.
80. *See id.*
81. *Id.*

cipient maintained a substantial amount of control over the harasser.[82] The Court recognized that public school officials maintain a substantial amount of control over students, much more than an employer would over adult employees.[83] They concluded that "recipients of federal funding may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."[84]

Furthermore, the Court placed limits on the liability, stating that it would not engage in second guessing the discipline decisions made by school officials.[85] Funding recipients must respond to incidents of peer sexual harassment in a way that is "not clearly unreasonable."[86] Administrators will still have the flexibility to respond to discipline situations in a manner in which they deem fit.[87] It is only when their "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances," that they may encounter liability.[88] Moreover, the standard is flexible and directly corresponds to the amount of control the school can exercise over its students.[89] Thus, a university would not be expected to exercise the same degree of control as an elementary school, "and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims."[90]

Students deserve to benefit from their education and should not be denied access to those benefits based upon their gender. Such denial to access does not have to be a physical barrier to entrance, but the sexual harassment must be "so severe, pervasive, and objectively offensive, and that [it] so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institu-

82. *See id.* at 1673.
83. *See id.*
84. *Id.*
85. *See Davis*, 119 S. Ct. at 1674.
86. *Id.*
87. *See id.*
88. *Id.*
89. *See id.*
90. *See id.*

tion's resources and opportunities."[91] It is possible that a single instance can rise to the level of severity required. However, the Court felt it unlikely that such an instance would meet the standard due to the "inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment."[92] The Court thus limited peer sexual harassment money damages actions to those cases "having a systemic effect on educational programs or activities . . . ."[93]

Whether a particular situation of harassment elevates to the level of actionable harassment depends upon the ages of the harasser and the victim, the number of people involved, the relationships involved, the circumstances, and the expectations involved in the event.[94] The Court recognized that children do act in manners that are inappropriate for adults and stated that:

> [d]amages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.[95]

Additionally, a mere drop in grades is insufficient to prove that harassment is actionable.[96] As is the case here, a grade decline provides evidence of a possible connection between the harasser's conduct and the denial of educational benefits, but the plaintiff's claim also relies heavily upon the severity of the harassment and the school's knowledge and deliberate indifference to the harassment.[97]

IV. WHY SHOULD SCHOOLS BE HELD RESPONSIBLE?

The Department of Education's Office of Civil Rights ("OCR") states that it has long recognized peer sexual harass-

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91. *Davis*, 119 at 1675.
92. *Id.* at 1676.
93. *Id.*
94. *See id.* at 1675.
95. *Id.*
96. *Davis*, 119 S. Ct. at 1676.
97. *See id.*

ment to be a violation of Title IX.[98] OCR is committed to:

> [t]he elimination of sexual harassment of students in federally assisted educational programs [because it] is a high priority for OCR. Through its enforcement of Title IX, OCR has learned that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.[99]

Schools were created to educate students on the basics: reading, writing, and arithmetic. Society's view of the education system's responsibilities have changed significantly. Now schools are not only responsible for teaching the "three R's," but they are also to teach students to become productive members of society. This productive member responsibility is quite broad, and among many things includes teaching students social skills. Social skills involve same sex interactions as well as opposite gender relations. From a very young age, children learn how to relate with one another. Although social skills are taught in the home, many social skills are taught in the schools, for this is where children come into contact with various personalities and get involved in various social situations and altercations. Thus, it has become and will continue to evolve into another responsibility for our public education system.

In order to provide such education, our schools need to be safe. Students need to feel comfortable and welcome at school so that they can enhance their learning potential in a positive learning environment.[100] Thus, in the case of peer sexual harassment, a school's mission is two-fold: to educate their students about sexual harassment to help them develop social skills, and to prevent, deter, and punish sexual harassment actions in order to create and maintain a safe and effective learn-

98. *See* Department of Education, Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties,* (visited Sept. 30, 1999) <www.ed.gov/offices/OCR/sexhar00.html>.

99. *Id.*

100. *See* Andrea Giampetro-Meyer, et. al., *Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in Title IX Peer Sexual Harassment Cases*, 12 WIS. WOMEN'S L.J. 301, 319-320 (1997).

ing environment.

> Sexual harassment is a serious and pervasive problem in society. In elementary, middle and high school, students observe, experience and participate in sexual harassment of their peers. Eventually, these students enter the workforce, where they observe, experience and participate in sexual harassment.[101]

Children learn by example. If students see other students engaging in sexually harassing behavior, and also see that such behavior is ignored by authority figures, then students learn that such behavior is acceptable. "Furthermore, 'ignoring certain behavior sends a message of inequality to girls . . . and sets the stage for how men and women treat each other as adults.' Thus, men and boys will not realize the inappropriateness of their behavior and will continue to behave in a similar manner."[102]

If sexual harassment is permitted in schools, female students are not only seen as unequal to their male peers, but their self-esteem is endangered as well.

> Every harassing act engenders in girls the feeling that they are inferior persons. Sexual harassment impedes the emotional and educational development of young girls who admit feeling embarrassed, afraid, angry, frustrated, and powerless in school. The ramifications extend beyond the psychological, as girls report suffering physical symptoms like insomnia, listlessness, and depression. In the end, the manifestation of concrete consequences, such as absenteeism, tardiness, decreased classroom participation, and poor scholastic performance illustrate the severe impact harassing behavior has on a girl's ability to receive an equal education.[103]

Therefore, female students are unable to receive an education equivalent to that of their male peers because sexual harassment significantly disrupts the learning process. Schools are in the business of educating, and if some students are not receiving that education due to a barrier created at school by other students, then the school officials should have a duty to

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101. *Id.* at 301.

102. *Id.* at 303-04 (quoting Monica Sherer, *No Longer Just Child's Play: School Liability Under Title IX For Sexual Harassment*, 141 U. PA. L. REV. 2119, 2135 (1993).

103. Laura M. Sullivan, Note, *An Evolutionary Perspective of Peer Sexual Harassment in American Schools: Premising Liability on Sexual, Rather than Power Dynamics*, 3 WM. & MARY J. WOMEN & L. 329, 341-42 (1997).

eliminate that barrier.

V. WHAT ARE SCHOOLS TO DO NOW?

In *Davis*, the Supreme Court recognized a school's responsibility to educate and protect students. The Court imposed liability upon school districts for peer sexual harassment if the school was "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."[104] In order to meet this standard, schools must respond to sexual harassment claims made by their students. The Court emphasized that the responsibility for student discipline rests solely with school officials and that the Court did not wish to engage in second guessing such decisions.[105] "[T]he recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable."[106]

Thus, the Court requires that school officials respond to known harassment in a "not clearly unreasonable" manner. This high burden that a plaintiff must prove (that the school has been deliberately indifferent to the harassment) is beneficial to school districts and boards. The burden protects them from monetary responsibility for every incident or even most incidents of peer sexual harassment. However, the requirement does nothing to address how schools can and should try to eliminate sexual harassment in the first place so that they can not only avoid liability, but more importantly, so that all students receive an equal education.

Schools should establish a sexual harassment policy as well as an education program. It is important to institute a prevention program and to establish and effectuate a discipline policy for occurrences of sexual harassment.

A. What is Sexual Harassment?

Before schools can implement programs, punish harassers, and eventually stop sexual harassment, school officials must understand what sexual harassment is so that they can further

104. *Davis*, 119 S. Ct. at 1675.

105. *See id.* at 1674.

106. *Id.*

educate their employees and students. There is no exact or clear definition of sexual harassment, but we do need some sort of working definition.[107] In the case of peer sexual harassment,

> harassment occurs when unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a nature by another student . . . are sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an educational program or activity or to create a hostile or abusive educational environment. Sexual harassment includes conduct that is also criminal in nature such as rape, sexual assault, stalking, and similar offenses.[108]

Examples of sexual harassment include, but are not limited to, uninvited or unwelcome sexual touching, sexual verbal abuse, unwelcome invitations or demands for sexual behaviors, and unwelcome sexual words or symbols directed at a student.[109]

B. Implementing a Sexual Harassment Policy and Discipline Procedure

Once school officials can define sexual harassment, they will be well on their way to identifying it and eventually eliminating it from their schools. Officials should institute a school-wide sexual harassment policy. This policy should be written and should be disseminated to all students, faculty, and employees, and should be prominently posted at the school site.[110] School officials should consider adding such a written policy statement to their code of conducts, which are regularly disseminated to the student body, and to personnel handbooks.[111] The policy should contain the following elements:

- The school's commitment to protect students from harassment;

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107. *See* Monica Sherer, *No Longer Just Child's Play: School Liability Under Title IX For Sexual Harassment*, 141 U. PA. L. REV. 2119, 2125 (1993).

108. Department of Education Office of Civil Rights, *Protecting Students from Harassment and Hate Crime: A Guide for Schools*, (last modified Jan. 1999) <www.ed.gov./pubs/Harassment/policy1.html >.

109. *See id.*

110. *See id.*

111. *See id.*

- A definition of sexual harassment and examples of such;
- Require reporting of incidents by both the staff and students;
- Explain the importance of reporting harassment and the steps to do so;
- Describe the steps the school will take to prevent as well as discipline those engaging in the harassment;
- Prohibit retaliation against those reporting incidents;
- Make sure that all have knowledge of their individual rights and duties.[112]

In addition to a written policy, schools should also develop a discipline and investigation procedure for incidents of harassment. School officials should "identify and respond to all incidents of harassment . . . ."[113] One person in the school should be designated as the one to receive and investigate the complaints.[114] This person could be but does not have to be the school's compliance officer. The person should be a school official who understands the urgency and importance of prohibiting sexual harassment. This person should be trained in the procedures and in receiving complaints.[115] Students and employees alike should be aware of who the designated official is. The reporting procedure should be simple and easy enough as to not deter reporting incidents. This school harassment official should also be someone who has the authority to "take corrective action."[116] Additionally:

> [s]chool personnel should not overlook incidents that, viewed alone, may not rise to the level of unlawful harassment. Consistent enforcement . . . and meaningful interventions by staff to teach appropriate behavior will tend to discourage more severe misconduct and to help achieve an atmosphere of respect

112. *See id.*

113. *Id.*

114. *See* Department of Education Office of Civil Rights, *Protecting Students from Harassment and Hate Crime: A Guide for Schools*, (last modified Jan. 1999) <www.ed.gov./pubs/Harassment/policy1.html >.

115. *See id.*

116. *Id.*

and courtesy.[117]

C. Education as Prevention: Educating the Entire School

Once a policy and disciplinary procedures have been developed, they need to be implemented. The most effective way for this to happen is to educate the entire school community. School officials should begin by educating themselves and their staff through staff in-service training sessions.[118] Students should also be educated through curriculum, activity and mediation programs, and presentations by outside officials and law enforcement agents.[119] The important thing is to educate the entire school community in order to "overcome ignorance, mistrust, and biases."[120]

VI. CONCLUSION

Davis makes clear that peer sexual harassment is identifiably sexual discrimination under Title IX and actionable for monetary damages if school officials are knowingly indifferent to the harassment. The Court says that schools must not clearly unreasonably respond to students' allegations. However, if schools only discipline, the problem of peer sexual harassment will never go away. Schools must do more than just respond to allegations– they must attack the source of the problem. They must educate the entire school community concerning sexual harassment in order to eliminate the myths, assumptions, biases, stereotypes, and misconduct. Through proper education, schools can effectively curb incidents of sexual harassment among students. This will allow them to effectuate their goal of providing an equal education to all of their students and help them truly produce socially responsible and productive members of society.

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117. *Id.*

118. *See id.*

119. *See id.*

120. Department of Education Office of Civil Rights, *Protecting Students from Harassment and Hate Crime: A Guide for Schools*, (last modified Jan. 1999) <www.ed.gov./pubs/Harassment/policy1.html >.