The Department of Education Clarifies Its Position Concerning Peer Sexual Harassment: But Will Federal Courts Take Notice?

Mark Blais
THE DEPARTMENT OF EDUCATION CLARIFIES ITS POSITION CONCERNING PEER SEXUAL HARASSMENT: BUT WILL FEDERAL COURTS TAKE NOTICE?

Mark Blais*

Congress enacted Title IX as part of the education amendments of 1972 to protect individuals from sex discrimination in any educational program or activity receiving federal aid.1 The lack of any federal statute addressing sex discrimination in educational institutions motivated Congress to enact Title IX.2 Initially, Title IX was used primarily to challenge discrimination in school admission policies,3 hiring and promotion

* J.D. candidate, May 199, The Catholic University of America, Columbus School of Law

1. See 20 U.S.C. §1681 (1994) (stating that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”).


3. See Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1190 (11th Cir. 1996) (Davis I) (acknowledging that Title IX’s chief purpose was initially to challenge discriminatory practices in admission policies and athletic programs), vacated en banc, 120 F.3d 1390 (11th Cir. 1997); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1416 (N.D. Iowa 1996) (explaining that Title IX was originally limited to claims challenging discrimination in athletic and admission policies); 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh) (stating that “the crux of Title IX is a provision banning sex discrimination in educational programs receiving Federal funds . . . [which] would cover such crucial aspects as admissions procedures, [and] scholarships”); see also Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 780 (3d Cir. 1990) (addressing a Title IX case against a high school for revoking a female student’s admission to the National Honor Society after she became pregnant from pre-marital sexual activity); Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264, 1269-70 (9th Cir. 1974) (analyzing a suit brought against an educational institution for its discriminatory practice of requiring higher admissions standards for girls to balance its male-to-female ratio).
policies, and the allocation of federal funds in school athletic programs. Title IX, however, has become a major tool in the fight against sexual harassment in educational institutions.

According to the United States Department of Education, Office for Civil Rights (OCR), sexual harassment is "verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX." The Equal Employment Opportunity Commission (EEOC), the agency responsible for implementing regulations regarding sexual har-

4. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 519-520 (1982) (discussing whether employment discrimination is covered by Title IX's prohibitions); Chance v. Rice Univ., 989 F.2d 179, 179-80 (5th Cir. 1993) (discussing whether a "disparate impact" theory of discrimination applies in a Title IX case involving university assignment and compensation practices); 118 CONG. REC. 5803 (1972) (emphasizing that Title IX "would cover such crucial aspects as admissions procedures, scholarships, and faculty employment").

5. See Julie Elizabeth Davis, Should Schools Be Held Liable for Peer Sexual Harassment Under Title IX of the Education Amendments of 1972?, 20 AM. J. TRIAL ADVOC. 219, 219 (1996) (noting that Title IX was used primarily as a means to assist women seeking equal access to athletic teams); see also Cohen v. Brown Univ., 991 F.2d 888, 893-900 (1st Cir. 1993) (finding that Title IX covers discrimination in school athletic programs), aff'd in part, rev'd in part, 101 F.3d 155 (1st Cir. 1996), cert. denied, 117 S. Ct. 1469 (1997); Haffer v. Temple Univ., 688 F.2d 14, 16 (3d Cir. 1982) (concluding that Title IX prohibits sex discrimination in school athletic programs). Title IX's greatest contribution thus far has been in the area of women's collegiate athletics, where it has precipitated marked increases in opportunities available to female athletes. See Cohen, 991 F.2d at 893-900 (discussing whether Title IX covers discrimination in school athletic programs); Haffer, 688 F.2d at 15-17 (addressing a case brought by students who alleged that a university committed sex discrimination in its athletic programs); see also Barbara Huebner, Title IX has been crew's propeller, BOSTON SUNDAY GLOBE, Oct. 19, 1997, at D12 (discussing Title IX's effect on women's crew). For example, in theory colleges with a 45% female student body should also have 45% female athletes as well. See id. Traditionally, the large number of males on college football teams has distorted the percentages in favor of men. See id. However, Title IX has helped to lessen the disparity by providing women with opportunities in a wider variety of sports, such as in women's crew. See id.

6. For examples of pivotal cases in Title IX jurisprudence as applied to sexual harassment in educational institutions, see Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (making compensatory damages available for Title IX violations), and Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (using Title VII standards in the context of sex-related employment discrimination under Title IX). Although schools traditionally responded to claims of peer sexual harassment by questioning the victim's complicity in the aggressor's behavior and labeling such claims as normal male behavior, peer sexual harassment has proven recently to be a genuine concern. See Davis, supra note 5, at 219.

assment in the work environment, established two forms of workplace sexual harassment under Title VII of the Civil Rights Act of 1964 that are applicable to the Title IX analysis of sexual harassment in educational institutions. These two forms of workplace sexual harassment include quid pro quo harassment and hostile environment harassment.

Quid pro quo sexual harassment occurs when an employee is coerced into sexual conduct as a condition of maintaining employment. Hostile environment sexual harassment involves sexually harassing conduct that is so severe or pervasive that it alters the conditions of the working or learning environment. Within the academic arena, hostile environment sexual harassment may occur in two ways—by a school employee’s harassment of a student or by one student’s harassment of another student. Regardless of which scenario occurs, courts generally apply standards established under Title VII’s treatment of workplace sexual harassment to guide their interpretation in Title IX disputes because Title IX failed to specify a standard. For example, some courts adhered to

8. See 29 C.F.R. §1604.11(a) (explaining that sexual harassment may be present when employment decisions are based on performance of sexual favors, or when an employer’s conduct is not linked such economic decisions as employment, but nevertheless causes a hostile working environment); see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (discussing how the EEOC defined two forms of sexual harassment, quid pro quo and hostile environment).

9. See infra note 84 and accompanying text (explaining quid pro quo sexual harassment).

10. See infra note 85 and accompanying text (explaining hostile environment sexual harassment).

11. See Meritor, 477 U.S. at 65 (explaining that when quid pro quo sexual harassment occurs a connection exists between an employer’s behavior and a grant or denial of an economic benefit to an employee); 29 C.F.R §1604.11 (discussing quid pro quo sexual harassment in the context of Title VII); infra note 84 and accompanying text (discussing quid pro quo sexual harassment).

12. See Meritor, 477 U.S. at 65 (discussing hostile environment sexual harassment in the workplace, as defined by the EEOC); 29 C.F.R. §1604.11(a) (recognizing hostile environment sexual harassment as constituting a legal form of sexual harassment).

13. See Lipsett v. University of Puerto Rico, 864 F.2d 881, 899-901 (1st Cir. 1988) (addressing the liability of an educational institution for the alleged discriminatory treatment of a female surgical resident by a superior under Title IX).

14. See Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 66-70 (D.N.H. 1997) (addressing a claim brought by a junior high student against a school board for failing to remedy alleged sexual harassment committed by fellow students).

15. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (stating that the same rule that applies “when a supervisor sexually harasses a subordinate” under Title VII “should apply when a teacher sexually harasses and abuses a student” (quoting Meritor, 477 U.S. at 64 (a Title VII case); Davis I, 74 F.3d at 1190, 1193 (employing Title VII standards in a Title IX hostile environment claim against a school for its knowing failure to remedy the sexual harassment); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995) (finding that in “claims of discrimination brought under Title...
Title VII's requirement that an entity have actual or constructive notice of sexual harassment before finding liability in the context of employee-on-student sexual harassment. Courts have disagreed vehemently, IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII''); Lipsett, 864 F.2d at 896-97 (holding that Title VII standards for proving discriminatory treatment apply to employment-related claims arising under Title IX); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) (regarding Title VII as "the most appropriate analogue when analyzing cases under Title IX").

16. See Lipsett, 864 F.2d at 900-01 (analyzing the Supreme Court's decision in Meritor to conclude that an educational institution could be liable for its failure to remedy hostile environment sexual harassment directed toward a trainee by a supervisor, even if the victim of such harassment fails to notify the proper officials); Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1528 (M.D. Ala. 1994) (holding that the "knew or should have known" standard of liability is appropriate where hostile environment sexual harassment is perpetrated by a school employee against a student). These holdings, however, were recently overruled by a controversial Supreme Court decision. See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998) (concluding that damages are unavailable under Title IX in circumstances involving the sexual harassment of a student by a teacher, "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct"); see also Richard Carelli, Sexual harassment rulings differ for workplace, school, BOSTON SUNDAY GLOBE, June 28, 1998, at A21 (stating that the Supreme Court's decision "to shield school districts from responsibility when teachers harass students unless administrators knew and [deliberately] did nothing about it," creates "a daunting trek for families of students victimized by teacher misconduct").

In Gebser, a high school teacher engaged in a sexual relationship with a ninth-grade student. See Gebser, 118 S. Ct. at 1993. The relationship consisted of sexual intercourse on numerous occasions, extending through the summer and into the student's tenth-grade year. See id. Although the student failed to report the relationship, parents of other students complained to the principal about inappropriate sexual remarks made by the teacher in class. See id. The principal subsequently warned the teacher about his classroom comments, but neglected to implement an official grievance procedure for receiving complaints of sexual harassment or distribute an official policy on sexual harassment. See id. Soon thereafter, a town police officer found the teacher and student having sex and arrested the teacher. See id.

In its analysis, the Court noted first that Title IX, unlike Title VII, does not expressly mandate the application of agency principles. See id. at 1995-96 (finding no "reference to an educational institution's 'agents'" in Title IX's language). Next, the Court reasoned that "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute . . . [so as] to avoid frustrating [its] purposes." Id. at 1996. The Court ultimately concluded "that it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official." Id. at 1997. Indeed, the Court noted that Congress never mentioned "the subject of either the right or the remedy" under Title IX, and that when it "expressly considered both in Title VII [Congress] restricted the amount of damages available." Id. Thus, the Court determined that a damage recovery against a funding recipient, absent actual knowledge of the discrimination, should be limited. See id.

After examining Title IX's purpose, the constitutional authority pursuant to which Con-
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however, on the proper method of extending liability to school districts for student-on-student, or “peer,” sexual harassment. 17

17. See Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997) (requiring that a school district have actual notice of peer harassment and intentionally discriminate against the victim for it to be liable, even though the OCR’s recently issued Sexual Harassment Guidance advocated a different test); see also Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997) (Davis II) (rejecting the applicability of student-on-student sexual harassment in Title IX claims). But see Doe v. Oyster River Co-op. Sch. Dist., 992 F. Supp. 467, 475-76 (D.N.H. 1997) (adopting exact Title VII and OCR criteria in a peer sexual harassment case only two months after the Londonderry decision in the same federal district).

The level of knowledge required of a school district in Title IX peer sexual harassment cases has been the focus of substantial dispute among the courts. Compare Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (extending liability under Title IX if the school district “knows or should have known of the hostile environment and fails to take corrective action”), with Wright v. Mason City Community Sch. Dist., 940 F.
While federal courts continue to quarrel over the issue of school district liability for peer sexual harassment, claims of pervasive sexual behavior between students have been growing in exorbitant numbers. Increases in sexual harassment claims, studies illustrating the deleterious effects of sexual harassment on students, and the differing approaches of federal courts in developing applicable criteria to determine the liability of school districts prompted the OCR to issue a policy guidance, explicitly clarifying its policy on extending liability to school districts in peer sexual harassment cases under Title IX. The OCR adopted a test

Supp. 1412, 1419 (N.D. Iowa 1996) (extending liability under Title IX if the school district had actual knowledge of the harassment and "intentionally" failed to correct the situation), and Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir.) (finding that a school district cannot be liable under Title IX if the district itself does not treat claims of sexual harassment differently based on the sex of the complainant), cert. denied, 117 S. Ct. 165 (1996).


19. See supra note 18 (listing cases involving peer sexual harassment claims). Increases in peer sexual harassment claims have catapulted this issue into the mind of the public. See Tamara Henry, More kids sue school over peer sex harassment, USA TODAY, Oct. 1, 1996, at 1D (illustrating one of many recent cases against a school district for alleged sexual misconduct instigated by students in the educational environment). In addition, much public attention followed the suspension of a six-year-old boy from school after he kissed a female classmate on the cheek. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034 (1997) (confirming that an incident involving a kiss on the cheek between two first graders does give rise to a valid sexual harassment claim); Katy Kelly & David J. Lynch, Headlines, S'mooch lands 1st-grader in hot water, USA TODAY, Sept. 26, 1996, at 1A (explaining the public uproar that resulted from the suspension of a six-year-old boy from school for kissing a fellow student on the cheek).

20. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 15 (1993) [hereinafter AAUW SURVEY]. A 1993 study by the American Association of University Women Educational Foundation (AAUW) found that of the 85% of girls in grades eight through eleven who had been victims of unwelcome sexual affronts or touching in school, 33% did not want to attend school, 32% did not want to talk in class as often, and 24% skipped class or school in an attempt to avoid further harassment. See id. at 7, 15. Female students also reported feelings of fear, confusion, and a loss of self-esteem due to sexual harassment. See id. at 17; see also NAN D. STEIN, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN PUBLIC (AND PRIVATE) SCHOOLS 2-7 (The Wellesley College Center for Research on Women, 1993) (finding that the majority of girls who experienced sexual harassment were harassed by their peers).

21. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,034 (confirming that sexual
for peer sexual harassment that is directly analogous to Title VII principles of extending liability to employers for sexual harassment in the workplace. Under this approach, a school district can only be held liable for peer sexual harassment if it fails to take immediate and proper remedial action in response to the harassment of one student by another student that creates a hostile learning environment that the district "know[ed] or should have known" existed. The OCR's policy guidance clearly established that a school district that fails to respond effectively to the existence of a hostile environment may be found liable upon actual or constructive notice.

Despite the OCR's unequivocal assertion that, similar to Title VII cases, liability may be extended if the school district knew or should have known of the sexual harassment and failed to correct it, federal courts continue to shape their own tests. For instance, the United States District Court of the District of New Hampshire recently rendered a decision on the issue of extending liability to school districts for peer sexual harassment under Title IX, and decided to modify the OCR's adoption of strict Title VII principles, calling its decision a "moderate approach."

harassment of students by school employees, other students, or third parties is actionable under Title IX). The OCR's policy guidance was a response to numerous "requests from school officials, teachers, parents, students and others for information on [peer sexual harassment]." See Education Department Issues Policy Guidance on Sexual Harassment, U.S. NEWSWIRE, Mar. 13, 1997, available in 1997 WL 5711388. In addition to the OCR's standards for establishing the liability of a school district for its failure to remedy peer sexual harassment, the policy guidance contains suggestions on how schools can recognize, respond, and prevent sexual harassment. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,034.

22. Compare Sexual Harassment Guidance, 62 Fed. Reg. at 12,039 (stating that school district liability for peer sexual harassment may exist if "the school knows or should have known of the harassment, and ... [it] fails to take immediate and appropriate corrective action"), with EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (concluding that Title VII allows claims based on hostile environment sex discrimination if an employer knew or should have known of the existence of a hostile environment and failed to respond properly).

23. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,039 (finding that a constructive notice standard is sufficient in peer sexual harassment cases); see also infra notes 151, 153 (describing the "unwelcome" and "pervasive" elements of a sexually hostile environment claim that are necessary to determine if certain harassing acts are actionable).

24. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,042. A school district has notice of a sexually hostile environment "if it actually 'knew, or in the exercise of reasonable care, should have known' about the harassment." Id. (quoting Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991)). The "should have known" portion of this inquiry establishes the existence of constructive notice as opposed to actual notice. See id.

25. See supra note 17 (noting the differences in approaches adopted by federal courts for extending liability to school districts for peer sexual harassment).

26. See Londonderry, 970 F. Supp. at 74 (explaining the "moderate approach[]" as allowing a plaintiff to bring suit against a school district under Title IX upon proof of the
In *Doe v. Londonderry School District*, Jane Doe, a seventh grade student at the Londonderry Junior High School (LJHS), alleged that three boys began to harass her in September 1993. According to Doe, the three boys frequently called her vulgar, sexually derogatory names in the presence of others who were encouraged by the boys to join in the name-calling. The episodes of abusive behavior continued to escalate, and Doe informed the school's guidance counselor, Katherine Ciak, of the problem. Although Ciak confronted the boys, who promised to stop their behavior, they did not cease the harassment.

Doe met with Ciak a second time in October and informed her parents of the harassment shortly thereafter. Later that school year, Doe received a pornographic drawing of herself showing one of the boys anally penetrating her. In response, Doe's mother spoke with the school principal, Nancy Meyers, who stated that no punishment would be forthcoming due to an inconclusive investigation and told Jane's mother "that such conduct was normal behavior for children in Jane's age group."

Doe gradually became extremely depressed and stopped eating and sleeping well. Moreover, because the boys continued their sexually harassing behavior without school intervention, Doe threatened to run away and commit suicide. As a result, Doe's parents decided to remove her from LJHS and enroll her in a private school, after which they

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existence of a hostile environment, actual knowledge by the school of the hostile environment, and the intentional failure of the school district to take corrective action).

27. 970 F. Supp. 64 (D.N.H. 1997).
28. See id. at 66.
29. See id. at 66-67. Specifically, the boys referred to Jane as a “slut,” a “whore,” and a “f---ing bitch.” See id. at 67.
30. See id. Hoping to ameliorate the situation on her own, Doe previously had asked the boys to stop their conduct, but they only laughed and continued to taunt her. See id.
31. See id. On one occasion, “the boys pushed Jane into lockers and down the stairs, knocked her books from her hands, and spat on her.” Id. In addition, Doe began to receive numerous phone calls at home, during which male voices would call her a “bitch, slut, and f---ing whore.” Id. One of the boys later admitted to making one of the harassing phone calls. See id. at 69.
32. See id. at 67. Prior to meeting with Jane's mother in November, Ciak told Jane to "stay away from" or 'ignore' the boys. Id. Ciak subsequently told Jane's mother that she was “taking care of it.” Id.
33. See id. at 68.
34. Id. When Jane's mother brought the sexually demeaning drawing of Jane to Meyers, it became evident to Mrs. Doe that Meyers had not even been informed of the incident prior to their meeting. See id.
35. See id. at 67. She also began to do poorly in school and participated less in extracurricular activities. See id. At one point, instead of investigating Jane's complaints, Meyers allegedly suggested that the matter be dropped. See id. at 68 n.6.
36. See id. at 69.
brought suit on their daughter's behalf against the Londonderry school district under Title IX. 37

Denying the school district's motion for summary judgment, the district court analyzed when and to what extent school districts may be found liable under Title IX. 38 The court reviewed OCR policy guidelines, 39 other federal court decisions, 40 and analogous case law under Title VII 41 and concluded that a school district may be found liable only if it had actual knowledge of a hostile environment and intentionally failed to remedy the situation. 42 Although the court conceded that it owed considerable deference to the OCR, 43 which emphatically adopted the "knows or should have known" standard for extending liability only three months earlier, 44 it nonetheless adopted a stricter approach. 45 To date, only three federal district courts and one federal circuit court have adopted a test with the protective stance advocated by the OCR as appropriate in peer sexual harassment cases. 46

37. See id. at 69-70. Even after Jane enrolled in a private school, she continued to suffer from the effects of the sexual harassment. See id. at 69. Not only did her grades continue to decline, but she also attempted suicide and subsequently underwent counseling due to her lingering feeling of betrayal by the school district. See id.

38. See id. at 71.

39. See id. at 72, 75 (referring to the OCR's Sexual Harassment Guidance to find that the OCR has concluded that peer sexual harassment may violate Title IX and that a school district can be held liable if it "knows or should have known of the harassment and . . . fails to take immediate and appropriate [] action").

40. See id. at 73 (explaining that the tests for establishing school district liability have varied among the federal courts, but generally adhere to either a "rigorous," "moderate," or "expansive" approach).

41. See id. at 72-73 (noting that although Title VII sexual harassment principles have been useful guides, courts generally adopt more flexible standards recognizing the differences between sexual harassment between coworkers in the workplace and between students in the school environment).

42. See id. at 74 (construing the "moderate approach" as the best resolution to "balance the competing concerns relevant to school district liability under Title IX in the peer sexual harassment context").

43. See id. at 72 (analyzing the OCR's interpretation of peer sexual harassment claims under Title IX).


45. See Londonderry, 970 F. Supp. at 74 (stating that modifying traditional Title VII standards to require that a school district "must have intended to create a hostile educational environment" before imposing liability best resolves the question of when a school district should be held liable for peer sexual harassment) (emphasis omitted).

46. See generally Doe v. Oyster River Co-op. Sch. Dist., 992 F. Supp. 467, 475-76 (D.N.H. 1997) (adopting the same test as the OCR, despite the contrary ruling in the Londonderry case in the same district only two months earlier); Franks ex rel. H.B.L. v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 748 (E.D. Ky. 1996) (employing the "knew or should have known" standard to determine whether peer sexual harassment occurred in a school district); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal.
This Comment will first explain the statutory development of Title IX and its relationship to Title VI and Title VII of the Civil Rights Act of 1964. Next, this Comment will address the judicial evaluation of Title VII and how courts have applied its principles to Title IX jurisprudence. This Comment will then compare the various approaches constructed by the courts to assess whether Title IX imposes liability on school districts for failing to remedy peer sexual harassment and the corresponding rationale for each approach. Finally, this Comment will argue that in light of Title IX's asserted purpose, case law which has developed under the statute, public policy, and the OCR's clear stance espoused in its Sexual Harassment Guidance, courts should apply strict Title VII standards to cases of peer sexual harassment under Title IX.

I. THE HISTORICAL BACKGROUND OF TITLE IX

Congress enacted Title IX to protect individuals from sex discrimination in educational institutions that receive federal financial assistance. Prior to Title IX's enactment, two avenues existed by which individuals could seek redress to remedy discriminatory treatment. The first option was for the affected individual to file a grievance under Title VI, which
prohibited discrimination in all federally-funded programs. The statute, however, did not include gender as a prohibited classification, and therefore, excluded claims based on sex. The second means of challenging discrimination was under Title VII, which prohibited sex discrimination in the workplace. The language of this provision, however, originally exempted educational institutions from its scope. Thus, victims of sexual discrimination in federally-funded academic programs had no way to seek redress for the harm. Congress enacted Title IX to fill the gap between Title VI and Title VII by extending a remedy to those who suffer sex-based discrimination in educational institutions receiving federal funding. Unfortunately, Title IX fails to specify the criteria for establishing a sex discrimination claim or the method by which a person can bring suit to challenge such discrimination. Thus, fashioning case law to

50. See id. (prohibiting discrimination based on classifications of "race, color, or national origin" by federal aid recipients).
51. See 42 U.S.C. §2000e-2(a)(1) (1994) (stating that "[i]t shall be [] unlawful . . . for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").
52. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524 (1982) (discussing how the 1972 amendments attempted to extend coverage of Title VII to educational institutions); Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (quoting legislative history to assert that Title IX's purpose was to remove those aggrieved in educational programs receiving federal funding from Title VII's exemption); H.R. REP. No. 92-554 (1971), reprinted in 1972 U.S.C.C.A.N. 2462, 2512 (stating that Title VII excluded educational institutions from its scope).
53. See Gregory E. Karpenko, Note, Making the Hallways Safe: Using Title IX to Combat Peer Sexual Harassment, 81 MINN. L. REV. 1271, 1275 (1997) (recognizing the failure of Titles VI and VII to protect women who suffer from discrimination in educational institutions that receive federal financial assistance).
54. See 20 U.S.C. §1681(a) (1994); Eriksson, supra note 2, at 1803 (emphasizing that Congress intended to fill the gap between Title VI and Title VII by enacting Title IX).
55. See 20 U.S.C. §1681 (providing no procedure by which a claim should be brought under the statute). Although the legislative history made clear that Title IX applies to sexually discriminatory admission and employment practices, it does not resolve the issue of peer sexual harassment. See generally 118 CONG. REC. 5803, 5803 (1972) (statement of Sen. Bayh) (stating that the crux of Title IX is to ban sex discrimination in areas such as admission policies and scholarships associated with federally-funded educational programs). Consequently, courts have received limited guidance in assessing sexual harassment claims brought under Title IX. See Karpenko, supra note 53, at 1275 (stating that courts initially lacked congressional guidance for determining the necessary standards to establish a sexual harassment claim under Title IX); Jill Suzanne Miller, Note, Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims, 1995 U. ILL. L. REV. 699, 714-15 (indicating the lack of guidelines in Title IX's mandate as to the criteria necessary to maintain an action for sex discrimination against educational institutions).
compensate for the Title IX shortcomings requires analogizing Title VI and Title VII principles and applying them to Title IX claims. The issue of peer sexual harassment, however, has caused significant complications for judicial analysis because it is a unique situation that is not directly comparable to other statutorily-defined prohibited behavior.

A. Title VI's Relationship to Title IX

1. Similar Statutory Interpretations

Although sex discrimination inquiries under Title IX usually invoke comparisons to Title VII principles, the Supreme Court generally considers Title IX to be an offspring of Title VI. Adopting this position, the Court compared the statutory language of Title IX to that of Title VI and noted that the statutes closely resemble each other, except that Title VI excludes sex as a prohibited classification. The fact that the lan-

56. See Yusuf v. Vassar College, 35 F.3d 709, 714-15 (2d Cir. 1994) (asserting that courts should analyze Title IX by analogizing already developed Title VI and Title VII case law).

57. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (finding that Congress intended for courts to base liability under Title VII on an agency theory). By contrast, Title IX claims dealing with employee-on-student sexual harassment are directly analogous to Title VII employment-related claims, and therefore, courts have little difficulty forming appropriate standards to establish liability in this context. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (utilizing Title VII standards to determine the liability of a school district when a teacher sexually harasses a student); Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (using Title VII standards to analyze a Title IX sexual harassment claim brought by an employee-trainee against a supervisor). Ordinarily, Title VII liability is imputed to an employer for the sexual harassment of an employee by either a supervisor or fellow employee via agency principles. See Meritor, 477 U.S. at 72 (stating that "Congress wanted courts to look to agency principles for guidance in this area"); infra notes 94-96 and accompanying text (discussing Meritor's analysis of agency principles in Title VII employment cases). However, the situation where a student sexually harasses another student is problematic due to the absence of an agency relationship between the student and the school district. See generally RESTATEMENT (SECOND) OF AGENCY §219(1) (1958) (stating that the master/servant relationship provides the basis for the master's liability). But see Doc v. Oyster River Co-op. Sch. Dist., 992 F. Supp. 467, 477, (D.N.H. Aug. 25, 1997) (noting that employer liability in the context of hostile environment sexual harassment claims is not based on agency principles, but instead is a form of "direct" liability arising from the employer's knowing failure to correct workplace harassment).

58. See Lipsett, 864 F.2d at 896 (comparing standards developed under Title VII to Title IX); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) (acknowledging Title VII "as the most appropriate analogue when defining Title IX's substantive standards").


60. See id. at 694-96 (stating that "[b]oth statutes provide the same administrative
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Language of these two statutes is almost identical illustrates Congress's intent to model Title IX after Title VI. In addition, the Supreme Court has interpreted Title IX and Title VI in a similar manner.

2. Remedies

Congress enacted Title VI and Title IX pursuant to its Spending Clause power. This power allows Congress to compel institutions receiving federal funding to comply with certain conditions attached to the allocation of this aid. Thus, the prohibition of discrimination under Title VI and Title IX is a condition that federal aid recipients must "voluntarily and knowingly" accept before becoming eligible to receive funds.

As a result of this pseudo-contractual relationship between Congress and the funded institution, the recipient's liability for violating a Spending Clause statute is ordinarily limited; therefore, declaratory and injunctive relief traditionally have been the only remedies available to aggrieved plaintiffs. However, in Guardians Association v. Civil Service...
Commission of New York, the Supreme Court extended the remedies available under Title VI to include compensatory damages if a plaintiff successfully establishes intentional discrimination. Thus, if the plaintiff is unable to prove the existence of intentional discrimination, the plaintiff will be entitled only to the traditional remedy of injunctive relief.

Although the Supreme Court in Cannon v. University of Chicago ruled that Title IX allows a plaintiff an implied private right of action, the Court still refused to recognize, as it did in the context of Title VI, compensatory damages as a proper form of relief in Title IX disputes. The Court's initial reservation to adopt this holding set the stage for its landmark decision in Franklin v. Gwinnett County Public Schools, which expanded on the Court's previous decisions in the Title VI Guardians Association case and the Title IX Cannon case. In Franklin, a high school student sued her local school district after repeated episodes of sexual harassment, which culminated ultimately into coerced intercourse. A unanimous Court held that a student could seek monetary damages for an intentional violation of Title IX. Pursuant to Spending Clause juris-

the contractual nature of the Spending Clause agreement, the Supreme Court, in the past, granted only injunctive relief and never ordered a grant recipient to pay a monetary award to a plaintiff. See id. at 29.


68. See id. at 606-07.

69. See id. at 607. Seven members of the Court supported the conclusion that a violation of Title VI required proof of discriminatory intent to justify a reward of compensatory damages. See id. at 608 n.1 (Powell, J., concurring) (explaining the Court's disagreement over the issue of intent).

70. 441 U.S. 677 (1979).

71. Cf. id. at 704-05 (finding a private cause of action under Title IX, but acknowledging that the only available remedy was injunctive relief, which denies financial aid to the recipient who engages in sexually discriminatory conduct).


73. See id. at 63 (noting that the coerced intercourse occurred on several occasions). The alleged harassment in Franklin involved questions about the victim's sexual experiences, her willingness to have sex with an older man, forcible kissing on the mouth, telephone calls to the victim's home, and forcible intercourse with the harasser. See id. The complainant also alleged that although teachers and administrators knew of the harassment, they did nothing to stop the conduct. See id. at 64.

74. See id. at 76. In deciding the sole issue of what remedies were available in a suit brought pursuant to an implied private right of action under a Spending Clause statute, the Court stated that the notice problem of Spending Clause grants does not arise in cases of intentional discrimination. See id. at 74-75.

Moreover, the Court noted that Title IX places a duty on school districts to ensure sex discrimination does not occur, and since sexual harassment of a subordinate by a supervisor in employment situations is considered sex discrimination, the same rule should apply when addressing sexual harassment of students by teachers. See id. at 75. The Court further stated that Congress "did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." Id.
prudence, which allows monetary relief for intentional violations, and absent any clear statement from Congress on the issue, the Court fashioned an appropriate remedy for the federal statutory cause of action. The Court reasoned because Congress was silent on the subject, a presumption existed that Congress intended to afford plaintiffs all available remedies. Although it clarified the remedy question, the Court’s decision in Franklin created considerable confusion as to the necessary proof a plaintiff must demonstrate to satisfy the intentional discrimination requirement when bringing a suit against a school district for compensatory relief. Consequently, courts generally analogize principles established in Title VII workplace sexual harassment case law to mold an appropriate test in Title IX claims.

**B. Using Title VII Principles for Guidance under Title IX**

1. The Development of Title VII

Title VII’s legislative history offers limited assistance when interpreting the statute, primarily because the House of Representatives added gender as a prohibited classification to Title VII only moments before

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76. *See* Franklin, 503 U.S. at 68 (acknowledging that “all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies”). Furthermore, in its assessment of available remedies, the Court did not focus on the constitutional provision by which Congress enacted Title IX because it concluded that the source of legislation was irrelevant to the question of remedies. *See id.* at 75 n.8.
77. *See id.* at 73. The fact that Congress remained silent on the subject of remedies after the Court in Cannon held that Title IX affords plaintiffs a private cause of action, illustrated Congress’s intent not to limit remedies in Title IX suits. *See id.* at 72-73. Thus, the Court upheld the traditional presumption in favor of any appropriate remedy, absent direction from Congress. *See id.* at 73; *supra* text accompanying notes 75-76 (noting the longstanding power of federal courts to provide appropriate remedies in the absence of congressional direction).
78. *Compare* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (concluding that because discriminatory intent is implicit in a hostile environment cause of action, liability may attach to a school district based on an actual or constructive notice standard), with Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997) (extending liability to a school district based on an actual notice standard alone, coupled with a specific demonstration of discriminatory intent); Karpenko, *supra* note 53, at 1283-84 (discussing the Franklin Court’s decision making damages available for intentional violations of Title IX and the subsequent disagreement in the federal courts over the issue of intent).
79. *See supra* note 15 (listing cases that have used Title VII principles to evaluate Title IX claims).
voting on the bill. Consequently, courts and the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing Title VII, began to determine independently the elements that amount to sex discrimination. Accordingly, the EEOC issued guidelines recognizing that sexual harassment is a form of sex discrimination prohibited by Title VII, and defined two types of harassment that could result in violations of the statute. These two categories are referred to as “quid pro quo” sexual harassment and “hostile environment” harassment. An employer commits quid pro quo sexual harassment when he or she conditions either a prospective job benefit or continued employment on the employee’s acceptance of sexual conduct by the employer, whether entailing verbal abuse or actual sexual acts. In contrast, hostile environment sexual harassment does not require that any conditions be placed on employment; rather, the effect of the conduct must unreasonably interfere with the employee’s work performance or intimidate the employee to such a substantial degree that a hostile or offensive working

80. See 110 Cong. Rec. 2577-2584 (1964); see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (explaining that opponents of adding sex as a prohibited classification were defeated in the waning moments before the vote, allowing Congress to pass the bill with a prohibition on sex-based discrimination). Meritor explained that those opposed to the addition of sex to the list of prohibited classifications under Title VII viewed sex discrimination as different from other forms of discrimination and thus, in need of independent legislation. See id.

81. See Meritor, 477 U.S. at 65-67 (discussing the proper interpretation of Title IX's prohibition against sex discrimination in light of its limited legislative history); 29 C.F.R. §1604.11(a) (1997) (setting forth the EEOC's description of what constitutes sexual harassment).

82. See 29 C.F.R. §1604.11(a). The EEOC guidelines specifically delineate what constitutes illegal sexual discrimination:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.; see also Meritor, 477 U.S. at 65 (explaining the difference between quid pro quo sexual harassment and hostile environment sexual harassment).

83. See Meritor, 477 U.S. at 65 (discussing the EEOC guidelines and noting that “Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult”).

84. See 29 C.F.R. §1604.11(a) (illustrating situations that would constitute sexual harassment); cf. Meritor 477 U.S. at 64 (assuming that Title VII covers the typical quid pro quo scenarios where sex discrimination is conditioned on “economic” or “tangible” loss, in contrast to hostile environment situations where the loss is merely psychological).
environment results. Such conduct may be in the form of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Although courts quickly recognized quid pro quo sexual harassment as a violation of Title VII, they failed to acknowledge the more ambiguous hostile environment sexual harassment as constituting impermissible sex discrimination until five years after the recognition of quid pro quo harassment. In Meritor Savings Bank v. Vinson, the Supreme Court both endorsed the EEOC guidelines defining sexual hostile environment claims and approved lower court rulings when it held that both quid pro

85. See Meritor, 477 U.S. at 65 (explaining hostile environment sexual harassment as not being linked to economic benefits or employment status).
86. 29 C.F.R. §1604.11(a); see also Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment, 2 UCLA WOMEN’S L.J. 85, 90 (1992) (listing "sexual jokes, remarks, physical contact, or pornographic displays" as examples of hostile environment sexual harassment).

In its discussion of how to determine whether certain conduct is "unwelcome," the Meritor Court refused to examine the "voluntariness" of the victim's behavior, and focused instead on the harasser's conduct. See Meritor, 477 U.S. at 68. The Court held that regardless of the victim's consent to the relationship, an examination of the entire record could show that the behavior was unwelcome because it was a response to the supervisor's position of power and ability to take away employment. See id. at 68-69. Evidence of sexually provocative speech or dress on the part of the victim, however, may be relevant to the overall analysis of welcomeness. See id. at 69 (citing EEOC guidelines for the proposition that "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred" determine whether sexual harassment exists).

87. See Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (holding that an employer could be found liable for a male supervisor's decision to fire a female employee because she refused the supervisor's demand for sexual favors); Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (deciding that a retaliatory firing because of an employee's refusal to agree to a supervisor's sexual demands constituted sex discrimination under Title VII), vacated on other grounds sub. nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

88. See Meritor, 477 U.S. at 65-66 (noting that judicial authority supported the right of employees "to work in an environment free from discriminatory intimidation, ridicule, and insult"); Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (concluding that discrimination may exist without the loss of any tangible job benefits if the "terms, conditions, or privileges of employment" have been affected). The recognition of a Title VII cause of action for a hostile environment sexual harassment claim derived from an earlier decision that dealt with a racially discriminatory work environment. See Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (stating that Title VII "is an expansive concept that sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination"). The court in Rogers found that an offensive work environment for a Hispanic complainant created by an employer by giving discriminatory service to its Hispanic clientele may constitute a violation of Title VII and, thus, Title VII protects "employees' psychological as well as economic fringes . . . from employer abuse." See id. at 236, 238.

89. 477 U.S. 57 (1986).
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quo sexual harassment and hostile environment sexual harassment were actionable under Title VII. The Court stated that sexual harassment is actionable if it is "sufficiently severe or pervasive" to alter the conditions of [the victim's] employment and create an abusive working environment.

The Court refuted the assertion, however, that employers are automatically liable for sexual harassment committed by their employee supervisors. The Court found that Congress's definition of "employer" as "any 'agent' of an employer" illustrated its intent to limit employer liability under Title VII to discriminatory conduct perpetrated by those acting within the scope of an agency relationship. Nonetheless, the Court further reasoned that although an employer could be automatically liable in cases where he or she actually delegated authority to a supervisor, the usual agency relationship is obscured in cases resting exclusively on a hostile environment sexual harassment claim. In the situation where a supervisor makes or threatens to make discriminatory decisions regarding the continued employment of his subordinates, the Court posited that the actions of the supervisor can be imputed to the employer who empowered him to carry out such responsibilities, re-

90. See id. at 64-66. One lower court, the Eleventh Circuit in Henson v. Dundee, declared that:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

682 F.2d 897, 902 (11th Cir. 1982) (discussing the effects of hostile environment sexual harassment under Title IX in relation to those of racial harassment under Title VI).

91. Meritor, 477 U.S. at 67 (quoting Henson, 682 F.2d at 904). The Supreme Court adequately addressed the level of severity required for conduct to become sexual harassment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 22-23 (1993). The Court in Harris concluded that to determine whether a hostile environment exists required both an objective and subjective perception of abusiveness. Cf. id. at 22. The Court reversed the lower court's decision, cautioning that a discriminatory abusive work environment need not affect the employee's "psychological well-being" per se to satisfy Title VII standards. See id. at 22. Indeed, if an employee had not yet experienced a nervous breakdown, it did not mean that the alleged sexual misconduct caused the employee no harm. See id. Rather, the Court noted, a hostile or abusive environment must be determined by looking at the totality of the circumstances. See id. at 23.

92. See Meritor, 477 U.S. at 63, 72 (rejecting the appellate court's holding that an employer should be strictly liable because "a supervisor is an 'agent' of his employer for Title VII purposes").

93. See id. at 72; infra note 95 (discussing the EEOC's method of holding employers liable for the acts of its agents).

94. See Meritor, 477 U.S. at 70-71.
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Regardless of the employer's knowledge of the supervisor's conduct.95 However, the Court noted that in hostile environment sexual harassment claims, this fundamental agency principle disappears, because the supervisor's actions are not the result of any delegation of authority, and thus, the employer lacks notice of the supervisor's conduct.96 Nonetheless, the Court cautioned that an employer who lacks notice of the existence of sexual harassment by a supervisor is not guaranteed protection from liability.97

Unfortunately, the Meritor Court did not establish specifically the criteria necessary for a showing of employer intent or the level of notice required under Title VII hostile environment sexual harassment claims.98 Since Meritor, however, federal courts agreed that a plaintiff alleging hostile environment sexual harassment must demonstrate that:

1. [the plaintiff] belongs to a protected group; 2. [the plaintiff] was subject to unwelcome sexual harassment; 3. the harassment was based on sex; 4. the harassment affected a term, condition, or privilege of employment; and 5. [the employer] knew or should have known of the harassment and failed to take proper remedial action.99

Thus, an employer may be liable for the acts of a low-level employee or third party if the plaintiff can show that the employer knew or should

95. See id. Although the EEOC often deems employers liable for the acts of its agents in the absence of any notice, it still requires examination of "the circumstances of the particular employment relationship and the job [functions] performed by the individual in determining whether an individual acts in . . . [an] agency capacity" before strictly adhering to such a rule. 29 C.F.R. §1604.11(c) (1997).

96. Cf. Meritor, 477 U.S. at 70-71. (discussing the applicability of agency principles to employer liability).

97. See id. at 72.

98. See id. (denying the imposition of absolute liability on employers for the acts of supervisors, but failing to clarify when liability could be imposed). The Court avoided a decision on the issue of employer liability due to the inconclusiveness of the record, which was insufficient to determine whether sexual harassment had occurred. See id. In two recent decisions, however, the Supreme Court addressed employer liability for sexual harassment committed by a supervisor and held that an employer may be vicariously liable when a sexually hostile environment is created by a supervisor, regardless of the employer's knowledge, subject to the employer's ability to raise a two-part affirmative defense. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998) (explaining that this holding satisfies both Meritor's recognition of common agency principles as relevant to a Title VII inquiry and its assertion that employer's may not be automatically liable for hostile environment sexual harassment in the workplace); Burlington Indus. Inc., v. Ellerth, 118 S. Ct. 2257, 2270 (1998) (same); see also Part I.B.1. (espousing the necessary elements that comprise an employer's affirmative defense in a Title VII suit alleging hostile environment sexual harassment created by a supervisor).

have known of the hostile environment, but failed to take appropriate corrective action. In the context of hostile environment sexual harassment in the workplace committed by a supervisor, however, the Supreme Court held recently that an employer may be vicariously liable, regardless of the employer's knowledge of the harassment, subject to the establishment of a two-prong affirmative defense: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

2. Application of Title VII to Title IX

Courts typically refer to Title VII case law when addressing alleged violations of Title IX due to Title IX's failure to enunciate an appropriate standard of analysis. For instance, the United States District Court for the District of Connecticut in *Alexander v. Yale University* decided that quid pro quo sexual harassment provides a cause of action under Title IX as it does under Title VII, since Title VII's prohibitions deal with...
types of harassment similar to those in Title IX cases. Several years later, the Supreme Court declared that courts should accord Title IX "a sweep as broad as its language" when interpreting Title IX's scope. As a result, federal courts began to expand further the reach of Title IX by applying the hostile environment theory of sexual harassment to disputes involving employees against educational institutions receiving federal funds.

In the first case to recognize the availability of a hostile environment sexual harassment claim under Title IX, Lipsett v. University of Puerto Rico, the First Circuit applied Title VII analysis to a Title IX case involving discriminatory acts of supervisors toward a female participant in a surgical residency program conducted by a university medical school. The First Circuit, relying on the Tenth Circuit's ruling in Mabry v. State...
Board of Community Colleges & Occupational Education, other case law, applicable EEOC guidelines, and the legislative history of Title IX, held that an educational institution could be found liable if it knew or should have known of a sexually hostile environment created by a supervisor's behavior toward an employee-trainee and neglected to take remedial action. Although Lipsett represented a pivotal step in the development of Title IX jurisprudence, the First Circuit expressly limited its holding to cover discrimination perpetrated by employees of educational institutions receiving federal aid. Lipsett did not resolve the issue of peer sexual harassment claims against school districts, which were relatively rare until 1992, when the Supreme Court in Franklin v. Gwinnett County Public Schools granted plaintiffs the ability to seek monetary damages in Title IX disputes.

After the Court in Franklin decided that plaintiffs could seek money...

110. 813 F.2d 311, 317 n.6 (10th Cir. 1987) (holding that "[b]ecause Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination," the court would consider Title VII to be "the most appropriate analogue when defining Title IX's substantive standards").

111. See Lipsett, 864 F.2d at 896-97 (looking at case law to assess the appropriate standard to apply in Title IX sex discrimination cases); O'Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986) (implying that Title VII and Title IX standards were the same); Nagel v. Avon Bd. of Educ., 575 F. Supp. 105, 106 (D. Conn. 1983) (same).

112. See Lipsett, 864 F.2d at 897 (stating that the EEOC guidelines were useful because they instructed agencies to consider Title VII case law when determining alleged violations of Title IX); 28 C.F.R. §42.604 (1997) (instructing courts to consider Title VII case law when determining liability under Title IX for discriminatory employment practices).

113. See Lipsett, 864 F.2d at 897 (stating that congressional intent supports the proposition that "similar substantive standards" applied under both Title VII and Title IX). The House of Representatives Report for the Education Amendments of 1972 asserted that Title VII is one of the most important steps in the equal employment cause, although it excluded educational institutions from its scope. See H.R. REP. NO. 92-554, 2d Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 2462, 2512. The House Report concluded that Title IX would correct this exclusion and cover "education under the equal employment provision." Id.

114. See Lipsett, 864 F.2d at 901. The Court reiterated that employers are not "always automatically liable" for the sexually harassing behavior of their employees and that although agency principles are a guide to finding liability, they are not absolutely determinative. See id. at 900.

115. See id. at 897 (declaring that the court had "no difficulty extending the Title VII standard to discriminatory treatment by a supervisor in [a] mixed employment-training context," but that the court's holding "is limited to the context of employment discrimination").


117. See id. at 76 (1992) (extending the available relief for intentional violations of Title IX); see also supra text accompanying note 74 (explaining that intentional discrimination must be shown in order to obtain monetary damages).
damages to redress their harm, student-on-student sexual harassment suits against school districts rose dramatically, requiring a resolution of a unique question and adding confusion to the relative clarity developed in past Title IX decisions. Thus, courts were forced to address the burden of proof required to secure a remedy against a school district for failing to correct a sexually hostile environment created by one student against another. Most federal courts that have addressed the burden of proof issue have differed as to whether a student seeking monetary damages under Title IX must meet the Title VII “knew or should have known” standard of liability or an actual notice threshold coupled with a showing of intentional discrimination on the part of the school district. At least one federal circuit completely rejected the applicability

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118. See supra note 18 (listing peer sexual harassment cases to demonstrate a significant increase after the Supreme Court’s decision in Franklin).

119. Compare Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997) (requiring that a school district have actual notice of peer harassment and intentionally discriminate against the victim for it to be liable, even though the OCR’s recently issued Sexual Harassment Guidance advocated a different test), with Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997) (Davis II) (rejecting the applicability of student-on-student sexual harassment in Title IX claims), and Doe v. Oyster River Co-op. Sch. Dist., 992 F. Supp. 467, 475-76 (D.N.H. 1997) (adopting exact Title VII and OCR criteria in a peer sexual harassment case only two months after the Londonderry decision in the same federal district). For examples of cases that helped to develop a clear foundation in Title IX jurisprudence, see Cannon v. University of Chic., 441 U.S. 677, 694-99 (1979) (allowing individuals to bring a private cause of action under Title IX), and Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1993) (allowing compensatory damages for actions brought under Title IX), and Lipset, 864 F.2d at 897 (extending liability to employers in a mixed employment-training context based on Title VII discriminatory treatment standards). But see Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2000 (1998) (holding, in a controversial five-to-four decision, that it will not extend liability to school districts for sexual harassment committed by teachers against students, absent congressional direction, unless there is actual notice to, and deliberate indifference by, an "appropriate person").

120. See supra note 17 (discussing cases that addressed school liability in peer sexual harassment claims).


122. See Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419-20 (N.D. Iowa 1996) (modifying the Title VII approach by eliminating constructive knowledge as a sufficient basis for the extension of liability); see also Doe v. University of Ill., 138 F.3d 653, 661 (7th Cir. 1998) (adopting an actual notice standard, but rejecting the need to
of Title VII analysis, requiring instead that a student show that a school
district responded differently to complaints of sexual harassment based
on the sex of the complainant. Additionally, other courts have found
that peer hostile environment sexual harassment is not actionable under
Title IX. Despite the differing decisions among the federal courts, the
Supreme Court has yet to grant certiorari.

II. HOW TO EXTEND LIABILITY TO SCHOOL DISTRICTS FOR
PEER SEXUAL HARASSMENT UNDER TITLE IX: AN
UNRESOLVED ISSUE

Many federal courts have considered whether, and to what extent,
school districts may be found liable under Title IX for peer sexual har-
assment. The vast majority of those courts have concluded that, in
some instances, school districts can be liable for failing to remedy a hos-
tile educational environment created by peer sexual harassment. Al-


124. See Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997)
(Davis II) (finding that peer sexual harassment is not a valid claim under Title IX); Garza
student cannot bring a hostile environment claim under Title IX”).

125. See, e.g., Seamons v. Snow, 84 F.3d 1226, 1232-33 (10th Cir. 1996) (discussing
the school district liability for peer sexual harassment); Rowinsky, 80 F.3d at 1010 (same);
Davis I, 74 F.3d at 1189-90 (same); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 71-74
Pa. 1997) (same); Franks, 956 F. Supp. at 746-48 (same); Petaluma, 949 F. Supp. at 1417
(same); Wright, 940 F. Supp. at 1416-20 (same); Bruneau ex rel. Schofield v. South Kort-
right Cent. Sch. Dist., 935 F. Supp. 162, 176-77 (N.D.N.Y. 1996) (same); Burrow v. Post-
ville Community Sch. Dist., 929 F. Supp. 1193, 1199 (N.D. Iowa 1996) (same); Bosley v.
Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020-23 (W.D. Mo. 1995) (same); Oona R.-S.
ex rel. Kate S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1462 (N.D. Cal. 1995) (same),
aff'd, 122 F.3d 1207 (9th Cir. 1997).

126. See, e.g., Rowinsky, 80 F.3d at 1016 (finding that Title IX covers peer sexual har-
assment when a school district treats complaints differently based on the sex of the com-
plainant); Londonderry, 970 F. Supp. at 74 (finding that Title IX covers peer sexual har-
assment when the school district knew of the harassment and intentionally failed to
correct the situation); Wright, 940 F. Supp. at 1420 (finding that Title IX covers peer sexual
harassment based upon an actual notice standard). But see Davis II, 120 F.3d at 1406
(deducing that because Congress failed specifically to notify grant recipients of potential
liability for peer sexual harassment, the Spending Clause precluded such suits); Garza, 914
F. Supp. at 1438 (finding no right of action for peer sexual harassment under Title IX).
The Fifth Circuit in Rowinsky, however, effectively overruled the court’s decision in
Garza. See Rowinsky, 80 F.3d at 1016 (accepting the possibility of school district liability
for peer sexual harassment, but only if the school district itself discriminated on the basis
of sex).
though courts differ on the specific standards for establishing liability in peer sexual harassment cases, three basic models have emerged: (1) the *Rowinsky* approach; (2) the actual notice and intentional discrimination approach; and (3) the "knew or should have known" approach.

**A. The Rowinsky Approach**

The first basic approach to establishing school district liability essentially rejects the applicability of Title VII analysis to peer sexual harassment claims. The Fifth Circuit, in *Rowinsky v. Bryan Independent School District*, held that Title IX does not impose liability on school districts for the sexual harassment of one student by another, absent a showing that the school district itself, rather than the harassing student alone, discriminated on the basis of sex. Thus, for liability to arise, the

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127. Compare *Rowinsky*, 80 F.3d at 1016 (holding that a school district must discriminate for liability to arise), with *Doe v. University of Ill.*, 138 F.3d 653, 661 (7th Cir. 1998) (requiring that a school district "actually kn[ow]" of the harassment before liability is imposed), and *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 960 (4th Cir. 1997) (allowing the imposition of liability when a school district "knew or should have known" of the harassment).

128. See infra Part II.A. (explaining the *Rowinsky* approach); see also *Londonderry*, 970 F. Supp. at 73 (calling the *Rowinsky* approach the "most rigorous").

129. See infra Part II.B.1. (explaining the actual notice and intentional discrimination approach); see also *Londonderry*, 970 F. Supp. at 73 (describing the actual notice and intentional discrimination approach as "more moderate").

130. See infra Part II.B.2. (explaining the "knew or should have known" approach); see also *Londonderry*, 970 F. Supp. at 73 (describing the "knew or should have known" approach as the "most expansive").

131. See *Rowinsky*, 80 F.3d at 1008 (concluding that Title IX did not impose liability on a school district for peer hostile environment sexual harassment, unless the school district itself engaged in sexually discriminatory conduct).

132. 80 F.3d 1006 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996).

133. See *id.* at 1016. In *Rowinsky*, two sisters, Jane and Janet Doe, alleged that they were the victims of numerous incidents of physical and verbal sexual harassment while riding on the school bus. See *id.* The sisters alleged that one male student continually patted them on the buttocks as they passed by him on the bus and, on a few occasions, grabbed their genital areas and breasts. See *id.* In addition, the male student frequently asked the girls, "When are you going to let me f--k you?", "What bra size are you wearing?", and "What size panties are you wearing?" *Id.* In response to this abuse, Jane and Janet's parents met with school officials on numerous occasions, prompting the school to suspend the male student from riding the bus for three days. See *id.* The episodes continued to occur after the boy returned, however, until the girls' mother removed them from the bus and brought suit against the school district on behalf of her daughters. See *id.* at 1009-10.

The court explained that liability under Title IX could extend to a school district if the district treated claims of sexual harassment brought by boys differently than those brought by girls, or if it concentrated on sexual harassment of girls while ignoring similar attacks on boys. See *id.* Reasoning that the transferal of sexual harassment from the adult workplace
school district would have to respond to claims of sexual harassment differently based on the sex of the complainant.\textsuperscript{134} The Fifth Circuit determined that the issue was not whether an educational institution was liable under Title IX for failing to remedy peer sexual harassment, but whether a school district receiving federal funds could be liable for sex discrimination when the actual conduct in question is perpetrated by someone other than the school district or its agents.\textsuperscript{135}

The majority evaluated several factors in reaching its conclusion, including the scope of Title IX, its legislative history, and the OCR regulations implementing Title IX.\textsuperscript{136} The majority determined that because Congress enacted Title IX as an exercise of its spending power, the statute should be interpreted to apply only to acts of grant recipients or their agents, and not to acts of third parties.\textsuperscript{137} The majority also noted that the legislative history illustrated that supporters and opponents of Title IX focused their arguments specifically around liability for acts by grant recipients,\textsuperscript{138} and thus, the majority interpreted the OCR regulations as

setting to a situation involving children was problematic, and thus, the court opted to reject the theoretical applicability of Title VII to Title IX peer sexual harassment cases. See \textit{id.} at 1011 n.11.

\textsuperscript{134} See \textit{id.} at 1016.

\textsuperscript{135} See \textit{id.} at 1010. The court refuted the dissent's assertion that a student is an agent of a school district by concluding that the school's power to discipline a student does not create an agency relationship. See \textit{id.} at 1010 n.9.

\textsuperscript{136} See \textit{id.} at 1012-13 (indicating that three factors support the conclusion to impose liability on school districts for only their own, or their agent's, actions).

\textsuperscript{137} See \textit{id.} at 1013 (stating that the imposition of "liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of title IX"). Although the court acknowledged that the Supreme Court had declined to issue a definitive conclusion as to whether Title IX was enacted pursuant to Congress' Spending Clause power, the Fifth Circuit nonetheless determined that three reasons suggested that Title IX was a Spending Clause statute. See \textit{id.} at 1012 n.14. First, Title IX emulates the structure of Title VI, which is a Spending Clause statute. See \textit{id.} Second, the statute covers purely private academic institutions within its regulatory prohibitions. See \textit{id.} Finally, the Supreme Court rarely has attributed congressional intent to act pursuant to its power to enforce the Fourteenth Amendment, the only other potentially applicable source of Title IX's authority. See \textit{id.} Indeed, Title IX's language offered nothing to suggest that Congress intended to invoke the Fourteenth Amendment, and thus, the language and structure indicated it was enacted pursuant to the Spending Clause. See \textit{id.}

\textsuperscript{138} See \textit{id.} at 1014. The court also recognized that the Supreme Court continually acknowledged that Congress enacted Title IX to prohibit discrimination by federal grant recipients. See \textit{id.} at 1013 (citing \textit{Cannon v. University of Chicago}, 441 U.S. 677, 704 (1979)). Furthermore, the court stated that "the value of a spending condition is that it will induce the grant recipient to comply with the requirement in order to get the needed funds," and that "[i]n order for the coercion to be effective, the likelihood of violating the prohibition cannot be too great." \textit{Id.} Thus, according to the Fifth Circuit, imposing third party liability on school districts would impede the value of the Spending Clause condi-
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not encompassing the behavior of third parties. To buttress its argument further, the Fifth Circuit in Rowinsky elaborated on the theoretical nature of sex discrimination, noting that the application of sex discrimination developed in the adult workplace setting to a situation involving the acts of children would be "highly problematic." The court explained that because the theory of discrimination is based on unequal power between the harasser and the harassed, it would be illogical to employ this theory in a situation between two children. Indeed, the Court noted, in an educational setting, it is the school that possesses the power, not the children. According to the court, the relationship between the harasser and the victim in the context of peer sexual harassment lacks the unequal power component necessary to impose liability on a school district. The court's discussion of unequal power, however, only provided more support to those courts and commentators who argue that the Rowinsky decision represented a fundamental misunderstanding, due to its failure to recognize that liability in peer sexual harassment cases is based on a school district's own actions in response to the harassment.

The Fifth Circuit's decision in Rowinsky is an extremely restrictive approach to extending liability to school districts for peer sexual harassment. Most courts agree, however, that the holding in Rowinsky is not

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139. See id. at 1015 (stating that the OCR's Policy Memorandum, which did not adequately express a clear opinion regarding peer sexual harassment in schools, but concentrated on acts by employees or agents, was the clearest statement by the OCR on sexual harassment). Although several other OCR documents, such as letters of finding, indicated that Title IX should extend to peer sexual harassment, the Fifth Circuit in Rowinsky stated that these documents should be accorded little deference, because they were merely interpretive regulations and not the result of "deliberate consideration of a rulemaking proceeding." Id.

140. See id. at 1011 n.11.

141. See id. (stating that "sexual harassment is the unwanted imposition of sexual requirements in the context of unequal power") (quoting CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979)). The court also cautioned that "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker." Id.

142. See id.

143. See id. The court further rejected the applicability of Title VII analysis that found employer liability for harassment committed by third parties because such cases dealt with the power of the employer, which is absent in peer sexual harassment suits. See id.

144. See infra notes 145-47 and accompanying text (explaining how the Rowinsky holding was fundamentally flawed).

145. See Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 73 (D.N.H. 1997) (assessing the various approaches that the federal courts have adopted to resolve the issue of a school district's liability for peer sexual harassment and concluding that Rowinsky adopted the "most rigorous" approach).
only adverse to Congress' goal of providing a school environment free from discrimination, but that it is also fundamentally flawed. Instead of focusing on the school district's action or inaction in knowingly permitting sexual harassment to persist in its hallways, courts believe that the Fifth Circuit stressed the school district's lack of participation in the harassing conduct of its students. Indeed, the court failed to recognize that when a school district knowingly allows a hostile learning environment to continue unfettered, inaction may constitute actionable discrimination. Furthermore, at least one commentator has concluded that the Fifth Circuit's reliance on Title IX's scope, legislative history, and regulatory treatment should have led the court to reach the opposite conclusion—to allow the imposition of liability on school districts for the acts of third parties.

146. See Doe v. University of Ill., 138 F.3d 653, 662 (7th Cir. 1998) (finding that Rowinsky "fundamentally misunderst[oo]d" the plaintiff's request, which was to hold the school district "liable for its own actions and inaction in the face of its knowledge that the harassment was occurring"); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 958 (4th Cir. 1997) (recognizing that Rowinsky "results in a deeply flawed analysis" because liability is the product of a school district's own actions, not those of students); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (declaring that "Rowinsky is manifestly based on a fundamental misunderstanding of the nature of this type of claim" because liability attaches to a school district pursuant to its response, or lack of response, to known sexual harassment); see also Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,048 n.27 (1997) (stating "that the Rowinsky decision misinterprets Title IX," which holds school districts liable for their own actions in response to known sexual harassment, and not for actions of students); Recent Case, Sexual Harassment—Title IX—Fifth Circuit Holds School District Not Liable for Student-to-Student Sexual Harassment, 110 HARV. L. REV. 787, 790 (1997) (concluding that Rowinsky's "interpretation of Title IX's scope rests on two false premises," namely that schools would be induced to reject grants if they could be liable for acts of students and that liability would attach automatically for incidents of peer sexual harassment).

147. See Brzonkala, 132 F.3d at 958 (recognizing that Rowinsky failed to understand that liability is the product of a school district's own actions, not those of students); Petaluma, 949 F. Supp. at 1421 (stating that Rowinsky did not recognize that Title IX holds school districts liable for their own conduct in responding toward the existence of a hostile educational environment, and not for the conduct of the harassing students themselves); see also Sexual Harassment Guidance, 62 Fed. Reg. at 12,048 n.27 (confirming that Title IX holds a school district liable not for the actions of its students, but for its own inadequate response to a known sexually hostile environment within its programs).


149. See Recent Case, supra note 146, at 792. Three justifications existed for concluding that Title IX should impose liability on school districts for discriminatory acts of third parties. See id. First, expanding the scope of Title IX to cover peer sexual harassment would not greatly increase the risk of violating the statute's prohibitions; rather, it would urge schools to deal with this significant problem that most have failed to address. See id. Second, Supreme Court decisions indicated that Title IX should be read broadly when interpreting its scope. See id. at 791. Finally, letters of finding issued by the OCR, which the Rowinsky court accorded little deference, suggested clearly that the OCR interpreted Title
B. Using Title VII As a Guide

Despite the Fifth Circuit’s ruling in *Rowinsky*, most courts that have considered the issue of hostile environment peer sexual harassment have held that school districts may be liable for failure to remedy the hostile environment.\(^\text{50}\) Similar to Title VII criteria for establishing the liability of an employer who failed to take appropriate corrective action to remedy a sexually hostile environment in the workplace, courts generally require a plaintiff to establish five elements in order to prevail: (1) that the plaintiff belonged to a protected group;\(^\text{151}\) (2) that the plaintiff was the victim of unwelcome sexual harassment while participating in an educational program or activity receiving federal financial assistance;\(^\text{11}\) (3) that the harassment was based on sex;\(^\text{152}\) (4) that the harassment was so severe or pervasive that it altered the conditions of the plaintiff’s educa-

\(^{150}\) IX as imposing liability on school districts for peer sexual harassment. See id. at 791-92. This assertion is buttressed by the OCR’s consistent position that a grant recipient may be liable for third-party harassment; thus, the court should have given these documents greater weight. See id. at 792.\(^\text{150}\)

\(^{151}\) See, e.g., Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997) (concluding that, in some instances, school districts may be liable under Title IX for failing to remedy the existence of hostile environment sexual harassment caused by their students); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1213 (E.D. Pa. 1997) (same); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996) (same).\(^\text{151}\)

\(^{152}\) See Wright, 940 F. Supp. at 1420 (listing the elements of an actionable Title IX claim for peer sexual harassment).\(^\text{152}\)

\(^{153}\) See id.; Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995). An important consideration in determining whether particular conduct was unwelcome is whether the alleged victim requested the conduct and “regarded the conduct as undesirable or offensive.” Sexual Harassment Guidance, 62 Fed. Reg. at 12,040; see also supra note 86 (explaining the court’s discussion in *Meritor* concerning the proper way to determine whether sexual conduct was “unwelcome”). The fact that a victim may acquiesce to conduct or does not complain is not necessarily dispositive as to whether the conduct was welcome. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,040. Such acquiescence or failure to resist may be the result of fear perpetrated by the aggressor. See id. The victim also may fail to object to a continual litany of disparaging sexual remarks for fear that any objection would cause the harasser to increase his or her comments. See id. Moreover, when inquiring about whether certain acts were unwelcome, courts should not focus on the “voluntariness” of the victim’s participation, but rather on whether the victim indicated that the behavior was unwelcome. See *Meritor*, 477 U.S. at 68.

In addition, the OCR acknowledged that determining “welcomeness” in the school environment involved the consideration of such factors as the age of the student, the nature of the conduct, and whether the student had the ability to “welcome” sexual conduct. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,040. Schools should accord special attention to situations in which the harasser is in a position of power over the victim, such as the case of a teacher allegedly harassing a student, regardless of the apparent consensuality of the relationship. See id.\(^\text{153}\)

\(^{153}\) See Wright, 940 F. Supp. at 1420. The Supreme Court has stated that harassment of a person because of that person’s sex constitutes discrimination based on sex. See *Meritor*, 477 U.S. at 64.
tion and created a hostile or abusive educational environment;\(^{154}\) and (5) that some basis for institutional liability exists.\(^{155}\)

In addition, due to the decision in *Franklin*, courts require some showing that a school district's conduct constituted intentional discrimination.\(^{156}\) However, whereas some courts explicitly include intentional discrimination as an extra part of the fifth element in the test,\(^{157}\) other

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154. See Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996); *Wright*, 940 F. Supp. at 1420; see also supra note 92 (discussing how to assess the severity of behavior in a sexually hostile work environment claim). In the Title VII context, determining whether sexual harassment is sufficiently severe or pervasive to establish a hostile environment requires consideration of the frequency and severity of the conduct, the threatening or humiliating nature of the conduct, and whether the conduct unreasonably interfered with the performance of the student. See *Harris* v. *Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993) (applying these factors in the employment context); *Bosley* v. *Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1023 (W.D. Mo. 1995) (citing *Harris*’s method of measuring whether conduct is sufficiently severe or pervasive under Title VII and transferring it to a Title IX claim). These factors must be evaluated on both an objective and subjective basis. See id. First, the severity or pervasiveness of the conduct should first meet a reasonable person standard of review. See id. Second, the court should consider whether the plaintiff perceived the environment as abusive. See id. If not, then the conduct has not caused a hostile environment because it did not actually change the conditions of the environment. See id. In the school setting, evidence of a change in a student's educational environment may be tangible, as where a student's grades decrease, or intangible, as where attending school simply becomes more difficult for the student. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,041.

The OCR reasoned in its policy guidance that a hostile environment is particularly evident when there is a pattern of harassing conduct or if the harassment is significant. See id. Accordingly, the more repetitive the conduct, the more likely it will create a hostile environment, even if the specific behavior viewed independently would not be severe enough to satisfy the analysis. See id. A single incident that is sufficiently severe may itself be enough to establish a hostile environment, despite the lack of a constant and continual pattern of abuse. See id. Finally, a hostile environment may exist even when the harassing behavior is not specifically directed at the complainant, but he or she witnesses it. See id.

155. See Seamons, 84 F.3d at 1232; see also *Wright*, 940 F. Supp. at 1420 (requiring a plaintiff attempting to establish institutional liability to show that the school district "knew of the harassment and intentionally failed to take proper remedial action"). But see Doe v. *Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1427 (N.D. Cal. 1996) (noting that institutional liability could be established if the school district did not have actual knowledge, but should have known of the hostile environment nonetheless, and failed to correct the situation).

156. See, e.g., *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992) (allowing monetary relief under Title IX where a school district engages in intentional discrimination); *Wright*, 940 F. Supp. at 1419 (recognizing the need to show intentional discrimination on the part of a school district to receive monetary damages under Title IX); *Bosley*, 904 F. Supp. at 1020 (same).

157. See, e.g., Doe v. *Londonderry Sch. Dist.*, 970 F. Supp. 64, 74 (D.N.H. 1997) (concluding that a plaintiff must show that a school district actually knew of the hostile environment and intentionally failed to respond to establish institutional liability for peer sexual harassment under Title IX); *Wright*, 940 F. Supp. at 1419 (same); *Bosley*, 904 F. Supp.
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The fifth prong of this test is, thus, the one where courts most often deviate from the Title VII standard in an attempt to satisfy the Court’s mandate in Franklin.

1. The Actual Notice and Intentional Discrimination Approach

The majority of courts that recognize a cause of action under Title IX for a school district’s failure to remedy peer sexual harassment in its educational programs have modified the traditional Title VII approach to require that schools actually know of the harassment and intentionally fail to take proper remedial action for liability to exist. Thus, to establish a basis for institutional liability, a plaintiff must offer a stricter demonstration of culpability than the Title VII “knew or should have known” standard. Evidence that a school had mere constructive knowledge of the harassment is insufficient to meet this threshold, even if the harassment was adequately severe, persistent, or pervasive to create a hostile environment.

Although Title VII clearly allows for liability where employers fail to correct a sexually hostile work environment created by low-level employees or third parties when they knew or should have known of the harassment, the majority of courts have relied instead on Franklin v. at 1020 (same).

158. See Doe v. University of Ill., 138 F.3d 653, 661 (7th Cir. 1998) (stating that a plaintiff need not “plead or prove that the recipient . . . failed to respond as a result of sexually discriminatory intent” because demonstrating “[t]he failure promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex”); Petaluma, 949 F. Supp. at 1424 (finding that “intent is established by proof of the elements required to prove the cause of action and needs no additional proof”).

159. See infra Part II.B.1. (explaining the rationale used by courts that alter the Title VII “knew or should have known” method of establishing liability).

160. See, e.g., Londonderry, 970 F. Supp. at 74 (concluding that a plaintiff must show that a school district actually knew of the hostile environment and intentionally failed to respond to establish institutional liability for peer sexual harassment under Title IX); Wright, 940 F. Supp. at 1419 (same); Bosley, 904 F. Supp. at 1020 (same).

161. See Wright, 940 F. Supp. at 1419 (stating that the Supreme Court’s decision in Franklin mandates a stricter standard for finding liability than mere negligence).

162. See id. (stating that a negligence standard is insufficient to impose liability on a school district for peer sexual harassment under Title IX).

163. See Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269, (8th Cir. 1993) (delineating the elements of a hostile environment sexual harassment claim under Title VII); see also Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998) (adopting a standard in the context of hostile environment sexual harassment created by a supervisor in the workplace that, subject to an affirmative defense, is even less stringent than the “knew or should have known” threshold). The “knew or should have known” standard of finding
to conclude that more than simple negligence must exist on behalf of a school district to hold it liable under Title IX. The Franklin Court observed that remedies are limited under Spending Clause statutes for unintentional violations, because recipients of federal funds may lack notice that they could be liable for monetary damages. Thus, Franklin required a finding of intentional discrimination to justify a monetary reward under a Spending Clause statute, prompting courts to demand that a school district must have received actual notice of the harassment and intentionally failed to remedy the situation in order to be found liable under Title IX. Some courts, thus, seek to rectify the notice problem espoused in Franklin by requiring an intentional discriminatory act on behalf of the federal grant recipient.

liability, however, may not satisfy the intent element when establishing that a school district discriminated on the basis of sex. See Senatus, supra note 46, at 394. Although establishing discriminatory intent is clearer when a sexually hostile environment is created by teachers, acts of students present a more difficult inquiry. See id. at 394 n.95.


See Wright, 940 F. Supp. at 1419 (stating that "[the Supreme Court's opinion in Franklin explicitly demands more than mere negligence to create liability for monetary damages for a violation of Title IX—it requires plaintiffs to show an intent to discriminate"). At least one federal court in California also determined that Franklin demanded a showing of intentional discrimination before monetary damages would be allowed. See Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1465 (N.D. Cal. 1995), aff'd, 122 F.3d 1207 (9th Cir. 1997). Such a determination resulted because Franklin elaborated on the differences between intentional and unintentional violations. See id.

See Franklin, 503 U.S. at 74-75 (considering whether compensatory damages are available to plaintiffs in a Title IX suit); see also supra note 66 and accompanying text (discussing the limitation of remedies under Spending Clause statutes and the problem of notice).

See Franklin, 503 U.S. at 74; see also supra note 64 (explaining that because of the contractual nature of the Spending Clause, federal aid recipients need to know of potential liability before being forced to pay monetary rewards).

See Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020-23 (W.D. Mo. 1995) (discussing Franklin's intentional discrimination requirement to justify the court's holding that institutional liability will exist only if a school district had actual knowledge of the harassment and intentionally failed to remedy the situation). Although the court asserted that Title VII, which allows a finding of liability upon actual or constructive knowledge, contains standards directly "adaptable to protect persons participating in federally supported educational programs from sex discrimination," it adopted the stricter actual notice threshold nonetheless. Id. at 1023. The court in Bosley also opined that applying Title VII standard in the context of Title IX best advances the congressional purpose of "not allowing federal monies to be expended to support intentional invidious discrimination based on sex." Id. Despite Bosley's enthusiastic espousal of the value of Title VII standards, the court nonetheless proceeded to adopt a more rigorous approach absent any explanatory justification. See id. (requiring more than the Title VII "knew or should have known" standard of establishing institutional liability in Title IX peer sexual harassment cases).

See id. at 1021 (referring to the problem of permitting monetary damages for unintentional violations of Spending Clause statutes due to the notice problem); see also su-
In determining the existence of discriminatory intent, courts are not required to focus on whether the school treated complaints of sexual harassment differently based on the complainant’s gender; rather, courts may infer intent based on the totality of the facts presented, including a failure to take adequate steps to cease harassment, toleration of the harassment, and the severity of the harassing behavior. Accordingly, “[i]f the finder of fact makes these findings, the finder of fact may infer that [the] defendant intentionally failed to take appropriate remedial action because of [the] plaintiff’s gender.” Such failure itself could be circumstantial evidence of discriminatory intent.

pra note 66 (explaining that Spending Clause grants are like contracts between the government and the recipient, requiring notice before liability for monetary damages can arise).

Certain courts essentially adhere to Franklin’s use of the Title VII standards of liability by implementing the remaining four elements of a Title VII hostile environment claim, but altering Title VII’s “knew or should have known” standard to require actual knowledge. See Bosley, 904 F. Supp. at 1023 (espousing the elements for a claim involving peer sexual harassment against a school district); see also supra notes 99 and accompanying text (stating the elements of a Title VII hostile environment claim against an employer). The court in Bosley stated that “Franklin supports the conclusion that Title VII law provides standards for enforcing the anti-discrimination provisions of Title IX.” Bosley, 904 F. Supp. at 1022.

170. See Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (distinguishing Rowinsky’s analysis of the intent requirement); Bosley, 904 F. Supp. at 1020-21 (discussing the element of intent needed for an award of compensatory damages in a Title IX hostile environment sexual harassment claim); Oona, 890 F. Supp. at 1469 (finding that “discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment”). The court in Bosley noted that unlawful discrimination need not be the sole motive of a defendant to satisfy the intent element, but that it is the “cumulative evidence of action and inaction which objectively manifests discriminatory intent.” Bosley, 904 F. Supp. at 1020 (citing United States v. Texas Educ. Agency, 564 F.2d 162 (5th Cir. 1977)). The court specifically found that discriminatory intent could be inferred by showing that the plaintiff was a victim of unwelcome sexual harassment, that the harassment was sex-based, that the harassment happened while the plaintiff was participating in a federally-assisted educational activity, and that the school district had notice of the harassment and “intentionally” failed to remedy the situation. See id. at 1023.

171. Bosley, 904 F. Supp. at 1023. The ability of courts to infer intent from a school district’s failure to remedy known sexual harassment within its educational system represents the main divergence between Rowinsky and other courts. See Burrow, 929 F. Supp. at 1203-04 (stating that “unlike Rowinsky [it] courts have allowed the trier to infer such intent from the totality of proof”). Instead of permitting courts to establish intent through inferences from the totality of the facts, Rowinsky required proof that the school district behaved in an intentionally discriminatory manner by treating claims of sexual harassment differently based on the gender of the complainant. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996).

172. Cf. Bosley, 904 F. Supp. at 1025 (indicating that a reasonable jury could conclude that a school district intentionally discriminated against a plaintiff based on findings that the school district knew of the harassment but failed to take corrective action).
Courts adopting this approach generally maintain that modifying the Title VII analysis to fit peer sexual harassment under Title IX not only satisfies Franklin's intentional discrimination requirement, but also helps to ameliorate the absence of an agency relationship between schools and students by making it more difficult for liability to attach.\textsuperscript{173} If based solely on agency principles, however, peer sexual harassment would not invoke school district liability.\textsuperscript{174} Nonetheless, the applicability of agency principles in hostile environment cases is still ambiguous,\textsuperscript{175} and most courts hold school districts liable for their own action or inaction in failing to cure a known sexually harassing atmosphere.\textsuperscript{176}

2. The "Knew or Should Have Known" Approach

Several federal courts have decided that student plaintiffs may establish institutional liability for peer sexual harassment under Title IX strictly in accordance with Title VII standards.\textsuperscript{177} For example, the

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\textsuperscript{173} Cf. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1575 (N.D. Cal. 1993) (discussing the relationship between Franklin's "intentional discrimination" mandate and the imposition of institutional liability via agency principles), reh'g granted, 949 F. Supp. 1415 (1997). One district court that allowed a peer sexual harassment claim under Title IX believed that Franklin imputed liability to the school district based on agency principles, making the district liable for the acts of its agents. See id. Moreover, at least one commentator has contended that a school district cannot be held vicariously liable for peer sexual harassment under Title IX, because third parties do not satisfy the definition of an agency relationship. See Senatus, supra note 46, at 396 (outlining the arguments in opposition to the recognition of peer sexual harassment claims under Title IX). The Supreme Court in Meritor, however, conceded that traditional agency principles are obscured in hostile environment cases and, thus, may not be wholly applicable. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (reviewing the EEOC's discussion of agency principles in hostile environment sexual harassment cases).
\textsuperscript{174} See Doe v. University of Ill., 138 F.3d 653, 662 (7th Cir. 1998) (conceding that a university could not be liable under Title IX for discriminatory behavior of students if based on agency principles); Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997) (noting that "[a]gency principles . . . cannot impute discriminatory conduct of an employee to the 'program or activity' under Title IX"); Senatus, supra note 46, at 396 (illustrating that third-party acts would never result in school district liability if based solely on agency principles).
\textsuperscript{175} Cf. Meritor, 477 U.S. at 70-72 (noting that the theory of agency may not be applicable to claims based solely on hostile environment sexual harassment but that "absence of notice to an employer does not necessarily insulate that employer from liability").
\textsuperscript{176} See, e.g., Petaluma, 949 F. Supp. at 1421 (noting that school district liability is based on a school's inaction when confronted with a known sexually hostile environment); Burrow, 929 F. Supp. at 1205 (allowing a student who was forced to leave school and graduate early due to peer sexual harassment to bring suit under Title IX against a school district for failing to remedy a known hostile environment); Bosley, 904 F. Supp. at 1023 (confirming that Title IX imposes liability on school districts for their knowing failure to remedy a hostile educational environment).
\textsuperscript{177} See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 958, 960
The United States District Court for the Northern District of California in *Doe v. Petaluma City School District*, determined that a school could be held liable if it "knew, or should in the exercise of [its] duties have known of the hostile environment" and failed to take remedial action.

The *Petaluma* court began its analysis by addressing the issue of intent, recognizing *Franklin*’s mandate that school districts may be liable for monetary awards only when they discriminate intentionally on the basis of sex, thereby giving these school districts sufficient notice of potential liability. Based on earlier Supreme Court precedent, the *Petaluma* court adopted the "knew or should have known" standard of institutional liability as appropriate in a Title IX case against a university for failing to take appropriate remedial action in response to an alleged rape; *Doe v. Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 475-76 (D.N.H. 1997) (adopting the Title VII "knew or should have known" standard in a Title IX peer sexual harassment case involving junior high students); *Franks v. Kentucky Sch. for the Deaf*, 956 F. Supp. 741, 746-48 (E.D. Ky. 1996) (adopting an actual or constructive notice standard in a Title IX peer sexual harassment suit alleging that a female student was raped while under the auspices of the defendants’ care at an away track meet); *Petaluma*, 949 F. Supp. at 1421 (adopting strict Title VII principles for finding institutional liability in a Title IX action involving junior high students). Initially, the Eleventh Circuit ruled that Title IX allows a claim for hostile environment peer sexual harassment based on the "knew or should have known" Title VII standard, but the court has since overturned that decision. *See Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1192-93 (11th Cir. 1996) (Davis I), rev’d en banc, 120 F.3d 1390 (11th Cir. 1997), cert. filed, 66 USLW 3387 (Nov. 19, 1997). Nonetheless, the Eleventh Circuit based its first decision primarily on the Supreme Court's analysis of Title VII's applicability to Title IX in *Franklin* and the Court’s mandate to read Title IX broadly. *See id.* at 1190. In addition, the court in *Davis I* supported its conclusion with ample public policy arguments for affording students even greater protection from harassment than employees in the workplace. *See id.* at 1193 (contending that sexual harassment can cause greater damage in the classroom than in the workplace due to the age of the victims and the students' need for proper emotional enhancement).

*Petaluma*, 949 F. Supp. 1415 (N.D. Cal. 1996). *Id.* at 1427. Another court, that initially adopted the "knew or should have known" standard, garnered support for its findings by looking at a Second Circuit decision that used *Franklin* to justify its application of Title VII standards in Title IX situations. *See Davis*, 74 F.3d at 1191 (stating that "[t]he [Franklin] Court's citation of *Meritor*, ... a Title VII case, in support of *Franklin*’s central holding 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") (quoting *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995)).

*Petaluma*, 949 F. Supp. at 1422 (analyzing *Franklin*’s use of the phrase "intentional discrimination" to determine its application to peer sexual harassment).

*See id.; supra note 66 and accompanying text (discussing the notice issue).*

*See Landgraf v. USI Film Products*, 511 U.S. 244, 281-82 (1994) (construing the 1991 amendments to Title VII as implicitly including hostile work environment sexual harassment within the definition of intentional discrimination). *Landgraf* is a Title VII liability case involving co-worker sexual harassment. *See Landgraf*, 511 U.S. at 248. In examining the retroactivity of the 1991 amendments to Title VII, which permit rewards of compensatory damages against employers, the *Landgraf* Court, according to *Petaluma*, assumed that hostile environment discrimination is a form of intentional discrimination.
taluma court concluded "that the hostile work environment cause of action developed as a species of intentional discrimination." To buttress this assertion, the Petaluma court compared the criteria for hostile environment sexual harassment to the elements of disparate treatment, an intentional discrimination type of sexual harassment, and found that the two bear a close resemblance to one another. Specifically, the court illustrated that the first and third prongs of a hostile environment cause of action require the same analysis as in a disparate treatment situation, where discriminatory intent may be inferred, rather than proven directly. Moreover, the court construed Ninth Circuit cases as recognizing the Title VII "knew or should have known" standard of liability as an intentional discrimination threshold and not a mere negligence standard. Finally, the Petaluma court stated that there are two elements of intent already in existence within a hostile environment analysis: the harasser's intentional conduct based on sex; and the institution's act of "implicitly condoning" the conduct by "knowingly failing to take steps to remedy it." Thus, proof of the elements necessary to establish a successful hostile environment cause of action fulfills the required intentional discrimination component, rendering unnecessary any separate re-

See Petaluma, 949 F. Supp. at 1422. Petaluma noted that while no strict definition exists, the amendments seem to define intentional discrimination "as any form of discrimination other than 'an employment practice that is unlawful because of its disparate impact.'" Id. (quoting 42 U.S.C. §1981a(a)(1) (1991)). Furthermore, Petaluma cited Landgraf for the proposition that the amendments create a new right to monetary relief for those who are the victims of a hostile work environment, but who have not yet been discharged. See id.


184. See id. at 1422-23 (noting that disparate treatment discrimination requires a showing of intentional discrimination, "whether by direct evidence or by inference"). Disparate treatment discrimination entails treatment of certain employees in a less favorable manner because of the employee's status as a member of a protected group. See id. at 1422.

185. See id. at 1423 (showing how both the hostile environment and disparate treatment standards require that a perpetrator choose a victim according to his or her membership in a particular group and contain provisions with respect to employer culpability).

186. See id.; see also Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir. 1986) (establishing an intentional discrimination threshold by finding that "failure to take reasonable steps to prevent a barrage of racist acts, epithets, and threats can make an employer liable if management-level employees knew, or . . . should have known about the campaign of harassment").

187. Petaluma, 949 F. Supp. at 1424. The court explained that, as in disparate treatment cases, victims of hostile environment sexual harassment must be selected by harassers as a result of gender, a protected group under Title VII. See id. at 1423. Finding intent in a harasser's conduct is relatively simple, but finding intent where an employer implicitly condones the conduct through a lack of response is more difficult. See id. The court noted, however, that other cases employed the "knew or should have known" standard as an intentional discrimination threshold. See id.
quirement of intent in addition to a showing of actual or constructive no-
tice.\textsuperscript{188}

To enhance the justification of this opinion, the court also endorsed
the Eleventh Circuit's language in \textit{Davis v. Monroe County Board of
Education},\textsuperscript{189} espousing public policy reasons for the need to protect stu-
dents as much as workers.\textsuperscript{190} Specifically, the \textit{Petaluma} court stated that
educational environments require protection from sexual harassment,
and that failure to provide such protection could prevent a harassed stu-
dent from fully developing his or her intellectual capacity.\textsuperscript{191} Citing vari-
ous statistics indicating that sexual harassment in schools is significantly
more prevalent than in the workplace, the court concluded that school
districts are therefore "on notice" that peer sexual harassment may very
well exist in their schools.\textsuperscript{192} Consequently, school districts have a duty
not only to implement programs reasonably calculated to create aware-
ness of peer sexual harassment, but also to remedy cases of sexually hos-
tile conduct, about which they have reason to know, regardless of
whether the aggrieved students have filed official complaints.\textsuperscript{193}

\textsuperscript{188} Cf. \textit{id.} (implying that no additional proof is needed to establish the intent re-
quirement of a hostile environment claim once the elements necessary for proving such a
claim are established).

\textsuperscript{189} 74 F.3d 1186 (11th Cir. 1996) (Davis I), \textit{rev'd en banc}, 120 F.3d 1390 (11th Cir.

\textsuperscript{190} \textit{See Petaluma}, 949 F. Supp. at 1420 (discussing the \textit{Davis I} court's reasoning for
adopting exact Title VII standards in Title IX peer sexual harassment suits).

\textsuperscript{191} \textit{See id.} (relying on \textit{Davis I} for the proposition that public policy supports the need
for enhanced protection of school children against sexual harassment by peers).

\textsuperscript{192} \textit{See id.} at 1426 (citing statistics indicating that while over 40\% of female federal
employees reported incidents of sexual harassment in 1980 and 1987, a 1993 study showed
that 85\% of girls and 76\% of boys reported experiences with similar abusive conduct in
school).

\textsuperscript{193} \textit{See id.} The court rejected the school district's argument that the absence of a
separate requirement of intent on behalf of the school district would force the schools to
create an environment free of harassment, which it deemed an impossible task. \textit{See id.}
The court reiterated that liability is not automatic and that Title VII principles, on which it
based its decision, would protect school districts from such a problem in three ways. \textit{See id.}
First, liability only attaches when the harassment is so pervasive or severe as to deter
the plaintiff's ability to function in the educational environment. \textit{See id.} Second, the
school district must know of the harassment, or, with the exercise of reasonable care,
should have known, before liability is imposed. \textit{See id.} Liability is not arbitrary, but will
attach only upon some proof that the situation was severe enough to make a reasonably
prudent school district aware of the harassment. \textit{See id.} Finally, even if there is a hostile
environment within the school, a district can avoid liability by responding adequately to
correct the situation. \textit{See id.} Schools are allowed reasonable leeway in adopting a method
they deem most effective to ameliorate each incident of sexual harassment. \textit{See id.}
III. THE OCR NOTIFIES SCHOOL DISTRICTS OF ITS POSITION, BUT COURTS CONTINUE TO RELY ON FALSE PREMISES

In March 1997, the OCR issued a Sexual Harassment Policy Guidance clarifying its position on peer sexual harassment in schools. This guidance officially addressed the OCR’s opinion concerning the current disparity among federal courts with respect to finding school district liability in peer sexual harassment cases that is hindering the uniform protection of student victims. In light of the OCR’s guidance, at least one commentator has reasonably assumed that federal courts would begin to adopt a unified position on the application of Title IX to peer sexual harassment claims. This assumption appears to be flawed, however. Despite the OCR’s clear policy interpretation, courts continue to show resistance, either by modifying Title VII standards of liability, or by

194. See Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,034 (1997). This policy guidance attempted to clarify the appropriate standards that the OCR uses to investigate and resolve peer sexual harassment claims. See Education Department Issues Policy Guidance on Sexual Harassment, U.S. NEWSWIRE, Mar. 13, 1997, available in 1997 WL 5711388. The OCR stated that its policy is consistent “with the Congress’ goal in enacting Title IX—the elimination of sex—based discrimination in federally assisted education programs,” with Supreme Court precedent, and with “well-established legal principles that have developed under Title IX,” Title VI and Title VII. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,034.


196. See Dawn A. Ellison, Comment, Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX, 75 N.C. L. Rev. 2049, 2146 (1997) (asserting that federal courts will begin to adopt the Title VII “knew or should have known” standard of institutional liability embraced by the OCR). The impact the new standards will have on the determination of liability under Title IX is not entirely clear, however, since the OCR’s interpretation is not binding on the courts. See id. at 2147-48.


198. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,039 (stating that a school district can be liable for peer sexual harassment if the school knew or should have known of the harassment, but failed to remedy the situation).
rejecting the applicability of Title IX altogether.\textsuperscript{199}

Although it is well-recognized that courts "must accord [OCR's] interpretation of Title IX appreciable deference,"\textsuperscript{200} OCR's guidelines are not binding on federal courts of law.\textsuperscript{201} However, because the OCR's Sexual Harassment Guidance represents the Department of Education's official interpretation, the policy should be accorded "substantial deference."\textsuperscript{202} Indeed, the Supreme Court has stated that agencies are in the best position to resolve difficult or changing circumstances due to their "unique expertise" in the particular subject matter for which they are authorized to make policymaking determinations.\textsuperscript{203} Nonetheless, because an agency's own policy interpretation is not binding, the OCR is forced to investigate sexual discrimination complaints according to the applicable law in each jurisdiction.\textsuperscript{204} Thus, when courts shun the policies adopted by the OCR and establish varying approaches to analyze peer sexual harassment claims, the OCR is forced to compromise its position, while simultaneously attempting to convince schools to apply its more protective policies.\textsuperscript{205} As such, the unsettled debate regarding this tenuous issue not only deprives students of the uniform protection of the law, but also hinders OCR investigations and creates uncertainty among school dis-

\textsuperscript{199} See supra note 197 (listing courts that have rejected the OCR's position regarding school district liability in the context of peer sexual harassment).

\textsuperscript{200} Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993) (discussing the degree of deference courts should accord an agency's interpretation of Title IX), aff'd in part, rev'd in part, 101 F.3d 155 (1st Cir. 1996), 117 S. Ct. 1469 (1997); see also Sexual Harassment Guidance, 62 Fed. Reg. at 12,036 (noting that courts "discuss according 'appreciable deference' to OCR's interpretation of Title IX").

\textsuperscript{201} Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (acknowledging that courts must at least accord agency interpretations deference "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies").

\textsuperscript{202} See Cohen v. Brown Univ., 101 F.3d 155, 173 (1st Cir. 1996), cert. denied, 117 S. Ct. 1469 (1997) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). In Cohen, the court held that a policy interpretation issued by the OCR should receive substantial deference, since it was an important guide in determining the requirements under Title IX. See id.

\textsuperscript{203} See Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) (asserting that agencies have the presumptive power to interpret their own regulations).

\textsuperscript{204} See Sexual Harassment Guidance, 62 Fed. Reg. at 12,048 nn.23 & 27 (acknowledging that the OCR will follow the applicable law in each jurisdiction when investigating sexual harassment complaints, even though it may be contrary to the OCR's position).

\textsuperscript{205} See id. Notwithstanding case law to the contrary, the OCR urges schools within jurisdictions affording students less protection under Title IX to follow its policies. See id. at 12,048 n.27. Indeed, the OCR stated that "to ensure students a safe and nondiscriminatory educational environment, the better practice is for these schools to follow the Guidance." Id.
tricts concerning their responsibilities regarding compliance with Title IX. 206

In addition to these judicial pronouncements concerning the necessary deference courts should accord the OCR policy interpretation, the Supreme Court has declared that Title IX's scope should be read broadly. 207 One court, however, in justifying a determination adverse to this mandate, contended that modifying Title VII would best address the competing concerns surrounding this area of law. 208 These allegedly dispositional concerns ostensibly include the lack of a traditional agency relationship between a student and a school district, 209 the "intentional discrimination" requirement espoused in Franklin due to the Spending Clause origin of Title IX, 210 and the need to prevent unlimited exposure of schools to monetary liability for the "uncondoned acts of students." 211 These courts, however, in addition to according OCR policies little deference when inconsistent with established case law, fail to recognize that the criteria needed to establish a hostile environment sexual harassment claim, as well as the inherent nature of such a claim, adequately address

206. See id. at 12,048 nn.23 & 27 (discussing how the OCR must alter its investigation according to the law in each jurisdiction); see also Williams & Brake, supra note 46, at 424 (stating that "[t]he difficulty schools are having addressing student-to-student harassment reflects the disarray in the courts in this emerging area of the law"). Schools have difficulty responding appropriately when confronted with a sexual harassment situation. See Ellison, supra note 196, at 2149.

Some commentators have noted additionally that as the law emerges in the context of peer sexual harassment, schools will become safer environments for all students—a goal mandated by Title IX. See Williams & Brake, supra note 46, at 456.


208. See Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 75 (D.N.H. 1997) (balancing Congress' purpose in enacting Title IX with the need to limit exposure of the public budget to liability); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 173-74 (N.D.N.Y. 1996) (concluding that the Title VII constructive notice standard is inapplicable to Title IX peer sexual harassment cases because of the lack of an agency relationship between schools and harassing students); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (stating that modifying Title VII criteria is justified because of the need to show "intentional discrimination").

209. See Bruneau, 935 F. Supp. at 174-75 (discussing the applicability of agency principles to Title IX peer sexual harassment cases); supra note 173-74 and accompanying text (illustrating that liability could not be imposed on a school district for the sexual harassment of one student by another if liability relied solely on agency principles because a student is not an agent of a school district).

210. See Burrow, 929 F. Supp. at 1205 (modifying Title VII criteria to account for the need to show "intentional discrimination," as ordered in Franklin); supra text accompanying note 74 (explaining Franklin's holding that a school district can be found monetarily liable only in the case of an intentional violation of Title IX).

211. Londonderry, 970 F. Supp. at 75.
each of these three concerns.212

First, as the OCR and some federal courts acknowledge, an institution’s liability in a hostile environment sexual harassment case depends on its own actions once it has notice and, thus, does not entail vicarious liability.213 Rather, the basis for the school district’s liability is a form of “direct” liability, rendering the absence of an agency relationship irrelevant.214 This view is consistent with Title VII case law, which provides that an employer may be liable for failing to correct a hostile environment created by third parties who are neither employees nor agents of the employer.215 The imposition of liability for hostile environment sex-

212. See generally Doe v Petaluma City Sch. Dist., 949 F. Supp. 1415, 1423-24 (N.D. Cal. 1996) (explaining how proving the elements of a hostile environment sexual harassment claim establishes intent); Sexual Harassment Guidance, 62 Fed. Reg. at 12,040 (explaining that the nature of a hostile environment sexual harassment claim holds entities liable for their own actions, not those of an agent). See also supra note 193 (explaining three ways that adhering to Title VII hostile environment principles can shield a school district from liability).

213. See Doe v. Oyster River Co-op. Sch. Dist., 992 F. Supp. 467, 477 (D.N.H. 1997) (explaining that institutional liability for hostile environment sexual harassment “is not a form of vicarious liability at all, but rather is a form of ‘direct’ liability because the [institution] is liable for its own misconduct”); Petaluma, 949 F. Supp. at 1421 (noting that liability attaches based on the school’s actions or inaction); Sexual Harassment Guidance, 62 Fed. Reg. at 12,039 (discussing the liability of a school for peer sexual harassment). The OCR’s policy guidance asserted that it is “a school’s failure to respond to the existence of a hostile environment within its own programs or activities [that] permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.” Id. at 12,039. A school district, however, can avoid violating Title IX altogether simply by taking immediate and appropriate corrective action. See id. If the school does not take the required action, subsequent liability would be based on the school’s actions or inaction, not those of the harassing students. See id. The OCR Guidance also established a notice requirement that triggers a school’s duty to respond, requiring plaintiffs to show that the school either knew or should have known of the harassment. See id. at 12,042. Moreover, the policy guidance noted that a school has notice “as long as an agent or responsible employee of the school received notice.” Id. In the event that a school, an agent, or a responsible employee of the school is not notified, a school may still have constructive notice if the harassment is so pervasive that the school should have known of the hostile environment. See id.

214. See Doe v. University of Ill., 138 F.3d 653, 667 (7th Cir. 1998) (stating that “[t]he absence of an agency relationship is simply irrelevant, given our holding that the liability [the plaintiff] seeks is direct, rather than agency-based”); Oyster River, 992 F. Supp. at 477 (discussing the method for imposing liability in a hostile environment sexual harassment cases).

ual harassment is, therefore, direct because it is based on the entity's own misconduct in failing to respond adequately to the harassment, and not on the misconduct of the actual harassers.\textsuperscript{216}

Second, although case law indicates that monetary awards are available under Title IX only if the school discriminates intentionally based on sex, thereby satisfying the notice problem,\textsuperscript{217} opponents' contention that the “knew or should have known” standard of liability is insufficient to establish this intent is irrational.\textsuperscript{218} As Petaluma noted, courts have characterized hostile environment cases under Title VII as disparate treatment claims, which require that a plaintiff show intentional discrimination on the part of the employer.\textsuperscript{219} Logic dictates that a hostile work environment claim, therefore, must contain an intentional discrimination facet as well;\textsuperscript{220} yet, the “knew or should have known” standard is still used to satisfy employer liability with respect to acts of low-level employees and third parties, despite this intent requirement.\textsuperscript{221} Indeed, the prima facie case need not demand that a plaintiff engage in a separate inquiry to establish intentional discrimination because satisfying the elements of a Title VII hostile environment claim implicitly demonstrates the existence of intent.\textsuperscript{222} Accordingly, if the “knew or should

217. See supra note 66 and accompanying text (discussing the notice problem concerning monetary rewards in connection with Spending Clause legislation).
218. See Senatus, supra note 46, at 394 (suggesting that Meritor's "knew or should have known" standard of liability may be insufficient to establish the required intent to discriminate); see also Karpenko, supra note 53, at 1305 (claiming that the "knew or should have known" liability standard could penalize schools that have made efforts to remedy harassment and that schools should be afforded a chance to resolve the situation before being forced to pay a monetary reward). But cf. Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (noting that intent can be inferred from a school's failure to remedy a sexually hostile environment of which it has knowledge); Bosley, 904 F. Supp. at, 1021 (stating that intent may be inferred from the totality of the circumstances).
219. See Petaluma, 949 F. Supp. at 1423 (explaining that courts have analyzed hostile work environment claims based on disparate treatment principles).
220. See id. at 1423-25 (explaining that the disparate treatment nature of a hostile work environment claim requires the showing of discriminatory intent).
221. See Ellison v. Brady, 924 F.2d 872, 881-82 (9th Cir. 1991) (quoting EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989)).
222. See Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982) (explaining that a plaintiff need not prove intent as part of the prima facie case because the disparate treatment claim of hostile environment sexual harassment does "not present a factual question of intentional discrimination which is at all elusive"); see also Andrews v. City of
have known” standard of liability is sufficient to fulfill the intentional discrimination requirement in Title VII hostile environment claims, it should also follow that this same standard is satisfactory in Title IX hostile environment claims.

Moreover, the court in Petaluma and the OCR note correctly that the true indicator of intent is not whether a student or other conveyor of information notifies a school district of a sexually hostile environment; rather, intent is a product of a school district’s response, or lack of response, to the harassment. Proving that sexually harassing behavior in the school’s programs or activities was so pervasive that the school district should have been aware of its existence and failed to take corrective action implicitly fulfills the intent requirement. As a result, courts that insist on modifying Title VII liability standards by requiring a separate intent element have created an unnecessary and overly burdensome threshold for students. Students who have been victims of such blatant and overt hostile environment sexual harassment that any reasonably prudent school would have noticed, but who have been too fearful of possible retaliation to complain, are especially at risk if schools are not forced to take action before actual notice arises.

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Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (stating that in hostile environment cases “the intent to discriminate on basis of sex . . . is implicit, and thus should be recognized as a matter of course”); Petaluma, 949 F. Supp. at 1424 (noting that the elements of a hostile environment claim establish the intent, and thus, further proof is unnecessary).

223. See Petaluma, 949 F. Supp. at 1426 (finding that the Title VII standard for intentional discrimination is appropriate in the Title IX hostile environment peer sexual harassment context); Kaija Clark, Note, School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers, 66 GEO. WASH. L. REV. 353, 376 (1998) (reasoning that the similarity between sexual harassment in the workplace and sexual harassment in the educational setting dictates that Title VII standards should be applied to Title IX).

224. Cf. Petaluma, 949 F. Supp. at 1421 (discussing the Rowinsky court’s misinterpretation of the nature of Title IX liability); Sexual Harassment Guidance, 62 Fed. Reg. at 12,048 n.27 (same); see also supra notes 182-88 and accompanying text (discussing the relationship between the element of intent and the “knew or should have known” standard of institutional liability).

225. See Petaluma, 949 F. Supp. at 1423 (describing the two elements of intent inherent in a hostile environment sexual harassment claim); supra notes 187-88 and accompanying text (explaining why it would be redundant to require a separate showing of an element of intent).

226. Cf. Petaluma, 949 F. Supp. at 1423 (illustrating that no additional proof of intent is necessary once a plaintiff establishes the elements required to prove a hostile environment sexual harassment claim).

227. See Julie Shaflucas, Legislative Reform, Sexual Harassment Between Students: Whether to Turn a Blind or Watchful Eye, 23 J. LEGIS. 317, 319 (1997) (noting that an actual notice standard protects against blatant sexual harassment in the school environment only when a student asks the school to remedy the situation).
Third, in response to those who opine that a constructive notice standard would potentially expose a school district's budget to limitless liability, the elements of a hostile environment sexual harassment claim dictate otherwise. Indeed, monetary liability should become an issue only if a hostile environment actually exists, the school has a valid reason to know of its existence, and the school chooses to ignore the situation. Accordingly, as the OCR's Sexual Harassment Guidance explains, if sexually harassing behavior in a school's programs or activities is not "severe, persistent, or pervasive" enough to establish a hostile environment, the school district will not be liable. Likewise, no liability will result if a hostile environment does exist and the school takes immediate and appropriate corrective action. Nonetheless, simple morals should

228. See supra note 193 (discussing how the elements of a hostile environment sexual harassment claim work to shield the school district from liability). To assuage those fearing a major depletion of public educational funds in the event that the Title VII liability standard is implemented in Title IX peer sexual harassment cases, Congress should enact legislation capping monetary relief at $300,000. See Clark, supra note 223, at 378 (calling for Congress to cap monetary relief under Title IX, as it did under Title VII).

229. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,039 (stating the elements that must exist for a school to be liable for peer sexual harassment under Title IX); Kernie, supra note 2, at 173 (discussing the financial effect that a monetary remedy could have on educational institutions); supra note 193 (discussing the ways a school district may shield itself from liability).

230. See Petaluma, 949 F. Supp. at 1426 (stating that the Title VII hostile environment standard is not a strict liability standard and, thus, an entity will not be liable for "sporadic or minor incidents"); Sexual Harassment Guidance, 62 Fed. Reg. at 12,039; see also supra note 154 (discussing factors that may result in a severe, persistent, or pervasive environment for purposes of creating a sexually hostile environment).

231. See Petaluma, 949 F. Supp. at 1426 (noting that the Title VII standard allows schools sufficient discretion in attempting to remedy sexual harassment before liability becomes an issue); Sexual Harassment Guidance, 62 Fed. Reg. at 12,039-40, 12,042 (explaining that once a school has notice of the existence of a hostile environment, the response must be "reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again"). Determining what type of response is reasonable will depend on the circumstances of a given case. See id. at 12,042. The OCR suggested that when a school receives information of a possible incident of sexual harassment, it should discuss what actions the parents or student are seeking to rectify the problem. See id. The school should then conduct a prompt investigation to determine if the allegations are true. See id. The school should thereafter take appropriate steps to resolve the situation. See id. Factors to consider when deciding what steps to take include: the nature of the complaint, the source of the allegation, the student's or students' age, and the school's size and administrative structure. See id. Moreover, a school may have to implement interim measures during the investigation of a complaint, especially if the incident involves a sexual assault or criminal activity. See id. at 12,043. Measures that ultimately may be employed to resolve a situation can include counseling, warnings, and disciplinary action against the harasser. See id. If these steps do not achieve the desired result, further measures such as separating the harasser and the victim may be necessary. See id.
dissuade courts from compromising the emotional stability of schoolchildren on the basis of economic concerns. 232

In addition to the foregoing arguments, it is simply egregious public policy to allow schools the ability to escape responsibility by willfully ignoring blatant episodes of sexual harassment within its programs or activities just because no one issued a direct complaint in compliance with an actual notice standard of institutional liability. 233 Once the trier of fact confirms that a sexually hostile environment existed, and that the abuse was so severe that the school should have become aware of the harassment, the courts should assume that a school district in fact had sufficient notice to impose liability. 234 Otherwise, schools will be able to circumvent Congress’s entire purpose for enacting Title IX—to provide an educational environment free from invidious sex discrimination. 235

Finally, given the recent public exposure, 236 the ample statistics concerning the prevalence of sexual harassment in schools, 237 and the clear policy guidance issued by the OCR, 238 courts should no longer be able to protect schools under the pretense that they lack notice of potential liability in cases of peer sexual harassment because Congress did not men-

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232. See Kernie, supra note 2, at 173 (stating that “[v]ictims of sex discrimination should not be denied the right to be compensated for their losses merely because a damages award exacts a stiff economic toll on an institution that has engaged in intentional discrimination”).

233. See Nicole M. ex rel. Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1378 (N.D. Cal. 1997) (declaring that “a principal, vice-principal or teacher cannot put her head in the sand once she has been alerted to a severe and pervasive hostile educational environment”); Shaflucas, supra note 227, at 319 (stating that “[a]n actual notice standard allows schools to ignore blatant and persistent sexual harassment between students until they are asked to remedy the situation”). It has been further asserted that a constructive notice standard can effectively induce schools to create and maintain a learning program free from chronic sexual harassment. See id. at 319. Indeed, this may be the only way to desocialize students from viewing women in a subversive manner and to change attitudes toward women as a whole. See id.

234. See Senatus, supra note 46, at 395 (stating that “[t]he assumption that the school ‘should have known’ about student harassment puts school districts on notice of possible liability”).

235. See 118 CONG. REC. 5803, 5806-07 (1972) (statement of Sen. Bayh) (stating that Title IX “is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers”); Bosley, 904 F. Supp. at 1023 (explaining how the application of Title VII standards to Title IX disputes will further the congressional purpose of eliminating sex discrimination underlying the statute).

236. See supra note 19 and accompanying text (illustrating examples of recent public recognition of peer sexual harassment).

237. See supra note 20 and accompanying text (citing statistics from a study conducted by the American Association of University Women Education Foundation).

tion expressly that such harassment constitutes a violation of Title IX prior to acceptance of federal funds. Not only did Title IX notify educational institutions receiving government aid that they would have an affirmative duty to maintain an environment free from sex discrimination, the Supreme Court also noted that changes in circumstances are better dealt with by the uniquely capable agencies responsible for implementing congressional acts. For the most part, federal courts have since proven resoundingly the wisdom of that sentiment via their inconsistent rulings under Title IX peer sexual harassment cases, and thus, should finally accord the OCR the deference to which it is entitled.

Assuming such deference will occur, however, may be a mistaken presumption.

IV. CONCLUSION

Although courts are not bound by OCR guidelines in their adjudication of claims against school districts for peer sexual harassment, they should nonetheless begin to adopt policies consistent with the OCR's stance. Not only do youthful victims of sexually abusive behavior deserve the utmost protection of the laws, but school districts should no longer have the discretion of choosing between the more lenient provisions established by the courts or the stricter measures advocated by the OCR. Such confusion interferes with the OCR's ability to enforce its policies, weakens Congress's initiative to provide a school environment free from discrimination, and ultimately, denies children the most com-

239. See Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (suggesting that schools have sufficient notice that peer sexual harassment most likely exists in their schools due to the presence of ample statistics; thus, failure to remedy incidents of severe harassment may result in the inference that the school intended the consequences of that failure to act). Perhaps those courts which "adhere to an actual notice standard are, in effect, stating that a pervasive culture of sexual harassment between students is okay and normal as long as no one is 'actually' complaining." Shaflucas, supra note 227, at 325.

240. Cf. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75 (1992) (stating that Title IX "unquestionably" created a "duty not to discriminate on the basis of sex" and that sexual harassment constitutes a form of sex discrimination).

241. See Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) (discussing the ability of agencies to develop policy in areas where they possess a particularized expertise).

242. See Petaluma, 949 F. Supp. at 1427 (reasoning that OCR interpretations are indicative of public policy and, accordingly, should be persuasive in the court's analysis); supra notes 200-203 and accompanying text (illustrating the deference that agency interpretations are supposed to receive).

243. See supra note 197 (discussing cases decided after, and in opposition to, OCR's Sexual Harassment Guidance).
prehensive means of protection.