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Title IX Liability for the Inaction of Educational Institutions or Their Agents: Responding to *Rowinsky v. Bryan Independent School District*

I. INTRODUCTION

Historically, sexual discrimination, which the Supreme Court has defined to include sexual harassment,[1] has been primarily associated with the employer-employee relationship.[2] Since the enactment of Title IX of the Education Amendments of 1972,[3] which prohibits sex discrimination in education, and subsequent Supreme Court interpretations of the statute, sexual harassment in schools has also become an important legal issue.[4] The issue recently received national recognition when an

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1. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). There are two recognized types of sexual harassment: "quid pro quo" and "hostile environment." Quid pro quo sexual harassment occurs when a superior conditions economic or job benefits on the receipt of sexual favors or punishes a subordinate for refusing to comply with these demands. Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988); *see also, e.g.*, Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979) (Title VII claim); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977) (Title IX claim), *aff'd*, 631 F.2d 178 (2d Cir. 1980). Hostile environment sexual harassment occurs when "one or more supervisors or coworkers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment." *Lipsett*, 864 F.2d at 897 (Title IX claim).

2. *See* Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 271 (1994).

3. 20 U.S.C. § 1681(a) (1994). Title IX provides in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.*

4. A number of statistics have been reported on sexual harassment in schools. *See* Baker, *supra* note 2, at 277-78 (reviewing a 1992 survey of elementary and secondary female students where 89% reported receiving "sexual comments, looks, or gestures," 83% had been "touched, pinched, or grabbed," and 39% reported being "sexually harassed at school on a daily basis in last year," 4% of which was "by teachers, administrators and other school staff" (citing NAN STEIN ET AL., SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 2 (1992))); *see also* Gail Sorenson, *Peer Sexual Harassment: Remedies and Guidelines Under Federal Law*, 92 ED. LAW REP. 1, 1 (1994) (referring to a 1993 aurvey with similar numbers (citing NAN STEIN ET AL., SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 3a (1993))); *cf.* Helena K. Dolan, Note, *The Fourth R–Respect: Combating Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 219 (1994) (citing AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL

elementary school boy, Johnathan Prevette, was suspended for kissing a female classmate at school.[5] Johnathan's suspension illustrates the fine line between extending protection against student-to-student sexual harassment and "a case of political correctness run amok."[6] While few people would contend that Johnathan deserved to be suspended, their opinions would likely change when student actions fall within a sphere which ordinary people would consider sexual harassment.[7] An even more disturbing situation exists when educational institutions or their agents know or should know of the sexual harassment but fail to take action or take action that is inadequate to remedy the harassment.[8]

School children need legal protection against sexual harassment by other students, yet courts are uncertain about how far the protection should extend. While many courts have tried to remedy this problem by applying Title IX, the Fifth Circuit's recent decision in *Rowinsky v. Bryan Independent School District*[9] found that Title IX generally does not reach any aspect of student-to-student sexual harassment.

This Note examines *Rowinsky* and concludes that the court misdirected its legal analysis of Title IX sexual harassment claims. The court looked strictly at whether student actions create direct liability under Title IX instead of whether the educational institution or its agents can be liable for inaction or failure to act.[10] In contrast, this Note suggests that courts

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HARASSMENT IN AMERICA'S SCHOOLS 2 (1993)).

There is also evidence that much of the peer sexual abuse goes unreported. For an example of frustrated students who stopped reporting sexual harassment see Rowinsky v. Bryan Independent School District, 80 F.3d 1006, 1008-09 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). *See also* Jollee Faber, Comment, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 101-06 (1992) (explaining why victims of peer sexual harassment often do not report the abuse).

5. *See* John Leland, *A Kiss Isn't Just a Kiss: Where Should Schools Draw the Line Between Normal Childhood Behavior and Sexual Harassment?*, NEWSWEEK, Oct. 21, 1996, at 71.

6. *Id.*

7. Although this Note only addresses student-to-student sexual harassment, sexual harassment of students in schools can come from teachers, *see* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 63 (1992), and administrators, *see* Lipsett v. University of P.R., 864 F.2d 881, 884 (1st Cir. 1988).

8. *See Rowinsky*, 80 F.3d at 1010 (claim made by the plaintiffs).

9. 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

10. *See id.* at 1011 ("The linchpin of Rowinsky's theory is the assumption that

should analyze whether Title IX liability arises when an educational institution failed to act or failed to act appropriately in the face of student-to-student sexual harassment. Part II of this Note gives a background of sexual discrimination law in employment[11] and education.[12] Part III provides a summary of the facts and the court's reasoning in *Rowinsky*. Part IV analyzes the various approaches to Title IX liability for student-to-student sexual harassment and suggests an approach which is consistent with legislative history, judicial interpretations, Office of Civil Rights ("OCR") interpretations,[13] and policy considerations. This approach relies on Title VII principles, agency law, and the unique school-student relationship to find that Title IX should reach student sexual harassment in some cases. This Note concludes that courts should not follow *Rowinsky* and suggests a two-step approach for analyzing student-to-student claims of sexual harassment under Title IX as claims against an educational institution for failure to act. Title IX liability should arise when an educational institution fails to act appropriately to respond to sexual harassment.

II. BACKGROUND

A. *Discrimination in Employment: Title VII*

Congress first addressed the problem of sex discrimination by passing the Civil Rights Act of 1964 which includes Title VII's prohibition of sex discrimination in the work place.[14] Title

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a grant recipient need not engage in prohibited conduct to violate title IX."). In contrast to the *Rowinsky* court, this Note discusses inaction or failure to act, which has the potential to cover a variety of situations. At a minimum, inaction encompasses an educational institution not responding to reports of student sexual harassment, and it might include situations where the school's response is so minimal that it may not be considered a response at all. *See id.* at 1008-09. The court failed to address inaction as a theory of liability.

11. *See* 42 U.S.C. § 2000e-2 (1994) (Title VII).

12. *See* 20 U.S.C. § 1681(a) (1994) (Title IX).

13. As part of the Department of Education, the OCR is the agency responsible for implementing Title IX's proscription of sex discrimination in education. *See* 34 C.F.R. § 106 (1995); *see also* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982).

14. 42 U.S.C. § 2000e-2 (1994). Title VII provides in part: "(a) Employer practices. It shall be an unlawful employment practice for an employer—(1) 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 . . . ." *Id.* § 2000e-2(a)(1).

VII expressly excludes educational institutions from its coverage.[15] Title VII may be useful by analogy in the educational setting,[16] however, because substantial case law has developed under Title VII and includes the use of agency principles in determining the liability of employers for sexual harassment.[17] While agency principles are not complex,[18] they create liability for a wide variety of actions and inactions of agents.[19] In *Meritor Savings Bank, FSB v. Vinson*,[20] for example, the Supreme Court found that sexual harassment is a form of discrimination and that employers can be liable for the sexual harassment committed by their agents.[21] The *Meritor* Court concluded:

> [W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. . . . Congress' decision to define "employer" to include any "agent" of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.[22]

The *Meritor* Court clearly used common-law agency principles in interpreting Title VII[23] to hold that claims of "hostile environ-

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15. *See id.* § 2000e-2(e).

16. *See* cases cited *supra* note 1; *see, e.g.*, Elizabeth J. Gant, Comment, *Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972—An Avenue of Relief for Victims of Student-to-Student Sexual Harassment in the Schools*, 98 DICK. L. REV. 489, 501 (1994).

17. *See* Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) ("[W]hen a supervisor wields the authority delegated to him . . . to further the creation of a discriminatorily abusive work environment, the supervisor's conduct is deemed to be that of the employer . . . ."). Liability is imposed on principals under the doctrine of respondeat superior. *See* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 1 (2d ed. 1990); *see also id.* § 272 ("[T]he liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.").

18. *See generally* REUSCHLEIN & GREGORY, *supra* note 17 (providing a detailed description of agency principles).

19. *See* RESTATEMENT (SECOND) OF AGENCY § 212 (1958) (intentional actions); *Id.* §§ 350, 356 (negligence—failure to act); REUSCHLEIN & GREGORY, *supra* note 17, § 97 (unauthorized actions).

20. 477 U.S. 57 (1986).

21. *See id.* at 72-73. Although the use of some agency principles is appropriate in Title VII cases, the *Meritor* Court recognized that "common-law [agency] principles may not be transferable in all their particulars to Title VII." *Id.* at 72.

22. *Id.* (citation omitted).

23. *See id.*

ment" sexual harassment are actionable as discrimination based on sex.[24]

Hostile environment claims typically arise when an employee is sexually harassed by a supervisor, manager, or coworker.[25] If the employer or its agents have actual or constructive knowledge of a sexually hostile and abusive work environment and fail to remedy it,[26] then the employer can be held liable for the sexual harassment.[27] Thus, the standard for a hostile environment claim can be considered a negligence standard or an intent standard.[28]

The hostile environment sexual harassment claim was developed in Title VII cases to address the problem of coworker sexual harassment.[29] The question of which standard to apply in analogous student-to-student sexual harassment claims has not yet been directly answered by the Supreme Court.[30]

B. Discrimination in Education: Title IX

Courts and commentators have analyzed various approaches to address the problem of peer sexual harassment in schools, including state tort actions, 42 U.S.C. § 1983 actions

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24. *See id.* at 73. The elements of a hostile environment claim have been drawn from *Meritor* and include:

> (1) the employee was subjected to unwelcome sexual harassment; (2) the harassment occurred because of the employee's sex; (3) the harassment was sufficiently severe or pervasive to create an abusive work environment affecting a term, condition, or privilege of employment; and (4) the employer knew, or should have known, of the harassment and failed to take remedial action.

LAWRENCE SOLOTOFF & HENRY S. KRAMER, SEXUAL DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE § 3.04[2] (1996) (citing Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (citing *Meritor*, 477 U.S. at 66-69)).

25. *See* SOLOTOFF & KRAMER, *supra* note 24, § 1.03 ("Supervisors, managers, and fellow employees may create a 'hostile environment' form of sexual harassment . . . .").

26. This is a form of inaction which, in essence, is considered action. *See infra* notes 93-95 and accompanying text.

27. *See* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989).

28. *See* Recent Case, *Sexual Harassment—Title IX—Fifth Circuit Holds School District not Liable for Student-to-Student Sexual Harassment*, 110 HARV. L. REV. 787, 790 (1997) [hereinafter *Sexual Harassment*]; *see also* Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996) ("*Franklin* explicitly demands more than mere negligence . . . .").

29. *See Meritor*, 477 U.S. at 72-73.

30. *See Sexual Harassment*, *supra* note 28.

for constitutional violations, and Title IX claims.[31] While tort actions have been discussed as a possible alternative,[32] most recognize it as an ineffective remedy for sexual harassment in schools.[33] One approach which has appealed to some is a § 1983 remedy.[34]

Suits under § 1983[35] have been pursued primarily as due process violations,[36] but there has also been some suggestion

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31. *See* Adam Michael Greenfield, Note, *Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588, 593 (1993) (listing potential remedies for peer harassment such as a tort action under state law, a sexual discrimination action under Title IX, or a substantive due process claim under 42 U.S.C. § 1983).

32. *See* Sorenson, *supra* note 4, at 12-13 (listing possible alternatives, such as: "(1) . . . state human rights or civil rights laws, (2) tort claims against school officials who . . . tolerated or aggravated peer harassment, and (3) teacher dismissal cases"); *see also* Baker, *supra* note 2, at 291 ("Courts have held teachers and school districts liable for physical injury to children resulting from negligent supervision." (citing Donald H. Henderson, *Negligent Liability Suits Emanating from the Failure to Provide Adequate Supervision: A Critical Issue for Teachers and School Boards*, 16 J.L. & EDUC. 435 (1987))).

One commentator has suggested a similar approach, stating that "[i]f the institution knew or should have known of ongoing student-on-student harassment and took no action to stop it, then the school should be held liable for negligently permitting sex discrimination in violation of Title IX." Kimberly Limbrick, Note, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601, 626-27 (1995) (citation omitted).

33. *See* Kirsten M. Eriksson, Note, *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1805 (1995) ("Suits brought under Section 1983 . . . have also been almost uniformly unsuccessful . . . .") (citing D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc); Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405 (E.D. Ark. 1992) (arguing that a tort suit for intentional infliction of emotional distress would be ineffective), *aff'd*, 7 F.3d 729 (8th Cir. 1993)).

34. *Compare* Greenfield, *supra* note 31 (listing tort actions under state law as a potential remedy for sexual harassment in schools).

35. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1983 (1994).

36. *See* Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989); *see also* Dolan, *supra* note 4, at 216-17 (arguing that a finding of a special relationship would create an affirmative duty for purposes of liability under § 1983); Greenfield, *supra* note 31, at 617 ("When a plaintiff seeks to show a school board's custom through omission, the inaction of the school board must amount to deliberate indifference towards due process rights before liability will be permitted under section 1983.") (citation omitted).

that an equal protection violation can be pursued.[37] Suits under § 1983 have generally been unsuccessful in addressing school districts' failure to correct peer sexual harassment.[38] Another problem with this approach is that it seeks to remedy the problem constitutionally and thereby ties legislators' hands. In light of Congressional creation of a possible statutory remedy, a better approach in cases of student-to-student sexual harassment is to make a claim under Title IX.

Eight years after passing the Civil Rights Act of 1964, Congress passed the Education Amendments of 1972, which contain the Title IX prohibition against sexual discrimination in education.[39] Interpretation of Title IX was initially stymied until the Supreme Court implied a private right of action[40] and congressional legislation abrogated states' Eleventh Amendment immunity[41] and broadened Title IX's coverage.[42]

Recently, a number of courts have been asked to determine whether student-to-student sexual harassment creates liability under Title IX when an educational institution or its agents fail to act or act appropriately when they knew or should have known of the sexual harassment. Plaintiffs have sought school liability under Title IX primarily because Title VII and Title IX prohibit the same activity,[43] and Title VII liability exists for this

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37. *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, 1143-51 (1994). "Plaintiffs seeking to hold school districts responsible for their acts or omissions regarding peer sexual harassment have a greater chance of recovery under the Equal Protection Clause than under the Due Process Clause." *Id.* at 1143.

38. *See* Eriksson, *supra* note 33, at 1805 (citing D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc); Dorothy J. v. Little Rock Sch. Dist., 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993)); Gant, *supra* note 16, at 491-94 (explaining the pitfalls of a § 1983 action against schools); Sorenson, *supra* note 4, at 8.

39. *See* 20 U.S.C. §§ 1681-1688 (1994). Title IX provides in part: "(a) Prohibition against discrimination; exceptions. 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 . . . ." *Id.* § 1681(a).

40. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).

41. *See* Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, *quoted in* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72-73 (1992).

42. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, *cited in Franklin*, 503 U.S. at 73; *see also* Baker, *supra* note 2, at 273.

43. *See* Mabry v. State Bd. of Community Colleges & Occup. Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987).

type of "hostile environment" sexual harassment claim. Because Title IX precedent is not as fully developed as Title VII, many courts have turned to Title VII for analogous principles.[44]

The most important Supreme Court decision bearing on the scope of Title IX liability is *Franklin v. Gwinnett County Public Schools*.[45] In *Franklin*, the Supreme Court was faced with a student's claim for damages from alleged sexual abuse by a teacher.[46] The Supreme Court held in *Franklin*, just as it had in Title VII cases, that Title IX's prohibition of discrimination based on sex includes a prohibition of sexual harassment in education.[47] Without much analysis or explanation, the Supreme Court cited to *Meritor*, a Title VII case, and stated:

> Unquestionably, Title IX placed on the [school] 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." We believe the same rule should apply when a teacher sexually harasses and abuses a student.[48]

The *Franklin* court thus implicitly recognized a Title VII hostile environment type claim in the Title IX setting[49] and relied on agency principles in the process.[50]

Following *Franklin*'s approval of a hostile environment claim and corresponding agency principles along with its citation to *Meritor*, several courts have relied on Title VII precedent in Title IX cases.[51] However, it is still unclear whether Title IX covers a claim for hostile environment sexual harassment cre-

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44. *See infra* Part IV.A.2.

45. 503 U.S. 60 (1992).

46. *See id.* at 63 (including an allegation of coercive sexual intercourse).

47. *See id.* at 75.

48. *Id.* (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (second alteration in original)).

49. Sexual harassment of a subordinate by a supervisor is a typical hostile environment claim. *See supra* note 25 and accompanying text.

50. A finding of liability for hostile environment sexual harassment is predicated on an agency relationship. *See supra* notes 19-23 and accompanying text. Just as a "company is a legal form [which can] 'act' only through its duly-appointed agents," Lipsett v. University of P.R., 864 F.2d 881, 900 n.21 (1st Cir. 1988) (quoting Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) (alteration in original)), education programs or activities are inanimate and necessitate the use of agents. *Cf.* REUSCHLEIN & GREGORY, *supra* note 17, at 3 ("[M]ost of the world's work is performed by agents.").

51. *See infra* notes 100-06 and accompanying text.

ated by students.[52] The Fifth Circuit was recently asked to determine this issue in *Rowinsky v. Bryan Independent School District*.[53]

III. *ROWINSKY V. BRYAN INDEPENDENT SCHOOL DISTRICT*

A. Facts

During the 1992-93 school year, "Jane" and "Janet" were eighth-grade students in the Bryan Independent School District in Texas. The girls alleged that sexual harassment began early in 1992 on the bus and spilled over into the classroom. Among other things, they claimed that male students on the bus had swatted their buttocks, grabbed their genital areas and breasts, reached up their skirts, and asked for sexual intercourse.[54]

Initially the incidents were reported to the bus driver, but when the incidents continued the girls stopped reporting them. Although two male students were later suspended for three days following a number of these incidents, the harassment did not end.[55] After four months of complaining to a variety of school district employees and officials, the activity on the bus was videotaped and a new driver assigned. The new driver promptly assigned one of the girls to sit next to one of the harassers. At this point, the girls' mother, Ms. Rowinsky, pulled her daughters off the bus and filed a Title IX action in federal district court.[56] Ms. Rowinsky alleged that the school district and its agents created a sexually hostile educational environment and therefore discriminated against her daughters because they failed to take timely or appropriate action to prevent the sexual harassment of students by other students.[57] The United States District Court for the Southern District of Texas dismissed the suit and the Fifth Circuit affirmed.

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52. *See infra* notes 111, 113-24 and accompanying text. The problem with extending *Franklin* to cover students' actions in peer sexual harassment is that, unlike teachers, students are not generally agents of the educational institution. *See* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 173 (N.D.N.Y. 1996) (finding students not per se agents of school).

53. 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

54. *See id.* at 1008-09.

55. *See id.* at 1009.

56. *See id.* Ms. Rowinsky brought suit on behalf of her daughters. *See id.*

57. *See id.* at 1010.

B. The Court's Reasoning

The Fifth Circuit framed the legal issue as "whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents."[58] Agents of grant recipients were then defined as grant recipients for the purposes of the opinion.[59] From this starting point, the Fifth Circuit focused on whether student conduct could violate Title IX. The court found Title IX's language ambiguous because the phrase "discrimination under an education program or activity" could be interpreted to allow a claim based on acts of third parties,[60] such as student-to-student sexual harassment. Concerned that Congress did not intend this result,[61] the court turned to three factors that "weigh in favor of interpreting Title IX to impose liability only for the acts of grant recipients"[62] (1) scope and structure of Title IX, (2) its legislative history, and (3) OCR interpretations of Title IX.[63]

In examining the scope and structure of Title IX, the *Rowinsky* court discussed the assumption that it was enacted pursuant to Congress's Spending Clause power.[64] The Spending Clause would allow Congress to require compliance with Title IX before federal funds would be granted. The court reasoned that a requirement that grant recipients be liable for the actions of third parties over whom they have little control (i.e., students) would necessitate schools rejecting funds.[65] Because Congress probably did not intend to make the funds so "unattractive," the court determined that the structure of Title IX implies that only the acts of grant recipients are subject to liability.[66]

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58. *Id.*

59. *See id.* at 1011 n.10.

60. *Id.* at 1012.

61. *See id.* at 1012-13 (arguing that conditions imposed on grant recipients would be almost useless because they would make federal funds very unattractive).

62. *Id.* at 1012.

63. *See id.*

64. *See id.* at 1012 n.14. The Supreme Court expressly declined to decide this issue. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 n.8 (1992).

65. *See Rowinsky*, 80 F.3d at 1013.

66. *See id.*

The *Rowinsky* court noted that numerous portions of legislative history, including statements by the amendment's sponsor, deal only with the acts of grant recipients.[67] Legislative history also suggests that Title IX was intended as an initial regulation of educational institutions, and that more research was needed before broadening its intended scope.[68] The Fifth Circuit concluded that because the legislative history shows an emphasis on activities of grant recipients and a limited intended impact, Title IX should only apply to grant recipients and not to third parties.[69]

The final factor the *Rowinsky* court weighed in favor of extending liability only to grant recipients is the Office of Civil Rights' ("OCR") interpretations of Title IX. The court determined the OCR's implementing regulation of Title IX is devoted solely to the acts of grant recipients.[70] The court then turned to the OCR's "most definitive" statement on Title IX interpretation, the Policy Memorandum, and reasoned that Title IX does not permit a peer sexual harassment claim because the Policy Memorandum does not mention it.[71] The court concluded that while the OCR's recent letters of finding apply Title IX to peer sexual harassment,[72] greater deference should be given to the implementing regulation and Policy Memorandum.[73]

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67. *See id.* at 1014 (giving as examples: admissions, scholarship programs, and hiring).

68. *See id.*

69. *See id.*

70. *See id.* at 1015. The implementing regulation provides in part:

> (a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

Education Programs and Activities, 34 C.F.R. § 106.31(a) (1996).

71. *See Rowinsky*, 80 F.3d at 1015. The Policy Memorandum provides in part: "Sexual Harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient*, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981), *quoted in Rowinsky*, 80 F.3d at 1015.

72. *See Rowinsky*, 80 F.3d at 1015.

73. *See id.*

The only other instance where the OCR recognizes peer harassment is in Title VI claims of racial discrimination in education.[74] The court found that the OCR's interpretation of Title VI gives no "reasoned explanation for why the statutory language supports applying Title VI to peer harassment."[75] The only analysis supporting Title VI peer harassment was a citation to Title VII and hostile environment claims.[76] The court then concluded that in order to make a claim for peer harassment under Title IX, "a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex."[77]

IV. ANALYSIS

The broad issue the *Rowinsky* court was asked to address was whether Title IX liability arises for educational institutions when students sexually harass other students. There are two ways to examine this issue. First, a court can consider whether the student action itself creates direct liability against a school.[78] Second, a court can consider whether a school is liable for not preventing or appropriately remedying student-to-student sexual harassment.[79] The *Rowinsky* court followed the first

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74. *See* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance; Notice, 59 Fed. Reg. 11,448, 11,449 (1994). Title VI provides in part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

Ironically, the court recognized in *Rowinsky* that Title IX is modeled after Title VI. *See Rowinsky*, 80 F.3d at 1012 n.14; *accord* Cannon v. University of Chicago, 441 U.S. 677, 694-95 (1979).

75. *Rowinsky*, 80 F.3d at 1016.

76. *See id.*

77. *Id.*

78. *See id.* at 1011. The *Rowinsky* court analyzed the issue this way. It did not consider the inaction of agents, despite assuming that agents of an educational institution are also considered "grant recipients," *id.* at 1011 n.10 (referring "to both the grant recipient and its agents as grant recipients"), and phrasing the issue to include agents of the grant recipient, *see id.* at 1010 (framing the issue as "whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents").

79. *See* Doe v. Petaluma City Sch. Dist., No. C 93-00123 CW, 1996 WL 432298, at *6 (N.D. Cal. July 22, 1996); *see also Sexual Harassment*, *supra* note 28, at 788 ("Writing for the majority, Judge Smith held that Title IX does not impose liability on a school district for its knowing failure to halt peer hostile environment sexual harassment . . . .") (citations omitted).

view and concluded that nonagents could not create direct liability for an educational institution.[80] This restrictive approach violates the Supreme Court's's command to "'accord [Title IX] a sweep as broad as its language,'"[81] and ignores the actual claim made by the Rowinskys.[82] Instead, the appropriate analysis should focus on the educational institution and its agents' inaction to determine whether that inaction creates liability under Title IX.

A. Attempts to Reach Inaction / Failure to Act Under Title IX

A number of courts have focused on whether the inaction of the educational institution or its agents results in Title IX liability.[83] This approach has produced different methods of analysis. The disagreement among courts centers on the

> issue of whether a student must prove "intent" to discriminate on the part of the educational institution in order to hold the institution monetarily liable under Title IX . . . [or whether] a student may state a claim for "hostile environment" peer sexual harassment using Title VII agency standards to hold the educational institution monetarily liable for its failure to take appropriate remedial action despite knowledge of the harassment.[84]

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80. *See Rowinsky*, 80 F.3d at 1012; *cf.* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 173 (N.D.N.Y. 1996) (finding students not per se agents of schools); Limbrick, *supra* note 32, at 625 (suggesting that schools and students do not share traditional agency relationship).

However, the *Rowinsky* analysis actually leads to the opposite result—that Title IX liability should extend to the acts of third parties. *See Sexual Harassment*, *supra* note 28, at 792 ("The Fifth Circuit's three justifications for limiting the scope of Title IX . . . actually lead to the conclusion that Title IX liability should extend to the acts of third parties.").

81. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

82. *See Doe*, 1996 WL 432298, at *6 (stating that *Rowinsky* is based on "fundamental misunderstanding" of this type of claim). The plaintiffs in *Rowinsky* attempted to focus the inquiry on the actions and inactions of agents, but the court focused only on whether there is Title IX liability for the actions of nonagents. *See Rowinsky*, 80 F.3d at 1011 ("The linchpin of Rowinsky's theory is the assumption that a grant recipient need not engage in prohibited conduct to violate Title IX.").

83. *See* Seamons v. Snow, 84 F.3d 1226, 1232 n.7 (10th Cir. 1996); Wright v. Mason City Community Sch. Dist., No. C 94-3056, 1996 WL 526274, at *8 (N.D. Iowa Aug. 27, 1996); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 174 (N.D.N.Y. 1996); *Doe*, 1996 WL 432298, at *6; Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1200 (N.D. Iowa 1996).

84. *Burrow*, 929 F. Supp. at 1203 (citation omitted).

Confusion concerning the intent required for Title IX claims arose following the *Franklin* decision. The defendants argued in *Franklin* that Title IX, like its model Title VI,[85] was enacted pursuant to the Spending Clause[86] and therefore did not permit money damages for unintentional violations.[87] The *Franklin* Court did not answer whether intent is required under Title IX because the plaintiff had alleged an intentional violation of Title IX.[88] The *Franklin* Court did say, however, that "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."[89] As a result of this passage, some courts have required a showing of intent to discriminate under Title IX before an educational institution may be liable.[90] *Franklin*, however, found a hostile environment allegation[91] to be an allegation of intentional discrimination.[92]

1. Inferring intent from a hostile environment claim

To be consistent with *Franklin's* apparent intent requirement for Title IX claims and the Court's finding that hostile environment claims involve intentional discrimination,[93] some

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85. *See* Cannon v. University of Chicago, 441 U.S. 677, 694-95 (1979). Title VI and Title IX are, in fact, identical except for interchanging the words "race" and "sex." *See* 42 U.S.C. § 2000d (1994) (Title VI); 20 U.S.C. § 1681(a) (1994) (Title IX).

86. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 & n.8 (1992). The court in *Rowinsky* argued that states would have rejected the funds if they would be subject to claims by third parties over whom they have little control. *See Rowinsky*, 80 F.3d at 1013 (citing no authority for the proposition). While this point may be valid with respect to some nonagents, educational institutions do have control over their agents and most students.

87. *See Franklin*, 503 U.S. at 74 (citing Pennhurst State Sch. and Hosp. v. Halderman 451 U.S. 1, 28-29 (1981)); *see also* Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996) ("*Franklin* explicitly demands more than mere negligence . . . .").

88. *See Franklin*, 503 U.S. at 74-75.

89. *Id.* at 74.

90. *See* Doe v. Petaluma City Sch. Dist., No. C 93-00123 CW, 1996 WL 432298, at *7 (N.D. Cal. July 22, 1996); *Wright*, 940 F. Supp. at 1419.

91. For the elements of a hostile environment claim, see *supra* note 24.

92. *See Franklin*, 503 U.S. at 74-75 & n.8; *see also Doe*, 1996 WL 432298, at *7 (arguing that *Franklin* was based on the assumption that hostile environment sexual barassment is intentional discrimination).

93. The court in *Doe* stated that "the [*Franklin*] Court's discussion reveals that th[e] assumption [that there was intentional discrimination] is based on its own characterization of such hostile environment discrimination as a form of intentional

courts have adopted a standard that allows the trier of fact to infer intentional discrimination from the evidence.[94]

The court in *Doe v. Petaluma City School District*, for example, concluded that "hostile environment sexual harassment is a type of intentional discrimination, but the intent is established by proof of the elements required to prove the cause of action and needs no additional proof."[95] This approach, while fairly unique, is consistent with *Franklin* because *Franklin* hinted at requiring some intent but found the requisite intent in the allegations of a hostile environment sexual harassment claim.[96]

Doe's approach, however, is problematic because *Franklin* in fact did not decide whether intentional discrimination is necessary for a Title IX claim for damages.[97] The *Doe* court's approach also does little more than change the title of the substantive standard to be applied. Under the court's approach in *Doe*, Title VII's hostile environment standard would still apply but would become an inference of intentional discrimination.[98] The OCR, when enforcing Title IX, has not required discrimina-

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discrimination." *Doe*, 1996 WL 432298, at *7; *see also* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1019-20 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) (Dennis, J., dissenting).

94. *See* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (citing Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006 (W.D. Mo. 1995)). The *Burrow* court also elaborated that "where an [educational] institution . . . knowingly fails to respond to" a hostile environment created by peer-to-peer sexual harassment, the educational institution denies the benefits to or subjects them to discrimination under an educational program or activity in violation of Title IX intentionally. *Id.* at 1200-01 (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996)). One commentator uses an either/or method—if courts will not extend liability to unintentional discrimination, then the definition of intent should cover failure to act by an inference of intent. *See* Eriksson, *supra* note 33, at 1816.

95. *Doe*, 1996 WL 432298, at *10.

96. *See id.* at *7.

97. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 n.8 (1992).

98. While Title VII's hostile environment sounds like negligence, the *Doe* court uses it to infer intent to satisfy the apparent requirements of *Franklin*. *See Doe*, 1996 WL 432298, at *10.

tion to be intentional,[99] and courts have been reluctant to adopt a standard of intent.

2. *Adoption of Title VII standards*

Instead of focusing Title IX analysis on definitions of intent, other courts have turned to Title VII standards and corresponding agency principles.[100] Some courts have found that Title VII's substantive standards provide the best analog for defining substantive standards in Title IX.[101] Other courts have found that applying Title VII standards to Title IX cases is already well established.[102]

The Title VII principle most often used by courts in the Title IX setting is the notion of a "hostile environment" form of sexual harassment, which is predicated on an agency relationship.[103] The Tenth Circuit, citing *Franklin*, stated that "Title IX does protect against sexual harassment hostile educational environment."[104] Most courts that have adopted Title VII agency principles have adopted a test which allows liability only when the educational hostile environment claims institution "knew or should have known" of the harassment but failed to remedy the

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99. *See infra* note 154; *see also* Jill Suzanne Miller, Note, *Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 717-18 (concluding that courts should not use an intent standard, but instead a negligence standard, because a court should not require intent to discriminate without looking to the legislative history and agency interpretations of the statute which in this case point to Title VII's negligence standard); *id.* ("'[W]e should not reject [these agency interpretations] absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history.'" (quoting Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983))).

100. *See infra* notes 101-07 and accompanying text.

101. *See* Mabry v. State Bd. of Community Colleges & Occup. Educ., 813 F.2d 311, 317 (10th Cir. 1987) (finding Title VII's substantive standards are the most appropriate analogue for defining substantive standards in Title IX); *Doe*, 1996 WL 432298, at *7 ("This Court agrees . . . that Title VII is the most useful and appropriate analogue in Title IX cases."); Limbrick, *supra* note 32, at 618 (concluding that courts should accept Title VII jurisprudence in analyzing Title IX).

102. *See* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 170 (N.D.N.Y. 1996) ("A considerable body of case law instructs that when analyzing a Title IX claim courts should apply Title VII jurisprudence."); *Doe*, 1996 WL 432298, at *6 ("The appropriateness of using Title VII substantive standards in Title IX employment cases is by now well established.").

103. *See supra* notes 23-27 and accompanying text.

104. Seamons v. Snow, 84 F.3d 1226, 1232 n.7 (10th Cir. 1996); *accord* Baker, *supra* note 2, at 286 (arguing that *Franklin* authorized federal courts to hear hostile environment sexual harassment claims under Title IX).

situation.[105] As a result, a number of courts have implemented a test for Title IX hostile sexual environment claims that mirrors the Title VII test.[106] There is a great amount of support for adopting Title VII principles and standards in the Title IX setting, not only from the established methods of statutory interpretation,[107] but also from the numerous articles written on the

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105. *See* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1201 (N.D. Iowa 1996) (stating that because Title VII does not require proof of intent, plaintiffs in Title IX claims are only required to show the school district "'"knew or should have known of the harassment in question and failed to take prompt remedial action."'" (quoting Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir. 1996) (quoting Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1992)))); Baker, *supra* note 2, at 290 ("[E]ducational institutions should be liable for peer harassment only if employees or agents knew or should have known of the harassment and failed to take immediate and appropriate corrective action."). *But cf. Bruneau*, 935 F. Supp. at 177 (holding that educational institutions will not be liable in Title IX claims unless they either provide no reasonable avenue of complaint or know of the harassment and do nothing (citing Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995))).

106. *See Seamons*, 84 F.3d at 1232 (10th Cir. 1996) (holding that the elements of Title IX hostile environment are: (1) the plaintiff must be a "member of a protected group"; (2) "subject to unwelcome harassment"; (3) the "harassment was based on sex"; (4) the "sexual harassment was sufficiently severe or pervasive so as unreasonably to alter" educational conditions "and create an abusive educational environment"; and (5) "some basis for institutional liability has been established" (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1194 (11th Cir. 1996))); *accord* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467-68 (8th Cir. 1996); *Bruneau*, 935 F. Supp. at 174; *Burrow*, 929 F. Supp. at 1205-06.

Others have suggested similar prima facie tests for Title IX sexual harassment. *See* Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119 (1993). Sherer suggests that the plaintiff must prove the following elements:

> (1) the student was a member of a protected class; (2) the student was subjected to unwelcome sexual harassment; (3) the harassment was prompted simply because of the student's gender; (4) the charged sexual harassment was sufficiently severe or pervasive to create an intimidating, hostile, or offensive educational environment; and (5) an official representing the educational institution knew or should have known of the harassment and failed to take prompt and appropriate remedial action.

Id. at 2158. Another commentator has stated that

> With respect to peer harassment among students, an educational institution is liable for acts of sex-based harassment in its schools (including conduct in classrooms, playgrounds, and on buses) where the educational institution, its employees, or its agents knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Baker, *supra* note 2, at 307.

107. The established methods of interpretation include analysis of case law, legislative history, and the OCR regulation. *See infra* Part IV.B.1.

issue.[108] Yet, while Title VII employee-to-employee harassment is analogous to student-to-student harassment, there are many distinct differences.[109] Although this approach is supported by a great deal of case law and other authority, it does not comfortably fit the educational environment contemplated in Title IX.[110]

Because of problematic differences between work and educational environments, the *Rowinsky* court was unwilling to import the hostile environment theory of discrimination into Title IX.[111] In addition, the Supreme Court has not directly addressed the issue[112] and therefore courts are unclear on whether to use the negligence standard of Title VII or an intent standard.[113]

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108. *See* Eriksson, *supra* note 33, at 1810-11 (arguing that courts should apply Title VII standards to Title IX claims of peer sexual harassment); Gant, *supra* note 16, at 506-11 (arguing that the hostile environment sexual harassment theory should be extended to include student-to-student harassment under Title IX); Miller, *supra* note 99, at 710-11 (suggesting there is strong support for a hostile environment claim in Title IX).

109. *See* Baker, *supra* note 2, at 290-93 (pointing out differences between workplace and school setting); *see also* Neera Rellan Stacy, Note, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1354-63 (1996). Stacy provides six reasons why the Title VII standard is inappropriate:

> 1) the unique nature of the teacher-student relationship; 2) the function and importance of a discrimination-free learning environment; 3) the compulsory attendance requirement imposed on elementary through high school students; 4) the limited protection for students and the lack of incentives for schools resulting from adoption of Title VII's knew-or-should-have-known standard; 5) the uneven development of Title VII jurisprudence; and 6) the differences in scope between Title VII and Title IX.

Id. at 1355-63.

110. *See supra* note 109; *see also Bruneau*, 935 F. Supp. at 173 (finding students not per se agents of school).

111. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

112. *See* Sorenson, *supra* nots 4, at 4.

113. *See Sexual Harassment*, *supra* nots 28, at 790. Other approaches to Title IX student-to-student sexual harassment claims beyond the two discussed have been suggested. One writer suggested a simple approach of adopting pure common law agency principles. *See* Stacy, *supra* note 109, at 1365-66 (advocating the use of pure common law agency principles because Title VII and Title VI do not provide adequate models but admitting this results in strict liability). The problem with this suggested approach is that the underlying result should be more closely tied to existing interpretations of Title IX and corresponding legislative and agency intent. Another approach advocated amending Title IX and outlined the proposed legislation. *See* Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary*

B. A Suggested Approach to Reach Inaction / Failure to Act Under Title IX

This Part analyzes whether the inaction of an educational institution creates Title IX liability and concurs with the weight of interpretive authorities in concluding that it does. In reaching this conclusion, this Part suggests a different approach to analyzing Title IX claims of student-to-student sexual harassment. This approach incorporates applicable Title IX standards, agency principles,[114] and also recognizes the unique school-student relationship.

Each of the previously discussed approaches have advantages and disadvantages, but none have been widely accepted by courts.[115] In light of the disagreement regarding the standard which should apply in Title IX cases of student-to-student sexual harassment, this Note suggests a different approach. The inaction of educational institutions and their agents can be reached with an alternative approach founded on Title VII interpretations, which incorporate agency principles, but would also take into account the unique school-student relationship. This approach would require a two step analysis.

The first step would require courts to recognize that Congress intended "similar," not identical, standards to apply in Title IX and Title VII cases.[116] The most important Title VII principles which should be recognized are the different types of sexual harassment (i.e., quid pro quo and hostile environment) and the corresponding use of common-law agency principles. In order to create school liability for a hostile environment,[117] a plaintiff would have to prove the elements of a hostile environment claim as adjusted for the educational environment.[118] Thus, the educational institution and its agents could be poten-

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School, 6 S. CAL. REV. L. & WOMEN'S STUD. 549, 584-87 (1996).

114. Title VII agency principles may apply because the Court suggested it in *Franklin*, the OCR has relied on Title VII agency principles, and Title IX is accorded a broad sweep. *See* Burrow v. Postvill Community Sch. Dist., 929 F.Supp. 1193, 1204 (N.D. Iowa 1996).

115. *See Sexual Harassment*, *supra* note 28, at 790.

116. *See* Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988).

117. This would incorporate all the traditional elements of hostile environment. *See supra* note 24.

118. *See supra* note 106.

tially liable if they knew or should have known of student-to-student sexual harassment but they or their agents nonetheless failed to act and thereby fostered a sexually hostile environment. Liability would only exist, however, if there is responsibility for preventing or stopping the sexually hostile environment.

The existence of liability for a hostile environment is predicated on an agency relationship[119] and a negligence standard. Students are not per se agents of educational institutions,[120] but agency principles extend liability to inactions where agents have control over third parties and fail to act.[121] Similarly, negligence requires the existence of a duty.

The second step in this Note's suggested approach would require that courts find a duty or relationship of control running from the school to the students which thereby requires the school to protect students from sexually hostile environments created by other students.[122] This duty would make the school liable when its agents knew or should have known of a hostile environment but failed to act.[123] This step would respond to the *Rowinsky* court's concern of "importing a theory of discrimina-

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119. *See supra* notes 19-23 and accompanying text. The use of agency principles is necessary to impute the liability from the agent (teacher, employee, etc., of the educational institution in this case) to the educational institution.

120. *See* Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 173 (N.D.N.Y. 1996) (finding students not per se agents of school). Since student actions usually do not create direct liability for the educational institution courts must rely on a finding that an agency duty to act had not been fulfilled.

121. *See* RESTATEMENT (SECOND) OF AGENCY §§ 350, 356 (1958).

122. In reference to Title VI's proscription of racial discrimination in education, the *Doe* court stated that

> [a]s the OCR stated in its agency interpretation, "the unique setting and mission of an educational institution" imposes a special duty of care . . . . "In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students."

Doe v. Petaluma City Sch. Dist., No. C 93-00123 CW, 1996 WL 432298, at *13 (N.D. Cal. July 22, 1996) (quoting Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance; Notice, 59 Fed. Reg. 11,448 (1994)). This showing would be unnecessary when an agent of the educational institution sexually harasses.

123. The level of duty may vary according to the level of control over the student, making the duty greater when a school fails to remedy a hostile environment among elementary students, and generally lower for upper level students.

tion from the adult employment context"[124] and remove the problematic nature of adopting a hostile environment theory of sexual harassment in the Title IX setting.[125] The school's duty to the student arises from the custodial nature of schools[126] and the special relationship between schools and students.[127] This duty would be to provide an environment which is free from sexual discrimination.[128]

This distinctive approach is necessary to maintain consistency with existing interpretations of Title IX and policy considerations. This approach also strikes a middle ground which would not require educational institutions to "walk on egg shells" but would also not allow them to turn a blind eye to destructive behavior.

1. Consistency with interpretative authority

Four sources of Title IX interpretation are essential to determine the consistency of this approach with Title IX; the language of Title IX, legislative history, case law, and Office of Civil Rights ("OCR") interpretations. These sources generally support the first step of the suggested approach and implicate the use of Title VII hostile environment principles. The Supreme Court's decision in *Franklin* and case law support the suggested approach's second step and recognize a special duty in the educational setting.

a. Language of Title IX. The starting point in determining the scope of Title IX, as with any statute, is its language.[129] Title IX states that "[n]o 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."[130] The language, "subjected to discrimination under any

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124. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 n.11 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

125. *See supra* note 106.

126. *See infra* notes 161-64 and accompanying text.

127. *See Rowinsky*, 80 F.3d at 1011 n.11 (describing the relationship between the educational institution and student as a "power relationship").

128. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (finding that Title IX creates a duty for the school not to discriminate).

129. *See* Bailey v. United States, 116 S. Ct. 501, 506 (1995).

130. 20 U.S.C. § 1681(a) (1994). In the Title VII setting, the statutory language resulted in the adoption of agency principles. Indeed, the *Meritor* court held that Title

education program or activity" could easily be interpreted to include instances of student-to-student sexual harassment. If a student sexually harasses another student at school while under the knowing supervision of teachers, the sexual harassment or discrimination arguably occurred "under" an educational program or activity. The *Rowinsky* court in fact conceded that this language could be read to include the acts of nonagent students.[131] Portions of legislative history also support the suggested approaches' extension of Title IX to student-to-student sexual harassment.

b. Legislative history. The *Rowinsky* court found that the legislative history indicates the statute was not intended to be a "panacea for all types of sex discrimination," but only a limited initial regulation requiring more research to implement further regulations.[132] The *Rowinsky* court interpreted this to indicate a very limited view of Title IX's coverage.[133] However, other portions of legislative history suggest an "impact" that is "far reaching."[134]

The House Report accompanying the Educational Amendments of 1972, which enacted Title IX, states that "one of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 . . . . Title VII, however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption under the equal employment provision."[135] Senator Bayh, sponsor of Title IX, further stated that

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VII's definition of employer, which included "any agent of an employer," showed Congress's intent to have courts apply agency principles. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

131. *See Rowinsky*, 80 F.3d at 1012. The court rejects this reading because of its understanding of the scope, structure, legislative history, and OCR interpretations of Title IX. *See id.*

132. *See id.* at 1014.

133. *See id.* at 1016.

134. 118 CONG. REC. 5807, 5808 (1972) (statement of Sen. Bayh), *quoted in Rowinsky*, 80 F.3d at 1014.

135. H.R. REP. NO. 92-554, (1971), *reprinted in* 1972 U.S.C.C.A.N. 2482, 2512. For this reason, the case law of Title VII should be relied on more than Title VI even though Title VI is also one of the provisions of the Civil Rights Act of 1964 and the model for Title IX.

The court in *Lipsett v. University of P.R.* stated that legislative history "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." 864 F.2d 881, 897 (1st Cir. 1988); *see also* Preston v. Virginia *ex rel.* New River Community College, 31 F.3d 203, 207 (4th Cir.

"[e]nforcement of [Title IX] will draw heavily on these precedents" under the Civil Rights Act of 1964.[136] These statements, while not conclusive of the issue, strongly suggest that sex discrimination in education could literally be read into Title VII and thus subject to Title VII standards for liability.[137]

Although some legislative history considered in isolation may suggest a limited view of Title IX's intended impact,[138] other statements in legislative history support the use of Title VII standards and corresponding principles of agency and hostile environment analysis.[139]

c. Franklin *and other relevant case law.* The key case in Title IX interpretation is the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*.[140] The *Franklin* Court held that a school district can be liable for money damages for a teacher's sexual harassment of a student.[141] The *Franklin* Court found that a school district has a duty not to discriminate, and when a teacher sexually harasses and abuses a student, the same rule that applies to supervisor-employee sexual harassment under Title VII (i.e., liability imputed to the principal) should apply under Title IX.[142]

1994); Mabry v. State Bd. of Community Colleges and Occup. Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987).

136. 118 CONG. REC. 5807, 18,437 (1972) (statement of Sen. Bayh), *quoted in* Cannon v. University of Chicago, 441 U.S. 677, 696 n.19 (1979). It could be argued that this statement only supported the adoption of existing precedent when the Amendment was passed. Title IX is identical to Title VI, which was included in the Civil Rights Act of 1964 and has been interpreted by the OCR to include peer harassment. *See infra* text accompanying nota 157.

137. *Cf. supra* notes 19-23 and accompanying text.

138. *See Rowinsky*, 80 F.3d at 1016 (examining legislative history to find liability only where the school district treated claims of sexual harassment differently). Courts have characterized *Rowinsky's* analysis as an equal protection disparate treatment analysis. *See, e.g.*, Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 171 n.7 (N.D.N.Y 1996).

139. Because of the unique school-to-student relationship, the agency principles used in Title IX will be somewhat different than those in Title VII. Just as in *Meritor* where the court said that "common-law principles [of agency] may not be transferable in all their particulars to Title VII," so too some agency principles may not be transferable to Title IX. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

140. 503 U.S. 60 (1992). *See supra* notes 45-51 and accompanying text.

141. *See Franklin*, 503 U.S. at 74-75; *see also* Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1200 (N.D. Iowa 1996) ("*Franklin* addressed the validity of a Title IX claim for monetary damages against a school district for its failure to stop the sexual harassment of a student *by a teacher* despite actual knowledge of the harassment . . . .").

142. *See Franklin*, 503 U.S. at 74-75.

This finding by the *Franklin* Court clearly supports the use of a Title VII hostile environment claim[143] and corresponding agency principles in Title IX cases. *Franklin* also imposes a duty running from a school district to a student,[144] for breach of which the school district can be liable. Subsequent cases have relied on this duty to require even greater protection in the educational environment than in the work environment.[145] Moreover, the trend in subsequent Title IX decisions appears to be to towards adopting Title VII standards—especially those relating to a hostile environment sexual harassment claim.[146]

d. Office of Civil Rights interpretations. The Supreme Court gives deference to agency interpretations and implementations of statutes.[147] The OCR's implementing regulation for Title IX states that a violation exists when a person is subjected to "discrimination under any . . . education program or activity operated by a recipient."[148] Among its specific prohibitions, the implementing regulation states that a grant recipient shall not "[o]therwise limit any person in the enjoyment of any right,

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143. *See* Seamons v. Snow, 84 F.3d 1226, 1232 n.7 (10th Cir. 1996) (recognizing that *Franklin* authorizes a hostile environment sexual harassment claim under Title IX); Linson v. Trustees of Univ. of Pa., No. Civ. A.95-3681, 1996 WL 479532, at *2 (E.D. Pa. Aug. 21, 1996).

In response, the *Rowinsky* court stated that "any language in *Franklin* regarding teacher-student sexual harassment, is pure *dictum*." Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 & n.11 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). But the *Franklin* Court could not have reached the issue of money damages against a school district without first concluding that under Title IX a school district could be held liable for the sexual harassment caused by one of its agents, such as a teacher. *See id.* at 1019-20 (Dennis, J., dissenting); *see also Franklin*, 503 U.S. at 66.

144. *See Franklin*, 503 U.S. at 75 ("Title IX placed on the [school] the duty not to discriminate on the basis of sex.").

145. *See* Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993). The *Doe* court said, "this Court discerns in Title IX no intent to provide a lesser degree of protection to students than to employees." Doe v. Petaluma City Sch. Dist., No. C 93-00123 CW, 1996 WL 432298, at *7 (N.D. Cal. July 22, 1996); *see also* Baker, *supra* note 2, at 291 (explaining that differences between work and educational environments require a higher duty to students).

146. *See supra* Part IV.A.2.

147. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986) (relying on EEOC interpretations).

148. 34 C.F.R. § 106.31(a) (1996).

privilege, advantage, or opportunity."[149] This language appears to "strike at the entire spectrum of" discrimination.[150]

In addition, the OCR's Policy Memorandum describes how an educational institution may impermissibly limit a "right, privilege, advantage, or opportunity" of a student by stating that "[s]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient*, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX."[151] The Policy Memorandum also includes agency principles and liability for "sexual harassment," which was originally a Title VII concept.[152]

Recent OCR letters of finding, promulgated by Regional Civil Rights Directors, even more clearly state that "if the harassment is carried out by nonagent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."[153] The failure to respond adequately when

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149. *Id.* § 106.31(b)(7). The *Franklin* court created a duty not to discriminate against students which suggests first that students have a right to be free from discrimination and second that a school's failure to act or remedy sexual harassment by peers limits that right. *See Franklin*, 503 U.S. at 75.

150. *See Meritor*, 477 U.S. at 64 ("The 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." (quoting Los Angeles Dep't 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))); *cf. Patricia H.*, 830 F. Supp. at 1289 ("The implementing regulations of Title IX forbid any sex-based limitation 'in the enjoyment of any rights, privilege, advantage or opportunity' related to federally funded education." (quoting 34 C.F.R. § 106.31(b)(7))); *id.* at 1293 (holding that tha implementing regulation extends to peer harassment).

151. OCR Policy Memorandum from Antonio J. Califa, *supra* note 71, *quoted in* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). The *Rowinsky* court gives this OCR interpretation great deference. *See id.*

152. *See* SOLOTOFF & KRAMER, *supra* note 24, § 1.03 ("[A] comprehensive concept of sexual harassment was first introduced into the law by the EEOC. However, it was not until 1986, when the Supreme Court decided *Meritor Sav. Bank, FSB v. Vinson*, that the concept became firmly established." (footnotes omitted)).

153. Letter of Findings by Kenneth A. Mines, Regional Civil Rights Director, Region V, at 2-4 (April 27, 1993) (Docket No. 05-92-1174); *accord* Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV, at 2 (July 24, 1992) (Docket No. 09-92-6002). The Supreme Court has used similar sources in Title VII claims by relying on EEOC guidelines and decisions. *See, e.g., Meritor*, 477 U.S. at 65. Instead of viewing the nonagent actions, the OCR looked at the educational institution's failure to act.

there is actual or constructive knowledge is the standard used for a Title VII hostile environment claim and therefore supports this Note's use of the standard in Title IX cases.[154] The *Rowinsky* court gave little deference to the recent letters of finding.[155] This was unfortunate because the implementing regulation and Policy Memorandum do not directly address the issue. In this situation, the views of the OCR as expressed in the recent letters of finding should have been considered.[156]

The OCR's interpretation of Title VI, which is the model for Title IX, provides for student claims of peer racial harassment and further supports the position stated in the recent letters of finding.[157]

2. Policy considerations.

The use of Title VII's hostile environment claim and corresponding agency principles along with recognizing a duty between an educational institution and students[158] is not only supported by the legislative history, judicial interpretations, and OCR interpretations but also by policy considerations. Policy considerations weigh in favor of extending Title IX interpretation to include liability for the inaction of educational institu-

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154. Other courts have relied on recent OCR letters of finding in claims of student sexual harassment by other students. *See* Doe v. Petaluma City Sch. Dist., No. C 93-00123 CW, 1996 WL 432298, at *13 (N.D. Cal. July 22, 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1204 (N.D. Iowa 1996).

155. *See Rowinsky*, 80 F.3d at 1015.

156. Other courts have relied on recent OCR letters of finding in adjudicating claims of student sexual harassment by other students. *See supra* note 154.

157. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance; Notice, 59 Fed. Reg. 11,448, 11,449 (1994). Although this Note suggests using Title VII's negligence standard instead of Title VI's intent standard, the OCR's interpretation of Title VI is helpful because it incorporates Title VII principles of hostile environment in support of this Note's use. *See id.* (relying on Title VII for the proposition that a hostile environment can be discrimination).

The *Rowinsky* court refused to rely on the OCR's Title VI interpretation because the OCR gave no "reasoned explanation" for the inclusion of peer harassment. *See Rowinsky*, 80 F.3d at 1016. The only explanation the OCR gave was reference to Title VII principles of hostile environment. *See id.* (citing Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance; Notice, 59 Fed. Reg. at 11,449).

158. This duty is to provide an environment free from sexual discrimination. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (creating a duty through Title IX).

tions and their agents and supports the approach suggested by this Note.

In order to protect students from sexual harassment at school, courts should adopt a standard for school district liability under Title IX which accounts for the unique circumstances and relationship between an educational institution and its students.[159] The relationship is unique because students are under the control and authority of teachers and administrators while at school.[160] Instead of attending to receive a paycheck, students are required by law to go to school.[161] One of the differences between the employment and education setting is that educational institutions have a higher duty to students because educational institutions have the custody of minor children[162] and assume the duties of supervision and care.[163] The recent indications of sexual harassment problems in schools also evi-

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159. *See supra* note 4.

160. *See Rowinsky*, 80 F.3d at 1024 (Dennis, J., dissenting); *see also* Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 208 (5th Cir. 1994); Baker, *supra* note 2, at 305 ("Control over the learning environment is part of the power delegated to a teacher by an educational institution and misuse of that power would be imputed to the institution."). *But see Rowinsky*, 80 F.3d at 1013 ("[G]rant recipients have little control over . . . third parties.").

161. *See* Doe v. Petaluma City Sch. Dist., No. C 93-00123 CW, 1996 WL 432298, at *5 (N.D. Cal. July 22, 1996).

> "The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as acceptable behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school."

Id. (quoting Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir.), *vacated*, 91 F.3d 1418 (11th Cir. 1996) (en banc)); *see also* Greenfield, *supra* note 31, at 602-05 (finding custody exists in schools in part because of compulsory education statutes).

162. *See* Greenfield, *supra* note 31, at 601-14 (arguing that school is a custodial environment where the school acts *in loco parentis*). Although this argument is made in support of a 42 U.S.C. § 1983 due process claim, it nevertheless illustrates the unique educational environment.

163. *See* Baker, *supra* note 2, at 291 (citing Donald H. Henderson, *Negligent Liability Suits Emanating from the Failure to Provide Adequate Supervision: A Critical Issue for Teachers and School Boards*, 16 J.L. & EDUC. 435 (1987)); *see also* Dolan, *supra* note 4, at 230 (stating that a "special relationship exists between school officials and school children").

dences the need to extend legal protection.[164] "The distinctions between the school environment and the workplace only emphasize the need for zealous protection against sex discrimination in the schools . . . ."[165] The suggested approach in this Note also addresses concerns of unwarranted school liability[166] and reaches a middle ground which should be satisfactory to students, educational institutions, and courts.

Adopting Title VII's standard for a hostile environment claim alleviates the concern of imposing strict liability[167] and eases the burden on school districts. Adopting this standard also brings in established elements of a hostile environment[168] and creates liability only when the harassment is severe or pervasive.[169] Adopting relevant agency principles incorporates some flexibility and stability in the connection between the failure to act of educational institutions and student-to-student sexual harassment. Finding a duty or special relationship between the educational institution and the student recognizes the unique school environment and removes concerns of extending Title VII hostile environment principles to Title IX.[170] The suggested approach not only reaches a middle ground between the interests of an educational institution and students but is also consistent with existing interpretations of Title IX.

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164. *See supra* note 4; *see also* Dolan, *supra* note 4, at 221-26 (discussing the consequences of sexual harassment in schools); Gant, *supra* note 16, at 511-13.

165. Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993). The *Doe* court said, "this Court discerns in Title IX no intent to provide a lesser degree of protection to students than to employees." *Doe*, 1996 WL 432298, at *7; *see also* Baker, *supra* note 2, at 291 (arguing that differences between work and educational environments emphasize the need for a higher duty to students).

166. There has been some response to criticisms of expanding Title IX to include peer harassment. *See* Erikson, *supra* note 33, at 1817-19. The *Rowinsky* court assumed that extending Title IX to student-to-student sexual harassment would result in strict liability. *See Sexual Harassment*, *supra* note 28, at 790-91.

167. *See Sexual Harassment*, *supra* note 28, at 790-91.

168. *See supra* note 24.

169. *See* Dolan, *supra* note 4, at 240 (asserting that a standard of knowledge or foreseeability would not make educational institutions liable for isolated instances of peer sexual harassment.) This standard should avoid harmless cases. *See* Leland, *supra* note 5.

170. *See Rowinsky*, 80 F.3d at 1011 n.11.

V. CONCLUSION

The *Rowinsky* decision viewed the issue of student-to-student sexual harassment narrowly and thereby failed to address the important issue of Title IX liability for inaction of the educational institution or its agents. Therefore, courts should not follow *Rowinsky*. Existing interpretations of Title IX suggest that liability extends to student-to-student sexual harassment, but courts have been unclear on what standard to apply. While some have relied on Title VI's standard of intent to discriminate, other courts have looked to Title VII for guidance.

Although the legislative history, judicial decisions, OCR interpretations, and policy considerations support the use of Title VII principles, the work environment and educational environment are not a precise fit. As a result, courts should also look to common-law agency principles and recognize the unique school-student relationship which gives rise to a duty not to discriminate under Title IX. This approach is consistent with existing interpretations of Title IX and reaches a reasonable result of protecting students from student sexual harassment claims while not subjecting educational institutions to strict liability or unreasonable burdens.

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