

WHEN A KISS ISN'T JUST A KISS: TITLE IX AND STUDENT-TO-STUDENT HARASSMENT

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INTRODUCTION

A 7-year-old Queens boy who kissed a classmate and tore a button from her skirt was suspended from school for sexual harassment, then reinstated as chagrined school officials weathered a wave of criticism yesterday and said they would review the school system's sexual harassment policies.¹

Two young boys — 6-year-old Jonathan Prevette of North Carolina and 7-year-old DeAndre Dearing of New York — experienced their “fifteen minutes of fame,” thanks to kisses on the cheek that got them branded as sexual harassers. Media organizations pounced on these stories, with some columnists even declaring these youngsters casualties in the “war against boys” waged by feminist organizations.² Despite the fact that several media reports focused rightly on the serious cases of sexual harassment in schools that unfortunately are the rule,³ many more reacted to the “kissing bandit” stories with unbridled zeal at what appeared to be cases of political correctness gone wild, to the detriment of boys who were just being boys. One commentator even went so far as to opine: “as long as . . . [members of] the flourishing gen[d]er bias industry exert their anti-male influence on government policy and the schools, male children will continue to be targeted.”⁴ If only life were this simple.

The fact is that sexual harassment in schools is not a political phenomenon, but a pervasive barrier to education for students of all ages and in every level of schooling.⁵ Peer harassment is by far the

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1. Norimitsu Onishi, *Harassment in 2d Grade? Queens Kisser is Pardoned*, N.Y. TIMES, Oct. 3, 1996, at A1.

2. Christina Hoff Sommers, *The War Against Boys*, THE BOSTON GLOBE, October 24, 1996, A21.

3. Tamar Lewin, *Kissing Cases Highlight Schools' Fears of Liability for Sexual Harassment*, N.Y. TIMES, Oct. 6, 1996, at 22.

4. Sommers, *supra* note 2.

5. See generally, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN*

most common form.⁶ But, what, if anything, should schools do when students sexually harass one another? Should they adopt a strict "no tolerance" policy that punishes behavior that is flirtatious but does not rise to the level of sexual harassment, typified by the schools that punished young Jonathan and DeAndre? Or, should they ignore peer harassment altogether, the more likely course of action,⁷ particularly in the many schools lacking sexual harassment policies, and chalk this misconduct up to youthful exuberance?

The difficulty schools are having addressing student-to-student harassment reflects the disarray in the courts in this emerging area of the law. Over twenty years after passage of Title IX of the Education Amendments of 1972,⁸ which prohibits sex discrimination in federally funded education programs and activities, courts are only just beginning to discern the statute's parameters with respect to sexually hostile environments. Just five years ago, the Supreme Court in *Franklin v. Gwinnett County Public Schools*,⁹ a sexual harassment case, ruled that Title IX authorizes monetary damages against schools that violate the statute. In the wake of that decision, courts across the country are working assiduously to articulate the scope of Title IX's coverage in this regard.

One of the most difficult issues in this context, as demonstrated amply by the "kissing bandit" stories, is that of student-to-student sexual harassment. The question of whether Title IX imposes any obligation upon schools to remedy peer hostile environment sexual harassment has come before three federal circuit courts with varied results.¹⁰ In *Davis v. Monroe County Board of Education*,¹¹ a case that was vacated pending a ruling *en banc*, the Eleventh Circuit held that Title IX prohibits peer sexual harassment and applied principles developed in the context of Title VII of the Civil Rights Act of 1964 in ruling that schools must take prompt remedial action to address such misconduct when it arises.¹² In contrast, the Fifth Circuit, in *Rowin-*

AMERICA'S SCHOOLS (1993) [hereinafter *HOSTILE HALLWAYS*]; NAN STEIN ET. AL., *SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS* (1993) [hereinafter *SECRETS IN PUBLIC*].

6. *HOSTILE HALLWAYS*, *supra* note 5, at 11 (four out of five students reporting harassment were harassed by another student); *SECRETS IN PUBLIC*, *supra* note 5, at 6 (96% of girls who were sexually harassed were harassed by peers).

7. *HOSTILE HALLWAYS*, *supra* note 5, at 22.

8. 20 U.S.C. §§ 1681-88 (1994).

9. 503 U.S. 60 (1992).

10. See *infra* notes 11-17 and accompanying text.

11. 74 F.3d 1186 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

12. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1192-95 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

sky v. Bryan Independent School District,¹³ held that schools can only be held liable for such peer harassment when they treat the complaints of boys differently from those of girls.¹⁴ Using a hybrid of these two approaches, the Tenth Circuit in *Seamons v. Snow*,¹⁵ applied the analytical framework articulated in *Davis*, but came up with a result that echoed *Rowinsky*.¹⁶ The Tenth Circuit held that the school in question could not be liable under Title IX because there had been no showing of a disparate handling of sexual harassment complaints by students.¹⁷ Since the Supreme Court thus far has declined the opportunity to address this issue, recently denying certiorari in *Rowinsky*, Title IX's scope in this regard is far from a settled question among the circuits.

Part I of this Article discusses *Franklin* and the three peer hostile environment sexual harassment cases that circuit courts have addressed in the wake of the Supreme Court's instruction in that case.¹⁸ Part II discusses the legislative history of Title IX, which demonstrates that Congress intended to end all forms of sex discrimination in federally funded education, including student-to-student hostile environment sexual harassment.¹⁹ Part III is an overview of the Supreme Court precedent interpreting Title IX, which mandates that its proscription against sex discrimination be construed expansively.²⁰ Part IV outlines the Department of Education's interpretation of Title IX's requirements concerning peer hostile environment sexual harassment.²¹ Finally, Part V discusses the Title VII principles underlying the analysis of student-to-student hostile environment sexual harass-

13. 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

14. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

15. 84 F.3d 1226 (10th Cir. 1996).

16. *Seamons v. Snow*, 84 F.3d 1226, 1232-33 (10th Cir. 1996).

17. *Seamons*, 84 F.3d at 1233.

18. See *infra* notes 23-103 and accompanying text. Title IX prohibits all forms of sexual harassment: *quid pro quo*, in which a student's participation in an education program or activity is conditioned implicitly or explicitly on the student's submission to unwelcome sexual advances or requests for sexual favors, for example; and hostile environment sexual harassment, which includes "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct [that is] sufficiently severe . . . or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment." "Sexual Harassment Guidance: Harassment of Students by School Employees," 61 Fed. Reg. 52, 172; 52, 175 (1996). This Article, however, only addresses *peer* hostile environment sexual harassment.

19. See *infra* notes 104-19 and accompanying text.

20. See *infra* notes 120-27 and accompanying text.

21. See *infra* notes 128-39 and accompanying text.

ment that support the conclusion that the Eleventh Circuit's analysis in *Davis* is "legally and ethically . . . the way to go."²²

I. *FRANKLIN* AND ITS PROGENY: DEVELOPING A LEGAL FRAMEWORK FOR ANALYZING PEER HOSTILE ENVIRONMENT SEXUAL HARASSMENT

A. *FRANKLIN V. GWINNETT COUNTY PUBLIC SCHOOLS*:²³ STEP ONE IN ENDING SEXUAL HARASSMENT AND ACHIEVING GENDER EQUITY IN SCHOOLS

The springboard for all school sexual harassment cases is the United States Supreme Court's decision in *Franklin*, the first — and only — Title IX sexual harassment case to be considered by the Justices.²⁴ In *Franklin*, a unanimous Supreme Court held that schools can be held liable for monetary damages for violations of Title IX.²⁵ In that case, Christine Franklin, a high school student, was subjected to hostile environment sexual harassment, which included rape, by a teacher/coach at her school.²⁶ School officials were aware of, and had even investigated, the harassment but refused to take any action to remedy it, and even attempted to dissuade Christine from pressing charges against the teacher.²⁷ The school stopped its investigation after the teacher resigned under the condition that it would take no further action against him.²⁸

Christine filed suit in the United States District Court for the Northern District of Georgia.²⁹ The district court dismissed her claim against the school on the grounds that damage awards are not available under Title IX.³⁰ The United States Court of Appeals for the Eleventh Circuit affirmed.³¹ The Supreme Court reversed, holding that all appropriate remedies, including damages, are available for intentional violations of Title IX, which included knowingly allowing a sexually hostile environment created by a teacher to flourish.³² The Court stated that "[U]nquestionably, Title IX placed on the Gwinnett

22. "Jury Rewards School Action in Peer Harassment Case," *SCHOOL LAW NEWS*, November 29, 1996, at 3. See *infra* notes 140-222 and accompanying text.

23. 503 U.S. 60 (1992).

24. *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 60-76 (1992).

25. *Franklin*, 503 U.S. at 74-76. As used in this Article, the term "school" denotes only those educational institutions that receive federal financial assistance and therefore are subject to Title IX's requirements.

26. *Franklin*, 503 U.S. at 63.

27. *Id.* at 63-64.

28. *Id.* at 64.

29. *Id.* at 63.

30. *Id.* at 64.

31. *Id.*

32. *Id.* at 75-76.

County Schools 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."³³ The Court noted that this same rule applies when teachers sexually harass and abuse students.³⁴ Significantly, the Court cited its decision in *Meritor Savings Bank, FSB v. Vinson*,³⁵ which requires employers to provide workers with a non-discriminatory environment under Title VII of the Civil Rights Act of 1964.³⁶ Thus, the Court concluded that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."³⁷ The Supreme Court in *Franklin* made plain that Congress intended to put an end to all forms of sex discrimination, including hostile environment sexual harassment, by enacting Title IX and, in so doing, sought to obligate all recipients of federal funds to maintain an environment free from sex discrimination.

B. *DAVIS v. MONROE COUNTY BOARD OF EDUCATION*.³⁸ APPLYING *FRANKLIN* TO PEER HOSTILE ENVIRONMENT SEXUAL HARASSMENT

In *Davis*, the first federal circuit court case to address student-to-student hostile environment sexual harassment, the Eleventh Circuit relied upon *Franklin* to hold that Title IX requires schools to take prompt remedial action to address peer hostile environment sexual harassment of which they knew or should have known.³⁹

In *Davis*, fifth grade student LaShonda D. endured six months of sexual harassment from another student who repeatedly attempted to touch her breasts and genitals, rubbed up against her sexually, and made vulgar statements.⁴⁰ Despite the fact that LaShonda and her mother complained to teachers and the school principal, no action was taken to remedy the harassment.⁴¹ A teacher even refused to allow LaShonda to move from her assigned seat next to the harassing student.⁴² Only after LaShonda's mother filed criminal charges of sexual

33. *Id.* at 75 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (emphasis added)).

34. *Id.* at 75.

35. 477 U.S. 57, 64 (1986).

36. *Franklin*, 503 U.S. at 75. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

37. *Franklin*, 503 U.S. at 75.

38. 74 F.3d 1186 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

39. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1192-94 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

40. *Davis*, 74 F.3d at 1188-89.

41. *Id.* at 1189.

42. *Id.*

battery against the boy — to which he plead guilty — did the harassment come to an end.⁴³ By that time, LaShonda's grades and emotional well-being had suffered as a result of the harassment. She had even written a suicide note, evincing her belief that death was the only way out of her predicament.⁴⁴

LaShonda's mother filed suit in the United States District Court for the Middle District of Georgia.⁴⁵ The district court dismissed the case, ruling that Title IX does not apply to the actions of students because, in its view, they are not "part of a school program or activity."⁴⁶ Since neither the Board nor any employee of the Board "had any role in the harassment," the court concluded, "any harm to LaShonda was not proximately caused by a federally-funded education provider."⁴⁷ On appeal, a divided panel of the Eleventh Circuit reversed, holding that Title IX prohibits peer hostile environment sexual harassment and requires schools to take steps to remedy it when they know or should know it is occurring.⁴⁸

As the court explained, liability under Title IX is based on school "officials' failure to take action to stop the offensive acts of those over whom [they] exercised control."⁴⁹ The Eleventh Circuit's decision relied largely on *Franklin's* authority to apply Title VII principles in this context, Title IX's legislative history, and the Supreme Court's instruction that the statute be construed broadly.⁵⁰ Based on these authorities, the court concluded that "a student should have the same protection in school that an employee has in the workplace."⁵¹ Moreover, the court reasoned, to the extent that the workplace and the schoolyard differ, those differences militate in favor of greater protections for children.⁵² As the court explained:

[T]he 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

43. *Id.*

44. *Id.*

45. *Id.* at 1188.

46. *Id.* (quoting *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994), *aff'd & rev'd in part*, 74 F.3d 1186 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996)).

47. *Id.* (quoting *Aurelia D.*, 862 F. Supp. at 367).

48. *Id.* at 1193-95.

49. *Id.* at 1193.

50. *Id.* at 1192.

51. *Id.*

52. *Id.* at 1193 (citation omitted).

as accepted 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.⁵³

The Eleventh Circuit then adopted and applied the five-part test commonly used in analyzing claims under Title VII for a hostile environment created by a co-worker.⁵⁴ Specifically, the court articulated the five elements that must be shown before a school will be held liable for a sexually hostile environment created by a student: 1) the victim is a member of some protected group; 2) they were subjected to unwelcome sexual harassment; 3) the harassment experienced was based on sex; 4) the harassment was "sufficiently severe or pervasive" to affect the conditions of their schooling; and 5) the school knew or should have known of the harassment and failed to take appropriate prompt remedial action.⁵⁵

As explained more fully below, the Eleventh Circuit's approach to peer hostile environment sexual harassment most closely reflects the Supreme Court's holding in *Franklin*, providing students the full range of protection from sexual harassment that Title IX is intended to afford. The other circuits that have addressed the issue have not followed the Court's direction, which has troubling implications for students.

C. *ROWINSKY v. BRYAN INDEPENDENT SCHOOL DISTRICT*.⁵⁶ A STEP BACKWARD FOR GENDER EQUITY

Two months after the Eleventh Circuit ruled in *Davis*, a divided panel of the United States Court of Appeals for the Fifth Circuit decided *Rowinsky*, holding that Title IX does not encompass claims of peer hostile environment sexual harassment.⁵⁷ Under the Fifth Circuit's reasoning, such claims are cognizable under Title IX only when the school treats the sexual harassment complaints of girls differently than those of boys.⁵⁸ This decision, which is contrary to *Franklin*, as well as the letter and spirit of Title IX, effectively counsels schools to ignore all complaints of sexual harassment.

Deborah Rowinsky brought this case on behalf of her daughters, Jane and Janet Doe, who were eighth graders at Sam Rayburn Middle

53. *Id.*

54. *Id.* at 1194-95 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982)).

55. *Id.* at 1194-95.

56. 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

57. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012-16 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

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

School when they were sexually harassed repeatedly during the 1992-1993 academic year.⁵⁹ Boys subjected Jane and Janet to escalating levels of verbal and physical abuse on the school bus by groping them, hitting their bottoms, and making foul remarks, such as "When are you going to let me ____ you?"⁶⁰ Both girls repeatedly complained to school officials, who suspended the boys, but the harassment continued, with another boy joining in the misconduct.⁶¹ The girls' mother met with the superintendent of the school district, who refused to take any additional action, in part, because she believed the suspensions constituted sufficient disciplinary action.⁶² Moreover, the superintendent "did not deem what had happened to Jane and Janet to be assaults."⁶³

The district court ruled that Rowinsky failed to state a claim under Title IX because she could not show that the school district had discriminated on the basis of sex.⁶⁴ Specifically, the court ruled that Rowinsky "had failed to provide evidence that sexual harassment and misconduct was treated less severely toward girls than toward boys."⁶⁵ The Fifth Circuit affirmed this decision, based on a constricted reading of Title IX that rejects *Franklin's* instruction to apply Title VII principles.⁶⁶

The Fifth Circuit's analysis is based on the flawed premise that the plaintiff sought to hold the school liable for the harassing students' actions. The court repeatedly stated that Title IX's proscription against sex discrimination applies only to the acts of grant recipients.⁶⁷ Thus, since students are not agents of the educational institutions they attend, the court reasoned, their actions cannot be the basis for a Title IX violation.⁶⁸ This rationale misapprehends the nature of the cause of action alleged. As *Davis* makes crystalline, liability in

59. *Id.* at 1008-09.

60. *Id.* at 1008.

61. *Id.* at 1008-09.

62. *Id.* at 1009.

63. *Id.*

64. *Id.* at 1010.

65. *Id.*

66. *See id.* at 1010-16.

67. *Id.* at 1012. The court asserted that the plaintiff's theory rested on a special reading of Title IX's mandate that "[n]o person be subjected to discrimination under any educational program or activities. Rowinsky focuses solely upon that phrase and argues that 'under' means 'in' and not 'by.' By making this substitution, she reasons that the statute cannot be limited to acts of discrimination by grant recipients." *Id.* at 1011. As demonstrated below, this semantic exercise by the court misses the mark. For example, Title IX's implementing regulation holds recipients of federal funds liable for the actions of third parties in many instances, based on the principle that recipients have an obligation under the statute to provide students with a non-discriminatory environment in which to learn. *See infra* notes 104-18 and accompanying text.

68. *Rowinsky*, 80 F.3d at 1013.

peer hostile environment cases is based on the *recipient's own* actions — its failure to take appropriate measures in the face of a known sexually hostile environment. *Rowinsky's* misunderstanding with regard to this concept is rooted in its narrow reading of Title IX and its erroneous rejection of Title VII principles.⁶⁹

Much of the court's rationale for limiting Title IX in this regard came, ironically, from the statute's expansive language and its legislative history.⁷⁰ Acknowledging that, on its face, Title IX's proscription against sex discrimination "could encompass the acts of third parties,"⁷¹ the court read the statute narrowly to conclude exactly the opposite, in direct contravention of the Supreme Court's mandate that Title IX be "accord[ed] a sweep as broad as its language."⁷² The Fifth Circuit found support for this inference in its assertion that Title IX was passed pursuant to Congress' authority under the Spending Clause, a conclusion that the Supreme Court has yet to make.⁷³

The Supreme Court explicitly declined to so hold in *Franklin*.⁷⁴ Indeed, to the extent that the Court has characterized the authority under which Congress enacted Title IX, it has suggested that lawmakers relied not only on the Spending Clause, but also on section 5 of the Fourteenth Amendment, which authorizes Congress to take the steps necessary to ensure that the promise of equal protection under the law is realized:

Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to sup-

69. The court even mischaracterized the argument advanced by the dissent, stating that the dissent "claim[s] that a student is an agent of the grant recipient." See *Rowinsky*, 80 F.3d at 1010 n.9. However, the dissent stated that the facts alleged supported a Title IX claim based on the school board's actions, namely:

the school board had actual knowledge that the plaintiffs were being subjected to sexual harassment and abuse sufficiently severe and pervasive as to create for them a hostile and offensive educational environment, and that the board failed to take appropriate corrective action.

Id. at 1024 (Dennis, J., dissenting) (emphasis added). As the dissent makes clear, the plaintiff stated a claim under Title IX because the board not only knew about the harassment, it also had the power and control over students to take effective action designed to end it. *Id.* (Dennis, J., dissenting).

70. *Rowinsky*, 80 F.3d at 1012-14.

71. *Id.* at 1012.

72. *Id.* See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

73. *Rowinsky*, 80 F.3d at 1013 n.14. The court also cited *Guardians Ass'n v. Civil Serv. Comm'n.*, 463 U.S. 582, 598 - 599 (1983) (White, J.), to support its conclusion that Title IX, like Title VI is Spending Clause legislation. *Rowinsky*, 80 F.3d at 1012 n.14. However, in *Guardians*, Justice Byron White was joined only by Chief Justice William Rehnquist in that portion of his opinion. See *Guardians*, 463 U.S. at 584, 598-99. A majority of the Supreme Court has yet to determine whether Title VI or Title IX were enacted pursuant to the Spending Clause or Section 5 of the Fourteenth Amendment, or both. *Rowinsky*, 80 F.3d at 1012 n.14.

74. *Franklin*, 503 U.S. at 75 n.8.

port discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.⁷⁵

Thus, while it is true that Congress intended to ensure that federal funds would not support any form of sex discrimination in education by enacting Title IX, it is equally true that Congress intended to eradicate sex discrimination, which clearly violates the Fourteenth Amendment, when it enacted Title IX.

Relying on its determination that Title IX was Spending Clause legislation, the Fifth Circuit in *Rowinsky* concluded that holding recipients liable for acts of third parties is inconsistent with this status.⁷⁶ Specifically, since "grant recipients have little control over the multitude of third parties who could conceivably violate. . . Title IX . . . the possibility of a violation would be so great that recipients would be induced to turn down the grants."⁷⁷ Holding recipients liable for the actions of third parties thus would make receipt of federal funds "unattractive," and would render the conditions Congress sought to impose "useless."⁷⁸

As discussed in greater detail below, however, facilitating recipient compliance with Title IX was not Congress' goal in enacting Title IX.⁷⁹ Rather, Congress used the broadest terms possible to ensure that not a single penny of taxpayer money would be used to finance practices that "encourage[], entrench[], subsidize[] or result[] in . . . discrimination."⁸⁰ By emphasizing its own view of the ease with which recipients could comply with Title IX, the court overlooked Congress' overarching goal in enacting the statute — eradicating sex discrimination throughout federally funded educational institutions. Accordingly, recipients can, and must, be held liable for condoning or tolerating the discriminatory actions of third parties.⁸¹

The court also rejected application of Title VII principles, in direct contravention of *Franklin*.⁸² Specifically, the court found that application of Title VII standards to a Title IX peer sexual harassment claim would be "problematic," in part, because "unwanted sexual advances of fellow students do not carry the same coercive effect or abuse

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

76. *Rowinsky*, 80 F.3d at 1013.

77. *Id.*

78. *Id.*

79. See *infra* notes 81-82 and accompanying text.

80. 130 Cong. Rec. 9271 (April 12, 1984) (remarks of Sen. Chafee, quoting President Kennedy's statement urging enactment of Title VI).

81. See *infra* notes 104-18 and accompanying text.

82. *Rowinsky*, 80 F.3d at 1011 n.11; *id.* at 1019-21 (Dennis, J., dissenting).

of power as those made by a teacher, employer or *co-worker*.”⁸³ However, contrary to the Fifth Circuit’s reasoning, the case law that has developed under Title VII does not base employer liability in peer harassment cases on the “power relationships” at issue. Rather, liability is based on an employer’s obligation to maintain a non-discriminatory work environment under Title VII.⁸⁴ Based on that obligation, employers are liable for peer hostile environment sexual harassment because such environments constitute an “arbitrary barrier to sexual equality at the workplace. . . .”⁸⁵ Under Title IX, educational institutions also have such an obligation.⁸⁶ The Fifth Circuit neither acknowledged nor addressed this important aspect of Title IX when it rejected Title VII standards.

In addition, the *Rowinsky* court asserted that Title VII cases involving sexual harassment by non-employees “are inapplicable” to the peer sexual harassment context because “in those cases the power of the employer was implicated.”⁸⁷ This distinction is somewhat baffling. The Supreme Court has recognized in other contexts that schools have a great deal of control over their own students — at least as much as employers have over their customers, consultants and other non-employees.⁸⁸ A school that watches with an approving eye while a student sexually harasses another student puts its stamp of approval on the harassment no less than an employer who sits idly by while a customer sexually harasses an employee.

With *Rowinsky*, the Fifth Circuit stands alone among the federal circuit courts of appeals to address sexual harassment claims under Title IX for its rejection of Title VII standards in analyzing these claims.⁸⁹ As a policy matter, *Rowinsky* effectively denies students

83. *Id.* at 1011 n.11 (emphasis added).

84. *See Vinson*, 477 U.S. at 65 (stating that “the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”).

85. *Henson*, 682 F.2d at 902.

86. *Franklin*, 503 U.S. at 75.

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

88. *Cf. Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2392 (1995) (permitting schools to exercise a degree of supervision and control over students “that could not be exercised over free adults”); *New Jersey v. T.L.O.*, 469 U.S. 325, 329 (1985) (stating that “the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.”); *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1387 (C.D. Cal. 1995) (ruling that a school’s suspension of student for sexual harassment of fellow students did not violate student’s due process rights).

89. The majority in *Rowinsky* stated that the United States Court of Appeals for the Eleventh Circuit was the only federal court of appeals to find that a school district could be liable for peer sexual harassment. *Rowinsky*, 80 F.3d at 1010 n.8. *See supra* notes 13-17 and accompanying text. However, the Eleventh Circuit was the *first* circuit

protection from sexual harassment that is available to their teachers. As discussed below, the weight of authority does not support such an unprincipled distinction.

D. *SEAMONS v. SNOW*: MUDDYING THE WATERS

The United States Court of Appeals for the Tenth Circuit's decision in *Seamons* appears to use the analytical framework adopted in *Davis*, but with a result that conforms to *Rowinsky*. As a practical matter, *Seamons* also provides schools with an incentive to ignore student-to-student hostile environment sexual harassment in order to escape liability under Title IX.

In this case, the plaintiff, Brian Seamons, a high school football player, alleged that his fellow teammates grabbed him as he emerged from the school's shower, "forcibly restrained and bound [him and his genitals] to a towel rack with adhesive tape," and then brought a girl who had dated plaintiff into the locker room to see him.⁹⁰ Brian reported this misconduct to his coach, who, in front of the entire team, accused *him* of betraying his fellow players and ordered him to apologize.⁹¹ When he refused, the coach dismissed him from the team.⁹² Brian continued to complain about his mistreatment and the fact that no disciplinary action had been taken against the harassing players. In response, the school district cancelled the final game of the season, a playoff game, which predictably lead to more harassment for Brian, who was deemed responsible for the premature ending to the team's season.⁹³ Throughout his ordeal, school officials advised Brian to "take it like man," and continually downplayed the incidents as "rites of passage" for football players.⁹⁴

Plaintiff alleged, *inter alia*, that the school's response was "sexually discriminatory and harassing," but did not complain that the original assault was based on his sex.⁹⁵ The United States District Court for the District of Utah dismissed the Title IX claims, ruling that, as a matter of law, plaintiff had failed to allege a claim for intentional dis-

court to address the question of recipient liability under Title IX for such misconduct. In addition, as discussed above, that court did not find the defendant school board liable for peer sexual harassment; it found that Title IX supports a claim for student-to-student harassment when the district knowingly refuses to address such misconduct. See *supra* notes 39-55 and accompanying text.

90. *Seamons v. Snow*, 84 F.3d 1226, 1230 (10th Cir. 1996).

91. *Seamons*, 84 F.3d at 1230.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* Brian contended that the "Defendants expected him to conform to a macho male stereotype, as evidenced by their suggestion to him that he 'should have taken it like a man.'" *Id.*

crimination.⁹⁶ The district court also refused to apply Title VII principles, stating that "important distinctions" precluded it from doing so.⁹⁷ Moreover, even if such principles applied, the court ruled, plaintiff had not stated a claim for sexual harassment under them.⁹⁸

Analyzing the plaintiff's Title IX claim against the school district, the Tenth Circuit applied the five-part test the Eleventh Circuit articulated in *Davis*.⁹⁹ The court concluded, however, that sufficient facts had not been alleged to demonstrate that plaintiff had been harassed based on his sex.¹⁰⁰ Specifically, the court noted that the qualities school officials urged plaintiff to adopt in response to the harassment, "team loyalty and toughness [were] not uniquely male."¹⁰¹ In addition, girls at the high school were subjected to similar hazing incidents, which school officials also ignored.¹⁰²

No other court has applied Title VII standards to require the school's response to the harassment, as opposed to the harassment itself, be sexual or based on sex.¹⁰³ Just as in *Rowinsky*, the court adopted an analysis that enabled the school to avoid liability by ignoring the complaints of boys and girls equally, a result clearly at odds with Title IX's plain language and Congress' intent.

Of the three decisions, *Davis* is the one that most closely adheres to Title IX's mandate to eradicate sex discrimination in federally funded education, and to Supreme Court precedent interpreting the statute. As the discussion below demonstrates, holding schools accountable for turning a blind eye to sexually hostile environments created by students is key to ensuring that Title IX's promise is realized.

II. TITLE IX'S MANDATE TO END SEX DISCRIMINATION IN EDUCATION

Title IX broadly prohibits the pervasive and destructive practice of sex discrimination in education, stating in relevant part:

96. *Id.* at 1231.

97. *Id.*

98. *Id.*

99. *Id.* at 1232 (citing *Davis*, 74 F.3d at 1194).

100. *Id.* at 1232-33.

101. *Id.* at 1233.

102. *Id.*

103. Indeed, even though the Tenth Circuit applied the Title VII analysis of hostile environment in this context, it questioned whether a school district could be held liable for the actions of a student, misapprehending the nature of this cause of action. *Id.* at 1232 n.7. However, as *Davis* made clear, in an opinion the Tenth Circuit cited, recipients are liable in cases of peer hostile environment sexual harassment for their own failure to remedy misconduct of which they knew or should have known. *Davis*, 84 F.3d at 1193.

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.¹⁰⁴

As Title IX's legislative history and post-enactment history demonstrate, Congress used these expansive terms to eliminate all aspects of sex discrimination in education.

Congress passed Title IX following an effort begun two years earlier to expand civil rights protections for women by amending Title VI of the Civil Rights Act of 1964¹⁰⁵ to include "sex" as a protected class, *inter alia*.¹⁰⁶ To put an end to sex discrimination in education, the area in which there was the most testimony, Congress enacted Title IX, using terms similar to those of Title VI, and applying the scope of its proscription to federally funded education programs or activities. In this connection, Title IX's sponsors intended that the statute "reach[] into all facets of education — admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."¹⁰⁷ It extended to financial aid and admission to prestigious honorary societies.¹⁰⁸ It prohibited vocational education programs that were sex-segregated, "teachers who favor their male students, and guidance counselors who discourage [females] from many careers that have limited numbers of women in higher levels of administration."¹⁰⁹ Congress plainly viewed Title IX as the vehicle for removing sex discrimination as a barrier to education.

Indeed, going beyond merely proscribing certain discriminatory actions based on sex in federally funded education programs or activities, Congress conditioned receipt of federal funds upon the assurance that sex discrimination not exist in any portion of an educational insti-

104. 20 U.S.C. § 1681(a) (1994).

105. 42 U.S.C. §§ 2000d-2000d-7 (1994). Title VI prohibits discrimination based on race, color, or national origin in any federally funded program or activity.

106. See generally, *Discrimination Against Women: Hearings Before House Special Subcommittee on Education on Section 805 of H.R. 16098*, 91st Cong. (1970).

107. 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh). The fact that sexual harassment was not mentioned among the ills Title IX was enacted to eradicate does not suggest that Congress intended to allow this pernicious barrier to education to flourish. When Congress enacted Title IX in 1972, sexual harassment was not yet recognized as a form of sex discrimination under Title VII of the Civil Rights Act, which also broadly proscribes sex discrimination. The first case to recognize that sexual harassment constitutes sex discrimination under Title VII was *Williams v. Saxbe*, 413 F. Supp. 654 (D. D.C. 1976), *vacated sub nom. William v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), twelve years after the statute was enacted. Four years later, in 1980, the EEOC issued its guidelines on sexual harassment. In the 25 years since Title IX's enactment, it is now axiomatic that sexual harassment violates the mandate of Title VII and Title IX.

108. 118 CONG. REC. 5805, 5811 (1972) (statement of Sen. Bayh).

109. 117 CONG. REC. 25507 (1971) (statement of Rep. Abzug).

tution's "program or activity."¹¹⁰ In so doing, Congress imposed upon all recipients an obligation to ensure that students and employees are provided with an educational environment that is free from sex discrimination. Congress used this structure based on the following principle:

Simple justice requires that public funds to which all taxpayers . . . contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in . . . discrimination.¹¹¹

Congress thus passed Title IX in 1972, prohibiting sex discrimination in the broadest of terms, imposing on recipients a similarly expansive obligation to ensure that sex discrimination is in no way a part of their education programs or activities. Title IX was intended to provide "women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."¹¹² Lawmakers envisioned and expected that Title IX would be both "strong and comprehensive."¹¹³

Time and again Congress has reaffirmed its intention that Title IX be construed broadly to effect its goal of eliminating sex discrimination throughout education, refusing to adopt measures that would scale back Title IX's scope and thus subvert the law's intent. In so doing, Congress has provided abundant evidence of its desire that Title IX impose upon educational institutions receiving federal funds the obligation to fully eradicate sex discrimination.

The post-enactment history of Title IX is replete with such examples. In 1983, for example, Congress overwhelmingly passed a resolution "expressing its belief that Title IX and its regulations 'should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.'"¹¹⁴ Three years later, in response to restrictive Supreme Court precedent, Congress enacted the Civil Rights Remedies Equalization Amendment of 1986, which abrogated the Eleventh Amendment immunity of the States from suit under Title IX.¹¹⁵

110. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 682 (1979) (quoting 20 U.S.C. § 1681(a)).

111. 130 CONG. REC. 9271 (April 12, 1984) (statement of Sen. Chafee, quoting statement of President Kennedy urging enactment of Title VI).

112. 118 CONG. REC. 5804 (1972) (statement of Senator Bayh).

113. *Id.*

114. See *Grove City College v. Bell*, 465 U.S. 555, 598 n.12 (1984) (Brennan, J., concurring) (citing H. R. Res. 190, 98th Cong. (1983); 129 CONG. REC. H10085-H10095, H10100-H10101 (Nov. 16, 1983)).

115. 42 U.S.C. § 2000d-7 (1994) (overruling *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985)).

Congress also enacted the Civil Rights Restoration Act in 1988, overruling the Supreme Court's decision in *Grove City College v. Bell*,¹¹⁶ which had limited Title IX's proscription against sex discrimination to the particular program receiving federal funds.¹¹⁷ Debate regarding this measure reflected Congress' intent that Title IX impose an institution-wide obligation to provide a sex discrimination-free environment. For example, former Representative Buchanan testified that Title IX was enacted to protect students and employees alike, stating that "the law was not a piecemeal solution, forbidding discrimination in one classroom, while allowing it in the next."¹¹⁸ Members of Congress recognized that the amendment was critical to ensure institution-wide protection from sex discrimination:

Thus, an institution could receive up to 100 percent of its tuition money from Federal student aid and only the financial aid department would be subject to Title IX requirements. Furthermore, a victim of sexual harassment would have to be harassed in the financial aid office or by a member of the financial aid staff to be protected by the statute. . . . The comprehensive impact of Title IX must be restored in education.¹¹⁹

Title IX's legislative history thus amply demonstrates that under the statute, recipients have an institution-wide obligation not to discriminate on the basis of sex and to ensure that they do not knowingly support sex discrimination in any form, including sexual harassment, whether at the hands of an employee or a student.

III. SUPREME COURT INTERPRETATION OF TITLE IX

Informed by the legislative history and post-enactment history of Title IX, the United States Supreme Court has interpreted the statute broadly, consistent with Congress' intent.

In *Cannon v. University of Chicago*,¹²⁰ the Supreme Court ruled that Title IX contains an implied private right of action despite the absence of specific statutory language to that effect.¹²¹ The Court relied, in part, on the fact that Title IX creates a right benefitting a specific class and imposes a duty on recipients to provide a non-discriminatory environment:

There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Ti-

116. 465 U.S. 555 (1984).

117. 42 U.S.C. § 2000d-4a (1994).

118. H.R. REP. NO. 98-329, 98th Cong. 7 (1984).

119. 130 CONG. REC. E 1682 (April 12, 1984) (remarks of Rep. Johnson).

120. 441 U.S. 677 (1979).

121. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

tle IX with an unmistakable focus on the benefitted class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.¹²²

The Court concluded that the availability of a private right of action was critical to "avoid the use of federal resources to support discriminatory practices . . . [and] to provide individual citizens effective protection against those practices."¹²³

Similarly, in *North Haven Board of Education v. Bell*,¹²⁴ the United States Supreme Court held that Title IX applies to employment discrimination in the education context, even though the statute was silent with respect to such practices.¹²⁵ Just as in *Cannon*, the Court relied heavily on the legislative intent underlying Title IX, stating, "if we are to give Title IX the scope its origins dictate, we must accord it a sweep as broad as its language."¹²⁶

Finally, and most recently, as discussed above, the United States Supreme Court in *Franklin* held that persons seeking relief under Title IX are entitled to compensatory damages despite the absence of specific authorization in the statute for such a remedy.¹²⁷ The Supreme Court found that Title IX's broad purposes mandated that educational institutions take steps to end sex discrimination when they know or should know that it is occurring.

IV. DEPARTMENT OF EDUCATION INTERPRETATION OF TITLE IX

The United States Department of Education ("DOE"), one of the administrative agencies charged with enforcing Title IX, has consistently imposed an obligation on recipients to remedy discriminatory environments, including sexually hostile environments of which they knew or should have known. This interpretation of the statute, as reflected in DOE's policy statements, regulations, and enforcement actions is consonant with the broad language of Title IX and Congress' intent.

The DOE has issued a policy statement regarding student-to-student sexual harassment that, consistent with Title IX and its implementing regulation, holds recipients liable for allowing this form of

122. *Cannon*, 441 U.S. at 690-93.

123. *Id.* at 704.

124. 456 U.S. 512 (1982).

125. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522, 530 (1982).

126. *North Haven*, 456 U.S. at 521 (citation omitted).

127. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65, 76 (1992).

harassment to infect the educational environment.¹²⁸ Pursuant to the Policy Guidance, "[p]eer sexual harassment can be the basis for a Title IX violation if the conduct creates a hostile environment and the school has notice of the hostile environment but fails to remedy it."¹²⁹ A recipient faces liability under these circumstances *not* "for the actions of the harassing students, but for its own discrimination in permitting the harassment to continue once the school has notice of it."¹³⁰ The Department thus correctly focuses on the educational institutions' own actions in assigning liability for peer hostile environment sexual harassment.

Title IX regulations adopted by DOE also reflect Title IX's broad scope, notably imposing liability on an educational institution for its knowing failure to remedy peer sexual harassment.¹³¹ The regulations do not specifically address sexual harassment; nevertheless, their prohibition against discrimination in federally funded education programs and activities encompasses sexual harassment of students by fellow students. Like the statute itself, the regulation's general prohibition of sex discrimination applies institution-wide. It provides:

[N]o person shall, on the basis of sex, . . . be denied the benefits of, or be subjected to discrimination under, any academic, extracurricular, . . . or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance.¹³²

In addition to this broad proscription against sex discrimination, specific provisions of the regulations extend to recipients who permit student-to-student sexual harassment in school programs. For example, a recipient may not, on the basis of sex, "provide different aid, benefits, or services or provide aid, benefits, or services in a different manner," or "otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity."¹³³ By turning a blind eye to a sexually hostile environment created by students, a recipient allows misconduct based on sex to limit a student's ability to learn and thus violates this provision.

128. See Sexual Harassment Guidance: Peer Sexual Harassment; Draft Document Availability and Request for Comments, 61 Fed. Reg. 42,728 (1996) [hereinafter Sexual Harassment Guidance]; Draft Policy Guidance Regarding Peer Sexual Harassment [hereinafter Policy Guidance].

129. 61 Fed. Reg. 42,728.

130. *Id.*

131. The former Department of Health, Education and Welfare (HEW) promulgated the regulations initially in 1975. HEW's functions under Title IX were transferred in 1979 to DOE, which subsequently adopted the regulations without substantive changes. See *North Haven*, 456 U.S. at 515-16 & nn.4, 5.

132. 34 C.F.R. § 106.31(a) (1996).

133. 34 C.F.R. § 106.31(b)(2),(7) (1996).

In addition, the regulations consistently hold recipients liable for sex discrimination that is not directly committed by the recipient or its employees, but which the recipient facilitates or fails to address. For example, when a recipient requires students or employees to participate in an education program, the recipient will be liable for sex discrimination even if the recipient does not operate that program and therefore does not itself commit the discriminatory act.¹³⁴ Recipients that require participation in programs operated by a third party, such as student-teaching assignments, must “develop and implement a procedure designed to assure” themselves so that the third party does not discriminate against student or employee participants.¹³⁵ Similarly, guidelines to the regulations require recipients to ensure that students enrolled in cooperative education, work-study, or other job placement programs are not subjected to discrimination on the basis of sex, *inter alia*, by employers or prospective employers.¹³⁶ The regulatory guidelines also require recipients entering into written agreements with labor unions or other sponsors of job training programs to obtain assurances that the sponsor will not engage in discrimination.¹³⁷ As these provisions demonstrate, the Title IX regulations place an affirmative obligation on recipients to ensure that discrimination is not occurring — notwithstanding the fact that a particular program is not operated or under the control of the recipient.

Finally, the Office of Civil Rights (“OCR”) enforcement actions under Title IX consistently have imposed liability on recipients that fail to take appropriate action to end peer sexual harassment of which they knew or should have known. For example, in finding that the Eden Prairie School District violated Title IX by failing to address adequately incidents of sexual harassment by male students on a school bus, the OCR concluded that the district had failed to take “timely and effective responsive action” as required by Title IX to stop sexual harassment.¹³⁸ Integral to this finding was the principle that recipients of federal funds must take affirmative measures to provide students with a non-discriminatory environment. Accordingly, when sexual harassment occurs, which OCR defined as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or

134. See 34 C.F.R. § 106.31(d) (1996).

135. See 34 C.F.R. § 106.31(d)(i) (1996).

136. See 34 C.F.R. Pt. 100, App. B (1996).

137. *Id.*

138. Letter of Findings by Kenneth A. Mines, Regional Civil Rights Director, Region V (April 27, 1993), Docket No. 05-92-1174 (on file with the National Women's Law Center).

student, which is unwelcome, hostile, or intimidating," an educational institution must take steps to address it.¹³⁹

These policy pronouncements reflect the expansive scope Congress intended to accord Title IX, as informed by well-established legal principles that have developed under Title VII.

V. SEX DISCRIMINATION OR SIMPLE FLIRTATION? SEARCHING FOR GUIDANCE FROM TITLE VII LAW

The current confusion in the courts over how to treat sexual harassment among students in school is reminiscent of earlier struggles to recognize sexual harassment at work as a form of sex discrimination. The resolution of these issues under sex discrimination law in the workplace can assist courts grappling with similar issues in the Title IX context.

The legal principles that govern sexual harassment under Title VII should serve as a starting point for interpreting Title IX's applicability to peer sexual harassment for two reasons. First, the United States Supreme Court's reliance on Title VII authority to recognize a student's Title IX claim for sexual harassment by a teacher effectively directs courts to look to Title VII law to define the contours of a sexual harassment claim under Title IX. Second, because courts have substantial experience analyzing sexual harassment claims under Title VII, they should draw on their experience with Title VII principles to address sexual harassment under Title IX, as they have in other contexts.

A. THE APPLICABILITY OF TITLE VII PRINCIPLES AS A BASELINE FOR ANALYZING SEXUAL HARASSMENT UNDER TITLE IX

The strongest authority for looking to Title VII principles for guidance in interpreting Title IX claims for sexual harassment comes from the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*.¹⁴⁰ In finding that a damages remedy was available to a student whose complaints of hostile environment harassment by a teacher went unheeded by school officials, the Court relied on *Meritor Savings Bank v. Vinson*.¹⁴¹ In *Vinson*, the Court first recognized hostile environment sexual harassment as a form of sex discrimination prohibited by Title VII.¹⁴² *Franklin's* reliance on *Vinson*, to rule that Title IX prohibits a teacher's sexual harassment of a student, without weakening or qualifying the Title VII principles enunciated in *Vinson*,

139. *Id.*

140. 503 U.S. 60 (1992).

141. 477 U.S. 57 (1986). *Franklin*, 503 U.S. at 75.

142. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

provides clear authority for courts to consult Title VII principles when addressing Title IX sexual harassment claims generally.

Although *Vinson* itself involved a supervisor's sexual harassment of an employee, its reach has not been limited to harassment by supervisors. Every post-*Vinson* court to address the issue has recognized that sexual harassment by peers or co-workers may also create a hostile environment for which an employer may be liable under Title VII. Indeed, in *Vinson* itself, the Court cited approvingly to the Equal Employment Opportunity Commission ("EEOC") Guidelines, which hold employers liable for sexual harassment by co-workers where the employer had notice of the harassment, yet failed to take prompt and appropriate corrective action.¹⁴³ Consequently, there is no basis in law under either Title VII or Title IX for limiting the applicability of Title VII sexual harassment principles to Title IX claims involving sexual harassment by teachers or persons in a supervisory position to the harassed student.

Since *Franklin*, several federal circuit courts have recognized the relevance of Title VII principles to Title IX sexual harassment claims generally, and have applied Title VII standards to determine a school's liability for sexually hostile environments created by third parties.¹⁴⁴ In *Murray v. New York University College of Dentistry*,¹⁴⁵ for example, the United States Court of Appeals for the Second Circuit concluded that *Franklin* "indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."¹⁴⁶ Applying those standards, however, the court found that the educational institution in question had not received sufficient notice of a patient's harassment of a dental student, and therefore was not liable for the hostile environment under Title IX.¹⁴⁷

Similarly, in a case involving allegations of a sexually hostile environment created by an independent contractor, the United States Court of Appeals for the First Circuit applied Title VII standards to determine the school board's liability for allegedly harassing statements made by the contractor.¹⁴⁸ Again, although the court found that the alleged harassment did not create an actionable claim under

143. *Vinson*, 477 U.S. at 65-66.

144. See *infra* notes 144-56 and accompanying text.

145. 57 F.3d 243 (2nd Cir. 1995).

146. *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

147. *Murray*, 57 F.3d at 251.

148. *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996).

these standards, the court's reliance on Title VII principles to reach this conclusion has far-reaching implications for peer sexual harassment claims under Title IX.

The United States Court of Appeals for the Ninth Circuit has also recognized the importance of *Franklin* to peer sexual harassment claims, and by implication, the applicability of Title VII principles to analyze peer sexual harassment under Title IX. In *Doe v. Petaluma City School District*,¹⁴⁹ the Court addressed the question of whether school officials who tolerated known sexual harassment by students were entitled to qualified immunity as public officials.¹⁵⁰ Although the court held that the officials in this case did have qualified immunity because the right to be free from sexual harassment under Title IX was not clearly established at the time of the alleged conduct, which occurred prior to the Supreme Court's *Franklin* decision, the court suggested that this conclusion would have been different had the conduct occurred post-*Franklin*.¹⁵¹ The fact that *Franklin* involved conduct by a teacher rather than other students did not stop the court from recognizing *Franklin's* implications for peer harassment claims.

The Tenth Circuit in *Seamons v. Snow*¹⁵² also purported to rely on Title VII principles by adopting the analytical framework for hostile environment cases under Title VII.¹⁵³ However, in dismissing the Title IX claim brought by a male football player who was subjected to harassment by other male players in the locker room, the court applied this framework in a manner inconsistent with Title VII law. Citing the Title VII analysis for hostile environment cases, the court found that the school was not liable under Title IX for failing to remedy the harassment because the school's actions with regard to the plaintiff were not "sexual," in that similar incidents affecting girls were treated identically.¹⁵⁴ However, Title VII standards do not require an employer's response to sexual harassment charges to be "sexual" in order to recognize a sexual harassment claim under Title VII. Rather, these standards impose liability where the employer, despite notice, failed to remedy harassment that was itself based on the sex of the person harassed. The *Seamons* court's confusion may have stemmed from the fact that the plaintiff did not allege that his teammates' conduct created a sexually hostile environment or was based on his sex. Rather, he alleged that the school's response discriminated

149. 54 F.3d 1447 (9th Cir. 1995).

150. *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1448-49 (9th Cir. 1995).

151. *Petaluma*, 54 F.3d at 1450-51.

152. 84 F.3d 1226 (10th Cir. 1996).

153. *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996).

154. *Seamons*, 84 F.3d at 1233.

against him based on his sex in violation of Title IX.¹⁵⁵ Although the court understood that Title IX reaches only discrimination that occurs on the basis of sex, it improperly focused the "because of sex" inquiry on the conduct of the school, rather than the harassing conduct itself.¹⁵⁶

A number of district courts that have addressed peer sexual harassment claims under Title IX also have recognized the similarity of Title VII and Title IX as applied to sexual harassment and have looked to Title VII principles for guidance.¹⁵⁷ In *Doe v. Petaluma City School District*,¹⁵⁸ the court held that the legal standard developed under Title VII for co-worker hostile environment harassment applies equally to student-to-student sexual harassment under Title IX.¹⁵⁹ The court noted:

[S]ound public policy supports applying Title VII standards to student actions as well as employee actions under Title IX, without weakening the standards applied to the students. In addition, this Court discerns in Title IX no intent to provide a lesser degree of protection to students than to employees.¹⁶⁰

Other courts have agreed with this analysis and have likewise applied Title VII sexual harassment principles to Title IX student-to-student sexual harassment claims. For example, the United States District Court for the Western District of Missouri concluded that "*Franklin* supports the conclusion that Title VII law provides standards for enforcing the anti-discrimination provisions of Title IX."¹⁶¹

Similarly, in *Bruneau v. South Kortright Central School District*,¹⁶² the United States District Court for the Northern District of New York analogized to Title VII standards in ruling that Title IX requires schools to take steps to remedy peer hostile environment sexual harassment where the school had actual notice of the harassment.¹⁶³ However, the court departed from Title VII principles by

155. *Id.* at 1230.

156. *Id.*

157. *See infra* notes 158-67 and accompanying text.

158. 1996 WL 432298 (N.D. Cal. 1996).

159. *Doe v. Petaluma City Sch. Dist.*, 1996 WL 432298, at *7 (N.D. Cal. 1993).

160. *Id.* One court has rejected Title VII standards as not providing sufficient protection to students, choosing instead to impose strict liability on schools for all forms of sexual harassment by teachers, quid pro quo or hostile environment. *See Bolon v. Rolla Pub. Sch.*, 917 F. Supp. 1423, 1429 (E.D. Mo. 1996). This court read *Franklin* to support its conclusion. *Id.* at 1428. In *Franklin*, however, the Court cited *Vinson*, which explicitly states that agency principles should be used to determine liability for hostile environment sexual harassment created by supervisors. *Franklin*, 503 U.S. at 75 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986)).

161. *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1022 (W.D. Mo. 1995).

162. 935 F. Supp. 162 (N.D.N.Y. 1996).

163. *Bruneau v. South Kortright Central Sch. Dist.*, 935 F. Supp. 162, 169, 173 (N.D.N.Y. 1996).

requiring actual, as opposed to constructive notice, in order to hold schools liable, based on the court's mistaken belief that Title VII's constructive notice principle was premised on an agency relationship between the harasser and the employer. In fact, as discussed below, Title VII liability in co-worker harassment cases attaches because of the employer's own conduct in permitting the hostile environment to continue unabated. In contrast, where the harasser does act as the employer's agent, for example where the harassment is quid pro quo harassment or where a supervisor exercises his delegated authority to create a hostile environment, the employer is liable for the harassment regardless of notice.¹⁶⁴

Cases outside the peer harassment context provide additional support for courts to draw on Title VII sexual harassment principles in adjudicating Title IX sexual harassment claims. Since *Franklin*, numerous courts have invoked Title VII principles to analyze Title IX sexual harassment claims involving sexual harassment of students by teachers.¹⁶⁵ In addition, Title VII standards have been used to analyze claims of employment discrimination under Title IX based largely on the similarity of both statutes' broad proscription of sex discrimination.¹⁶⁶ As the United States Court of Appeals for the Third Circuit recognized in a sexual harassment claim brought by an employee, "[t]hrough the sexual harassment 'doctrine' has generally developed in the context of Title VII, [the EEOC] Guidelines seem equally applicable to Title IX."¹⁶⁷

The use of Title VII principles to further develop the contours of Title IX's proscription against sex discrimination draws on the broad experience of the federal courts in deciding Title VII claims. Similarly, Title VII law has served as a stepping stone for courts interpreting other areas of the law that broadly proscribe sex discrimination.

164. See, e.g., *Horn v. Duke Homes*, 755 F.2d 599, 603, 605-06 (7th Cir. 1995) (holding employers strictly liable for quid pro quo harassment); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (holding employers liable under agency principles for hostile environment created by supervisor's exercise of delegated authority because the supervisor relied on the employer's authority to perpetrate the harassment).

165. See, e.g., *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 754-55 (E.D. Va. 1995); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1519-21 (M.D. Ala. 1994); *Pallett v. Palma*, 914 F. Supp. 1018, 1024 (S.D.N.Y. 1996); *Bustos v. Illinois Institute of Cosmetology*, 1994 WL 710830, at *3 (N.D. Ill. 1994); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1291 (N.D. Cal. 1993).

166. See, e.g., *Brine v. Univ. of Iowa*, 90 F.3d 271, 275-76 (8th Cir. 1996); *Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 206-07 (4th Cir. 1994); *Mabry v. State Bd. of Community Coll. & Occup. Educ.*, 813 F.2d 311, 316-317 n.6 (10th Cir. 1987); *Pinkney v. Robinson*, 913 F. Supp. 25, 31-32 (D.D.C. 1996); *Nelson v. Univ. of Maine System*, 923 F. Supp. 275, 279 (D. Me. 1996); *Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 375 (D. Md. 1994).

167. *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1366-67 n.2 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

For example, courts construing Title VIII of the Fair Housing Act¹⁶⁸ have looked to Title VII caselaw to hold that the Act's prohibition of sex discrimination in housing extends to sexual harassment, and have invoked Title VII principles to construct a claim for sexual harassment under the Act.¹⁶⁹ In *Shellhammer v. Lewallen*,¹⁷⁰ the first case to address the Fair Housing Act's coverage of sexual harassment, the court recognized the "simultaneity of purpose between Title VII and Title VIII," and found that any differences between the housing and employment context "cannot avoid the fact that both statutes are designed to eradicate the effects of bias and prejudice. Their purposes are, clearly, the same; only their field of operation differs."¹⁷¹ In reasoning that Title VII is entirely applicable to Title VIII, the court concluded:

In view of the policy of broad interpretation of the Fair Housing Act, the statute's remedial purposes, and the absence of any persuasive reason in support of the defendants' contentions that sexual harassment is not actionable under the Act, I conclude that it is entirely appropriate to incorporate this doctrine into the fair housing area.¹⁷²

Accordingly, the court invoked the elements of a Title VII claim for hostile environment sexual harassment to define a hostile environment claim under the Fair Housing Act.¹⁷³ Since *Shellhammer*, courts have uniformly applied Title VII principles to adjudicate sexual harassment claims in the housing context based on the similarly broad reach of both statutes' prohibition of sex discrimination.¹⁷⁴

Likewise, courts have invoked Title VII principles to address sexual harassment under the Equal Protection Clause. For example, the United States Court of Appeals for the First Circuit, in recognizing a medical resident's claim for sexual harassment by co-workers and supervisory employees under both Title IX and the Equal Protection Clause, acknowledged that its analysis was simplified by the fact that it could "draw upon the substantial body of case law developed under Title VII. . . ."¹⁷⁵ Explaining its reliance on Title VII principles to

168. 42 U.S.C. §§ 3601-19 (1994).

169. See *infra* notes 170-74 and accompanying text.

170. 1 Fair Hous. Fair Lend. ¶ 15,472 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985) (unpublished opinion).

171. *Shellhammer v. Lewallen*, 1 Fair Hous. Fair Lend. ¶ 15,472 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985) (unpublished opinion).

172. *Id.*

173. *Id.*

174. See, e.g., *Beliveau v. Caras*, 873 F. Supp. 1393, 1396-97 (C.D. Cal. 1995); *Grieger v. Sheets*, 1989 U.S. Dist. LEXIS 3906, at *7 (N.D. Ill. 1989); *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988). See also *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993).

175. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988).

analyze sexual harassment under the Equal Protection Clause, the court stated: "Because a showing of discriminatory intent is also necessary to make out a claim of disparate treatment under Title VII, 'we have recognized that the analytical framework for proving discriminatory treatment [under Title VII] . . . is equally applicable to constitutional and Title VII claims.'"¹⁷⁶ Accordingly, courts have routinely drawn on Title VII principles to analyze sexual harassment claims brought against public employers pursuant to the Equal Protection Clause.¹⁷⁷

The relevance of Title VII caselaw on sexual harassment to an equal protection claim for sexual harassment stems not from the fact that both claims involve employment settings, but rather from the fact that both sources of law broadly prohibit sex discrimination.¹⁷⁸ The United States Court of Appeals for the Ninth Circuit, for example, explicitly recognized this similarity of purpose between Title VII and the Equal Protection Clause in addressing the question of whether supervisory employees were entitled to qualified immunity in an equal protection claim based on their failure to respond to known sexual harassment by co-workers:

Title VII cases are relevant to the discussion of when the constitutional right to be free of sexual harassment became clearly established because Title VII and equal protection cases address the same wrong: discrimination. Title VII case

176. *Lipsett*, 864 F.2d at 896 (quoting *White v. Vathally*, 732 F.2d 1037, 1039 (1st Cir. 1984)).

177. See, e.g., *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1186 (7th Cir. 1986).

Although some courts appear to require an extra showing of intent to establish a sexual harassment claim under the Equal Protection Clause as opposed to Title VII, they have actually found that the same elements necessary to support a Title VII sexual harassment claim are also sufficient to state an equal protection violation. See *Bator v. Hawaii*, 39 F.3d 1021, 1027-29 & 1028 n.7 (9th Cir. 1994) (stating that an equal protection claim, unlike Title VII, requires a showing of intent, but finding allegations that a supervisor failed to investigate and stop sexual harassment by coworkers stated an equal protection claim); *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537-40 (7th Cir. 1990) (differentiating Title VII and equal protection sexual harassment claims based on the latter's requirement of intent, but finding sufficient intent from the fact that the harasser would not have targeted the plaintiff but for her gender). A clearer analysis would recognize that sexual harassment is *per se* intentional discrimination, and a form of disparate treatment under both Title VII and the Equal Protection Clause. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course."). Consequently, no separate showing of intent, beyond proof of a disparate treatment sexual harassment claim, should be required to establish an equal protection violation.

178. For example, at least one court has applied this analysis outside the employment context to hold prisons liable for racial harassment under the Equal Protection Clause. See *Knop v. Johnson*, 667 F. Supp. 467, 505 (W.D. Mich. 1987).

law establishes that sexual harassment is prohibited sex discrimination, and it reflects our collective understanding of what conduct violates a person's rights. Indeed, our cases 'indicate that there is a very close relationship between [Title VII and equal protection] . . . claims,' and, not surprisingly, case law on equal protection tracks case law on Title VII.¹⁷⁹

Because Title IX likewise broadly prohibits sex discrimination, the use of Title VII precedent to assist courts construing Title IX claims for sexual harassment is equally appropriate.

Those courts that have rejected Title VII principles in the Title IX sexual harassment context have either adopted an overly restrictive reading of Title IX or have misinterpreted important principles of Title VII law.

A number of courts have declined to apply Title VII standards to Title IX sexual harassment claims based on a narrow reading of Title IX that is at odds with the statute's legislative history. For example, as discussed above, in *Davis v. Monroe County Board of Education*,¹⁸⁰ the United States District Court for the Middle District of Georgia ruled that Title IX did not encompass an action for a school's failure to respond to a student's complaints of sexual harassment by another student because sexual harassment by a student "is not part of a school program or activity."¹⁸¹ This interpretation is tantamount to holding that sex discrimination is not covered by Title IX because it is not an education program or activity. In fact, Title IX broadly defines "program or activity" to include "all the operations of" an educational institution, and broadly bars any discrimination occurring under an education program or activity, any part of which receives federal funds.¹⁸² As another district court has observed, this approach "interpret[s] the definition of 'program or activity' in an exceedingly narrow fashion."¹⁸³ The relevant inquiry is not whether the harassment itself constitutes an education program or activity, but whether its occurrence deprives a person of educational benefits of that program because of their sex.¹⁸⁴

179. *Bator*, 39 F.3d at 1028 n.7.

180. 862 F. Supp. 363 (M.D. Ga. 1994), *aff'd & rev'd in part*, 74 F.3d 1186 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

181. *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994), *aff'd & rev'd in part*, 76 F.3d 1186 (11th Cir.), *vacated and reh'g en banc granted*, (11th Cir. 1996). See also *Floyd v. Waiters*, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (sexual assault of student by security guard not actionable under Title IX because security guard's actions "do not constitute discrimination under a 'program or activity' of the Board.").

182. 20 U.S.C. § 1687 (1994).

183. *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 753 (E.D. Va. 1995).

184. See 34 C.F.R. § 106.31 (1996).

Other courts rejecting the analogy to Title VII sexual harassment principles in the Title IX context have misconstrued Title VII's use of the word "agent." Because Title VII defines the term "employer" to encompass "any agent of such a person," and Title IX does not use the word "agent" in prohibiting sex discrimination under any federally funded education program or activity, some courts have ruled that the omission of the word "agent" from Title IX warrants a rejection of Title VII agency principles under Title IX.¹⁸⁵ Accordingly, these courts, just as the Fifth Circuit in *Rowinsky v. Bryan Independent School District*,¹⁸⁶ have ruled that, in order to be held liable under Title IX, recipients themselves, through their governing boards, must take some discriminatory act.

This interpretation of the difference in statutory language between Title VII and Title IX is unwarranted. The use of "agent" in Title VII was intended as a limitation on, rather than an extension of, employer liability. As the Supreme Court recognized in *Meritor Savings Bank v. Vinson*,¹⁸⁷ Congress included the word "agent" in Title VII to signal its intent that employers are not to be held strictly liable for employment discrimination:

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.¹⁸⁸

Indeed, in *Vinson*, the Court was choosing between agency principles and strict liability for hostile environment sexual harassment, not between agency principles or no liability unless formal discriminatory action is taken by an employer's board of directors.

Consequently, if any meaning is to be read into the absence of the word "agent" from Title IX, it would be to extend Title IX liability further than Title VII to hold institutions strictly liable for discriminatory conduct without regard to agency principles. Indeed, one court has rejected Title VII agency principles as not providing sufficient protection to students, choosing instead to impose strict liability on schools for all forms of sexual harassment by teachers, quid pro quo or hostile environment.¹⁸⁹

185. See, e.g., *Howard v. Board of Educ. of Sycamore*, 876 F. Supp. 959, 974 (N.D. Ill. 1995); *Floyd*, 831 F. Supp. at 876.

186. 80 F.3d 1006, 1016 (5th Cir. 1996).

187. 477 U.S. 57 (1986).

188. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

189. *Bolon v. Rolla Pub. Sch.*, 917 F. Supp. 1423, 1428-29 (E.D. Mo. 1986). However, in reaching this conclusion, the court relied on questionable reasoning, reading *Franklin* to support its conclusion that Title IX requires strict liability, rather than relying on Title VII agency principles. See *id.* at 1428. However, in *Franklin*, the Supreme Court cited its earlier Title VII ruling in *Vinson*, which explicitly states that agency principles

The only circuit court to reject Title VII standards in analyzing a Title IX sexual harassment claim is the Fifth Circuit in *Rowinsky*.¹⁹⁰ As discussed above, however, the reasoning of the *Rowinsky* court, which viewed the application of Title VII standards in this context as "problematic" because "unwanted sexual advances of fellow students do not carry the same coercive effect,"¹⁹¹ cannot be squared with Title VII law, which prohibits sexual harassment that occurs because of sex regardless of the power relationship between the harasser and the complainant.

Properly understood, Title VII sexual harassment principles serve as a baseline for analyzing Title IX sexual harassment claims since both statutes broadly proscribe the same conduct and impose upon institutions a similar obligation to provide a non-discriminatory environment.¹⁹² Importation of Title VII standards for sexual harassment into the education context is necessary to ensure that students have at least the same amount of protection against sexually hostile environments as adults have in the workplace.¹⁹³

The unique role of our schools also supports the application of Title VII principles to establish strong legal protections against sexual harassment. As the Supreme Court has recognized, schools serve as a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to this environment."¹⁹⁴ Schools also play an important role in the socialization of students.¹⁹⁵ Schools "prepare pupils for citizenship" and "inculcate the habits and manners of civility as values in themselves."¹⁹⁶ In this regard, "a proper educational environment requires close supervision of schoolchildren, as well as enforcement of rules of conduct that would be perfectly permissible if undertaken by an adult."¹⁹⁷

Nothing could be more inconsistent with this educational mission than a classroom atmosphere that "injects the most demeaning sexual stereotypes into the general . . . environment,"¹⁹⁸ and requires students to "run a gauntlet of sexual abuse" on a daily basis.¹⁹⁹ Courts

should be used to determine liability for hostile environment sexual harassment created by supervisors. See *Franklin v. Gwinnett Co. Pub. Sch.*, 503 U.S. 60, 75 (1992).

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

191. *Id.* at 1011 n.11 (emphasis added).

192. See *supra* notes 140-79 and accompanying text.

193. See *supra* notes 104-79 and accompanying text.

194. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

195. See *infra* notes 196-97 and accompanying text.

196. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

197. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

198. *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981).

199. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

have had no trouble recognizing that sexual harassment is "demeaning and disconcerting" to adults in the workplace.²⁰⁰ It is no less so to children and young adults in the classroom. Students, particularly those in elementary and secondary school, are equally in need of protection from this type of assault.²⁰¹ As one court recognized in a case involving sexual abuse of a student by a school employee:

[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives.²⁰²

Students, just as adults in the workplace, should not be subjected to "environments so heavily polluted with discrimination as to destroy completely [their] emotional and psychological stability."²⁰³

Accordingly, application of Title VII standards in the education context is appropriate and necessary. Any other conclusion would provide students with less protection from sexually hostile environments than is available for employees — a result that contravenes Title IX's mandate and undercuts the mission of educational institutions.

B. TITLE VII STANDARDS SUPPORT HOLDING SCHOOLS LIABLE FOR KNOWINGLY FAILING TO REMEDY PEER SEXUAL HARASSMENT

Sexual harassment was first recognized by a federal court as a form of prohibited sex discrimination under Title VII in 1976.²⁰⁴ It was not until 1986 that the Supreme Court established that Title VII protects employees from sexual harassment that causes a hostile environment, even when it does not result in tangible economic harm.²⁰⁵ Although it is now axiomatic that Title VII imposes on employers the obligation to correct a sexually hostile work environment once they have notice that such an environment exists,²⁰⁶ the discomfort of the

200. *Henson*, 682 F.2d at 902.

201. *Franklin*, 60 U.S. at 75. Cf. *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 149 (5th Cir. 1992) ("[T]here is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter."), *vacated on reh'g*, 15 F.3d 443 (5th Cir. 1994).

202. *Patricia H. v. Berkeley Unified School District*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993).

203. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

204. *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976).

205. *Vinson*, 477 U.S. at 63-69 (1986).

206. See, e.g., *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803-04 (6th Cir. 1994); *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485-86 (3d Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014-1015 (8th Cir. 1988); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 n.3 (5th Cir. 1987); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986); *Snell v. Suffolk County*, 782 F.2d 1094, 1103-1104 (2d Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th

first courts to struggle with sexual harassment under Title VII is similar to the current confusion in the courts regarding Title IX's application to sexual harassment.

Early court decisions refusing to hold employers responsible for remedying sexual harassment at work bear a striking resemblance to the more recent court decisions that have refused to impose a similar obligation on schools under Title IX.²⁰⁷ For example, one early Title VII decision viewed sexual harassment as "isolated and unauthorized sexual misconduct of one employee to another," and required proof of "an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination" in order to hold employers liable for sexual harassment under Title VII.²⁰⁸ This court's requirement of a discriminatory employer policy to support Title VII liability is similar to the *Rowinsky* court's requirement that a plaintiff establish a school district policy or practice of treating sexual harassment complaints by girls worse than sexual harassment complaints by boys.²⁰⁹

Using similar reasoning, another early Title VII decision refused to recognize sexual harassment as a form of sex discrimination because it viewed it as "nothing more than a personal proclivity, peculiarity or mannerism" with "no relationship to the nature of the employment" because it did not serve any employer policy.²¹⁰ The *Davis* district court took a similar view of sexual harassment in schools, rejecting Title IX liability for a school's knowing failure to remedy sexual harassment by a student because "sexually harassing behavior of a fellow fifth grader is not part of a school program or activity."²¹¹

The spurious requirement of a widespread policy or practice to support liability on a sex discrimination claim is unique to sexual harassment. A discriminatory firing or refusal to hire by an individual supervisor, for example, if proven, has been easily recognized by courts as sex discrimination without regard to an employer's overall practice or formal policy. Courts' resistance to approaching sexual harassment in the same manner as other forms of sex discrimination may reflect judges' own biases that "boys will be boys" and that unruly sexual behavior is a fact of life that should be tolerated rather than

Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981); *DeGrace v. Rumsfeld*, 614 F.2d 796, 803 (1st Cir. 1980).

207. See generally, *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), reversed, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), vacated without opinion on procedural grounds, 562 F.2d 55 (9th Cir. 1977).

208. *Miller*, 418 F. Supp. at 234, 236.

209. *Rowinsky*, 80 F.3d at 1006.

210. *Corne*, 390 F. Supp. at 163.

211. *Davis*, 862 F. Supp. at 367.

regulated through sex discrimination law. In the Title VII context, however, any such reservations have given way to the universal recognition among the courts that sexual harassment is an unlawful barrier to equal opportunity in the workplace. The manner in which Title VII courts have resolved employer liability for such conduct should assist courts struggling with similar issues under Title IX.

Under Title VII law, an employer is liable for hostile environment harassment where the employer knew or should have known of the harassment, but failed to take prompt and appropriate corrective action, regardless of whether the harasser acted as an agent of the employer.²¹² Consequently, employers are liable under Title VII for condoning hostile environment harassment whether perpetrated by a supervisor, co-worker or even a non-employee. Indeed, courts consistently have interpreted Title VII to hold employers responsible for failing to remedy hostile work environment harassment by non-employees where the employer knew or should have known of the harassment.²¹³

As one court explained:

Under both standards [for acts of harassment by employees and by non-employees], the employer accrues liability not because of the actual acts of harassment but because it had the ability to end the harassment but failed to do so. Viewed in that light, the identity and employment status of the harasser is immaterial; the relevant issue is whether the employer subjected its employee to a hostile work environment by allowing the known harassment to continue unabated.²¹⁴

The EEOC Guidelines also adopt this approach, holding employers liable for failing to take immediate and appropriate corrective action in response to sexual harassment by non-employees where the employer knew or should have known of the harassment.²¹⁵

212. See *Hall*, 842 F.2d at 1015-16 (rejecting employer's argument that it could not be held liable for co-worker harassment because the harassers were not agents, and holding employer liable for its own failure to respond to the harassment); *Henson*, 682 F.2d at 910 (explaining that liability for employer's failure to respond to hostile environment harassment does not require harasser to act as employer's agent).

213. See *Menchaca v. Rose Records*, 67 Fair Empl. Prac. Cas. (BNA) 1334, 1336-37 (N.D. Ill. 1995); *Otis v. Wyse*, 1994 U.S. Dist. LEXIS 15172 at *17-19 (D. Kan. 1994); *Sparks v. Regional Med. Ctr.*, 792 F. Supp. 735, 738 n.1 (N.D. Ala. 1992) (citing 29 C.F.R. 1604.11(e)); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1027-28 (D. Nev. 1992); *Magnuson v. Peak Technical Servs., Inc.*, 808 F. Supp. 500, 512-13 (E.D. Va. 1992); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981). Cf. *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987) (finding the employer's response sufficient so as to not impose liability).

214. *Otis*, 1994 U.S. Dist. LEXIS, at *18.

215. 29 C.F.R. § 1604.11(e) (1996). A number of courts have cited this specific provision of the guidelines with approval. See, e.g., *Henson*, 682 F.2d at 910; *infra* note 217. The EEOC guidelines "constitute [t]he administrative interpretation of the Act by the

Because the employer's obligation to remedy sexual harassment stems from its duty to provide workers with a non-discriminatory environment, Title VII liability for such conduct does not depend on the harasser's status as an employee or agent of the employer. Rather, under agency law, an employer is responsible for acts by persons not acting in an agency capacity where the employer acts negligently or recklessly in managing the workplace.²¹⁶ This principle operates as an exception to the general rule that an employer is responsible only for the acts of an employee committed in the scope of employment or under the guise of actual or apparent authority.²¹⁷ Explaining the purpose of this rule in the Title VII context, the Eleventh Circuit in *Henson v. City of Dundee*²¹⁸ recognized:

The environment in which an employee works can be rendered offensive in an equal degree by acts of supervisors, . . . co-workers, . . . or even strangers to the workplace.²¹⁹

Similarly, courts analyzing sexual harassment claims brought under the Equal Protection Clause have consistently held that a public employer's knowing failure to remedy a sexually hostile work environment violates the Equal Protection Clause.²²⁰ As in the Title VII context, employer liability in such actions derives from the employer's acquiescence in the harassment and does not require any employment or agency relationship between the harasser and employer. As Judge Richard A. Posner explained in his concurring opinion in *Bohen v. City of East Chicago*,²²¹ "so far as the harassment itself is concerned, it is as if it had been done by private persons."²²²

This reasoning applies with equal force to the Title IX context. The fact that student-harassers are not agents of a school system should not mitigate a school's liability for condoning such harassment any more than it would in the employment context. Where a school knowingly tolerates sexual harassment among students by failing to remedy a hostile and abusive educational environment of which it had

enforcing agency,' and consequently they are 'entitled to great deference.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)).

216. Restatement (Second) of Agency § 219(2)(b) (1958).

217. *Id.*

218. 682 F.2d 897 (11th Cir. 1982).

219. *Henson*, 682 F.2d at 910 (citations omitted).

220. See, e.g., *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-902 (1st Cir. 1988); *Andrews*, 895 F.2d at 1479; *Bohen v. East Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994). See also *Cross v. Alabama Dept. of Mental Health and Mental Retardation*, 49 F.3d 1490, 1507-1508 (11th Cir. 1995) (company officials liable under § 1983 for violating equal protection clause based on failure to correct supervisor's sexual harassment of employee despite notice of harassment).

221. 799 F.2d 1180 (7th Cir. 1986).

222. *Bohen*, 799 F.2d at 1190 (Posner, J., concurring).

notice, Title VII principles dictate that the school be held accountable. Any less would subject students to the very harms from which their teachers are protected by Title VII.

CONCLUSION

The harm sexual harassment exacts on its young victims — students such as named plaintiffs LaShonda D., Christine Franklin, or Bryan Seamons — is indisputable. These cases and others demonstrate vividly that sexually hostile environments mean much more than kisses on the cheek, innocent flirting, or rites of passage to be endured. As courts in this rapidly changing area of the law move towards adopting the “moral and ethical” approach to addressing such misconduct, as in the *Davis* case, our schools will become safer places for all students. The promise of Title IX demands no less.