COMMENT

BETWEEN A (SCHOOLHOUSE) ROCK AND A HARD PLACE: TITLE IX PEER HARASSMENT LIABILITY AFTER *DAVIS V. MONROE COUNTY BOARD OF EDUCATION**

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I. INTRODUCTION

The issue of peer sexual harassment in schools gained national attention in 1997 after a North Carolina elementary school suspended a six-year-old boy for kissing one of the girls in his class.[1] The media's reaction to schools' heightened awareness of peer sexual harassment suggests that many people do not believe it is possible for sexual harassment to take place among school-aged children.[2] Perhaps this denial is one of the reasons why peer sexual harassment has become a constant part of many students' lives.[3]

This Comment discusses the United States Supreme Court's recent decision in *Davis v. Monroe County Board of Education*[4]

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1. George F. Will, *Six-Year Old Harassers?*, NEWSWEEK, June 7, 1999, at 88 (reporting the suspension).

2. *See id.* (describing an American Association of University Women's study, which found that a majority of students have been the target of sexual harassment, as "hysteria-mongering by 'victimization feminists' wielding ludicrous definitions of sexual harassment"); *see also* Jennifer C. Braceras, *New Menace in the Schools: Hand Holding*, WALL ST. J., May 25, 1999, at A26 (urging that schools should not spend money on sexual harassment workshops, but rather focus on "more serious . . . forms of student misconduct" such as students' bringing weapons to school); Curt A. Levey, *If Billy Teases Suzy, Can Suzy Sue?*, WALL ST. J., Jan. 12, 1999, at A22 (characterizing peer-harassment lawsuits as students suing for "an unwanted peck on the cheek").

3. *See, e.g.*, Sandra Kopels & David R. Dupper, *School-Based Peer Sexual Harassment*, 78 CHILD WELFARE 435, 437 (1999) (relating survey results of 4200 females aged 9–19 years in which 39% "reported being harassed daily at school during the past year").

4. 526 U.S. 629 (1999).

and its implications for schools seeking to limit their liability under Title IX of the Education Amendments Act of 1972 (Title IX).[5] Part II focuses on the *Davis* Court's five to four decision, in which the Court recognized a cause of action under Title IX for a school's deliberate indifference to known peer harassment. An analysis of the Court's Title IX sexual harassment doctrine follows in Part III. This Comment then compares the peer sexual harassment guidelines adopted by the Department of Education Office for Civil Relations (OCR) in 1997[6] with the actionability standard articulated by the *Davis* Court. In Part V it is argued that the OCR should set forth age-appropriate disciplinary guidelines to assist school districts faced with an allegation of peer sexual harassment. Additionally, this Comment asserts that schools should implement sexual harassment policies, and suggests elements of a model policy. Part VI explores the possibility that yet another type of sexual harassment liability exists under Title IX.

II. *DAVIS V. MONROE COUNTY BOARD OF EDUCATION*

A. Factual and Procedural Background

Mrs. Aurelia Davis, the mother of (then) fifth-grade student LaShonda Davis, sued her daughter's school district for failing to stop a male classmate's (referred to by the Court as "G.F.") alleged repeated sexual comments and conduct toward LaShonda.[7] LaShonda had told her teachers about each of the incidents, and, in turn, the teachers notified the school's principal, Bill Querry.[8] Principal Querry, however, did not discipline G.F. for his misconduct.[9] G.F.'s actions continued for

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5. 20 U.S.C. §§ 1681–1687 (1994). Title IX provides, in pertinent part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

6. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Dep't of Educ. Mar. 13, 1997) (final policy guidance) [hereinafter Sexual Harassment Guidance].

7. *Davis*, 526 U.S. at 632–33. G.F.'s alleged acts included repeated attempts to touch LaShonda's breasts and genital area, telling LaShonda, "I want to get in bed with you," and rubbing his body against her in a "sexually suggestive manner." *Id.* at 633–34. (internal quotation marks omitted)

8. *Id.* at 633–34. In fact, a group of girls who were also targets of G.F.'s alleged conduct tried to meet with their principal about the problem. *Id.* at 635. Their request was denied. *Id.*

9. *Id.* at 635. When Mrs. Davis spoke with Principal Querry about the alleged harassment, his response was to ask her why LaShonda "was the only one complaining." *Id.* (internal quotation marks omitted).

several months,[10] finally ending "when G.F. was charged with, and pleaded guilty to, sexual battery."[11]

Mrs. Davis brought the lawsuit under Title IX, seeking monetary and injunctive relief.[12] The district court dismissed the Title IX claim for failure to state a cause of action.[13] The United States Court of Appeals for the Eleventh Circuit initially reversed the lower court, then, sitting en banc, reversed itself and affirmed the dismissal.[14] The United States Supreme Court granted certiorari in order to resolve a conflict among the federal circuit courts of appeal "over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment."[15]

B. Majority Opinion

Justice O'Connor delivered the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer.[16] The Court began its analysis by examining Title IX's statutory language.[17] The Court noted that the Monroe County School Board was "a recipient of federal education funding for Title IX purposes" and acknowledged that student-on-student harassment can "rise to the level of 'discrimination' for purposes of Title IX."[18] Thus, the Court framed the issue as "whether a recipient of federal education funding may be liable for damages under Title IX

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10. *Id.* at 634 (describing a series of alleged incidents that began in February of 1993 and ended in May of 1993).

11. *Id.* The Davises brought the sexual battery charge against G.F. after the school failed to stop his actions. Brief for Petitioner at *5, Davis v. Monroe County Bd. of Educ., 1998 WL 792418 (No. 97-843).

12. *Davis*, 526 U.S. at 635–36.

13. *Id.* at 636.

14. *Id.* at 636–37.

15. *Id.* at 637. The split of authority among the courts of appeal on this issue existed between the Eleventh Circuit's holding in the instant case, *see id.* at 637–38, the Fifth Circuit's holding in *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1008 (5th Cir. 1996) (holding that private damages for peer harassment are available under Title IX only when the funding recipient responds to claims differently based on the gender of the victim), and the Seventh Circuit's holding in *Doe v. University of Illinois*, 138 F.3d 653, 667 (7th Cir. 1998), *vacated*, 526 U.S. 1142 (1999) (upholding a private cause of action under Title IX when a funding recipient fails to respond adequately to known peer harassment).

16. *Davis*, 526 U.S. at 632. Chief Justice Rehnquist and Justices Scalia and Thomas joined Justice Kennedy's dissenting opinion. *Id.*

17. *Id.* at 638–39 (noting that Congress authorized Title IX's enforcement by any legal means necessary to effectuate the statute's restrictions).

18. *Id.* at 639.

under any circumstances for discrimination in the form of student-on-student sexual harassment."[19]

Following its past decisions in Title IX cases, the Court reaffirmed that an implied right of action exists under Title IX[20] for money damages.[21] Because Title IX is treated as legislation passed under Congress's Spending Clause power,[22] in order to be liable for private damages, the Court requires a finding that funding recipients either had "adequate notice that they could be liable for the conduct at issue,"[23] or had intentionally violated Title IX.[24] The Court noted that, through Title IX's regulatory scheme, funding recipients have received abundant notice that a failure to respond to discriminatory acts of certain third parties would expose them to liability under Title IX.[25] The Court noted further that schools are routinely held responsible under the common law for their negligent failure to protect students from the torts of their peers.[26]

In accord with its decision in *Gebser v. Lago Vista Independent School District*,[27] the Court rejected the petitioner's argument of agency theory as a basis of liability and emphasized that a funding recipient could be liable only for its conduct—not the conduct of one of its teachers or students.[28] The Court based its rejection upon the "textual differences between Title IX and Title VII."[29] The majority also refused to incorporate a negligence standard that would have imposed liability based upon what a

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19. *Id.*

20. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 691 (1979)).

21. *Id.* at 639–40 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992)).

22. *Id.* at 640.

23. *Id.* (characterizing Spending Clause legislation as a contract between the federal government and recipient state governments).

24. *Id.* at 642 (rejecting the argument that a funding recipient must have notice that it will be liable for money damages in cases when the recipient "intentionally violates the statute").

25. *Id.* at 643–44 (discussing the Department of Education's requirement that funding recipients monitor certain third parties for discriminatory acts).

26. *Id.* at 644 (citing RESTATEMENT (SECOND) OF TORTS § 320 & cmt. a (1965)).

27. 524 U.S. 274 (1998).

28. *Davis*, 526 U.S. at 642–43.

29. *Id.* at 642. In *Gebser*, the Court characterized Title VII's statutory language as broad and prohibiting, with an emphasis on compensating victims of discrimination. 524 U.S. at 286–87. In analyzing Title IX, however, the *Gebser* Court found that the statute's goal is to protect rather than compensate victims of sex discrimination. *Id.* at 287. Commentators have criticized this refusal to use Title VII to interpret Title IX. *See, e.g.*, Fermeen Fazal, Note, *Is Actual Notice an Actual Remedy? A Critique of* Gebser v. Lago Vista Independent School District, 36 HOUS. L. REV. 1033, 1064 (1999) (urging that the Court should focus on the similarities between the two statutes' goals).

school "knew or should have known."[30] Instead, the Court applied the "actual knowledge" and "deliberate indifference" standards.[31]

Although Title IX does not employ agency principles, the identity of the harasser is still relevant in determining whether a funding recipient will be directly liable to the victim.[32] Under the "deliberate indifference" standard, a recipient is directly liable only when it has corrective authority over the alleged harassment.[33] This requirement, combined with the restrictive language of Title IX,[34] narrows the circumstances under which a school will be liable for peer sexual harassment.[35] Thus the *Davis* Court considered whether a school district is liable for an intentional violation of Title IX because of its deliberate indifference to known peer harassment.[36] The Court answered this question with a qualified "yes."[37] Under the standard set out in *Davis*, however, a student must overcome significant hurdles in order to prevail against a deliberately indifferent school district.[38]

Not every episode of peer harassment that takes place at school will trigger liability under Title IX.[39] The *Davis* Court articulated a stringent standard whereby the plaintiff must establish that the school was "deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it . . . deprive[s] the victims of access to the educational opportunities or benefits provided by the school."[40]

The Court further narrowed this standard by emphasizing that a funding recipient cannot be held liable unless it "has some

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30. *Davis*, 526 U.S. at 642 (emphasis omitted).

31. *Id.* at 642–43.

32. *Id.* at 644.

33. *Id.* (explaining that a funding recipient cannot be held directly liable for acts beyond its remedial authority).

34. Refer to note 5 *supra* (reciting Title IX's provisos). Title IX's language limits its scope to prohibited acts by the funding recipient that subject students to harassment and deny them access to educational opportunities. *Davis*, 526 U.S. at 644–45.

35. *Davis*, 526 U.S. at 644–45 (articulating a narrow theory of Title IX liability for peer sexual harassment).

36. *Id.* at 643 (analyzing whether the Court's holding in *Gebser* should be extended to incorporate the facts in *Davis*).

37. *Id.* at 643–47 (placing limitations on its extension of *Gebser* to peer harassment cases).

38. *Id.* at 652–53 (highlighting the "very real limitations" on a school's liability under Title IX).

39. *Id.* at 644 (confining the scope of liability for peer sexual harassment under Title IX "based on the recipient's degree of control over the harasser and the environment in which the harassment occurs").

40. *Id.* at 650.

control over the alleged harassment."[41] The *Davis* majority did not, however, articulate a clear standard by which to determine how much control a school must exercise over the harasser or the setting of the harassment before liability attaches.[42] The majority and the dissent agreed that the "substantial control" standard is satisfied when the offender is an agent of the recipient.[43] The majority analogized this degree of control to the student milieu and noted that a school may incur liability when peer harassment occurs during school activities or while school employees are supervising students.[44] In this situation, the majority reasoned, a school wields "substantial control" over both the circumstances of the harassment and the harasser.[45] Thus, when a school has the authority to stop known harassment yet chooses not to do so, it may be subject to liability under Title IX.[46]

The majority emphasized that a school may protect itself from liability by "merely respond[ing] to known peer harassment in a manner that is not clearly unreasonable."[47] The majority intimated further that such a response falls somewhere along the spectrum between doing nothing[48] and expelling the offender from school.[49] The majority also pointed out that, in many cases, whether a response is clearly unreasonable is a question of law.[50]

The *Davis* Court placed "very real limitations"[51] on Title IX peer harassment liability by denying damages for mere teasing and name-calling,[52] and requiring more than a "mere 'decline in grades'" to defeat a motion to dismiss.[53] Rather, the petitioner

41. *Id.* at 644.

42. *Id.* at 646 (describing circumstances in which the school retains "control," "substantial control," and "significant control" over persons and conduct).

43. *Id.* at 645 (explaining that the requirements of substantial control over the harasser and environment are easily met in this situation). As noted *supra*, however, agency is not a prerequisite for liability under Title IX. Instead, it is the school's own failure to act in the face of known discrimination that triggers liability. *Id.* at 645–46.

44. *Id.* at 646 (illustrating examples of when misconduct takes place "under" the funding recipient's "operation").

45. *Id.* (observing that a school board's power permits a high degree of supervision and control over students).

46. *Id.* at 646–47.

47. *Id.* at 649–50.

48. *Id.* at 648.

49. *Id.* (rejecting the notion that expulsion is the only appropriate response to peer harassment that would "protect school systems from liability or damages").

50. *Id.* at 649.

51. *Id.* at 652.

52. *Id.* (distinguishing teasing and banter from actionable harassment).

53. *Id.* (characterizing a decline in grades as merely one factor in determining Title IX liability).

must prove that the harassment was persistent and severe,[54] and that the school board was deliberately indifferent to known harassment.[55] Additionally, the harassment must, on a systemic level, "deny[] the victim equal access to an educational program or activity."[56] These limitations balance Title IX's prohibition against "official indifference to known peer sexual harassment with the practical realities of responding to student behavior."[57]

Applying this standard to the facts of the case, the *Davis* Court concluded that the petitioner's allegations entitled her to an opportunity to present evidentiary support for her claims.[58] Accordingly, the Court remanded the case to the Eleventh Circuit Court of Appeals for further proceedings.[59]

C. *The Dissent*

Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, asserted that Title IX does not give schools unambiguous notice of potential liability for peer sexual harassment[60] as required by *Pennhurst State School and Hospital v. Halderman*.[61] The dissent characterized *Pennhurst*'s clear notice requirement as a bastion against federal invasion into the states' affairs and posited that the majority's holding offended the Court's Spending Clause jurisprudence.[62] Justice Kennedy also asserted that the majority had further undermined the Spending Clause by implying a money damages remedy on top of its judicially created cause of action.[63] Moreover, Justice Kennedy dismissed the majority's purportedly "very real limitations" on liability as a "fence . . . made of little sticks [that] cannot contain the avalanche of liability now set in motion."[64]

The dissent argued that Title IX discrimination must be "authorized by, or in accordance with, the actions, activities, or

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54. *Id.* (stating requirements for a cognizable cause of action).

55. *Id.* (urging courts to impose liability sparingly under Title IX).

56. *Id.*

57. *Id.* at 652–53 (surmising that Congress surely intended that courts consider the realities of student behavior when deciding Title IX cases).

58. *Id.* at 653–54.

59. *Id.* at 654.

60. *Id.* at 655–58 (Kennedy, J., dissenting) (characterizing the notice requirement as vital protection against excessive federalism).

61. 451 U.S. 1 (1981).

62. *Davis*, 526 U.S. at 655 (Kennedy, J., dissenting).

63. *See id.* at 656–57 (Kennedy, J., dissenting) (describing the majority's recognition of a money damages remedy as "particularly troubling").

64. *Id.* at 657 (Kennedy, J., dissenting).

policies of the grant recipient."[65] Under this interpretation, there must be more than discrimination in an environment controlled by the school—the school policy itself must actually authorize discrimination.[66] Justice Kennedy concluded that this interpretation, which makes sense when addressing *teacher-student* sexual harassment, does not support an extension of Title IX liability to peer sexual harassment.[67]

The dissent also attacked the majority's "degree of control" test, which it described as ill-defined.[68] Justice Kennedy focused his attack on the majority's failure to define either how much control is sufficient or "how the States were on clear notice that the Court would draw the line to encompass students."[69] Justice Kennedy also argued that the majority should not substitute its judgment for that of the Department of Education,[70] which uses a control standard that reaches only persons to whom the school delegates its official functions.[71]

Additionally, Justice Kennedy highlighted two areas that were mentioned only in passing by the majority: (1) the legal rights of alleged harassers; and (2) distinctions among the levels of control schools can exercise over students of varying ages.[72] The dissent discussed these obstacles, as well as the legal constraints that arise under the Individuals with Disabilities Education Act (IDEA)[73] and the First Amendment.[74]

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65. *Id.* at 659 (Kennedy, J., dissenting).

66. *Id.* at 660 (Kennedy, J., dissenting).

67. *Id.* at 660–61 (Kennedy, J., dissenting) (contrasting *Davis* with *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998)).

68. *Id.* at 662 (Kennedy, J., dissenting) (asserting that the test is "little more than . . . arbitrary line-drawing").

69. *Id.* (Kennedy, J., dissenting).

70. *Id.* at 663 (Kennedy, J., dissenting).

71. *Id.* (Kennedy, J., dissenting) (speculating that schools were probably "on notice that they could not hire third parties to do" what they themselves are prohibited from doing under Title IX). The Department of Education standard recognizes that a public school has much greater control over hired third parties than it does over the students it educates. *Id.* at 664 (Kennedy, J., dissenting).

72. *Id.* at 664–67 (Kennedy, J., dissenting). The majority opinion cursorily acknowledged that school officials face significant obstacles in their disciplinary roles and called on Congress to review federal legislation that may interfere with an administrator's authority. *Id.* at 649.

73. 20 U.S.C. §§ 1400–1487 (Supp. IV 1994).

74. *See Davis*, 526 U.S. at 665–67 (Kennedy, J., dissenting). The IDEA regulates the disciplinary actions that schools may take against students with behavior disorders. *Id.* at 665–66 (Kennedy, J., dissenting). For a more in-depth discussion of the IDEA and relevant case law, see generally MICHEAL IMBER & TYLL VAN GEEL, EDUCATION LAW 232–56 (2d ed. 2000). The First Amendment protects student speech, including speech that is sexually suggestive. *Davis*, 526 U.S. at 667 (Kennedy, J., dissenting) (discussing several federal court decisions that impose constitutional limitations on the degree of school control over student speech).

Justice Kennedy went on to predict that an increase in litigation would result because the majority did not specifically identify what degree of peer sexual harassment denies a victim equal access to education.[75] In Justice Kennedy's opinion, the absence of a functional definition of actionable peer harassment acts as a Siren song to litigators and creates a "climate of fear" in the schoolhouse.[76]

III. TITLE IX SEXUAL HARASSMENT DOCTRINE

A. *Legislative History*

To fully understand how the Court arrived at its opinion in *Davis*, it is useful to consider the evolution of the Court's Title IX sexual harassment doctrine. Congress enacted Title IX in order to prohibit the spending of federal dollars on discriminatory practices and to protect private citizens from discrimination based upon sex.[77] Title IX's language closely mirrors Section 601 of Title VI of the Civil Rights Act of 1964 (Title VI),[78] and Section 602 of Title VI, which together withhold federal funding from programs that discriminate based upon "race, color, or national origin."[79] Accordingly, the Court's resolution of Title IX issues often parallels its Title VI doctrine.[80]

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75. *See Davis*, 526 U.S. at 675–77 (Kennedy, J., dissenting).

76. *Id.* at 677, 681 (Kennedy, J., dissenting).

77. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (discussing Title IX's legislative objectives).

78. *See* 42 U.S.C. § 2000d (1994). Title VI provides as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

79. *Id.* § 2000d-1 (1994). In fact, the only difference in the statutes' description of the benefited class is Title IX's substitution of the word "sex" for the words "race, color, or national origin" in Title VI. *See Cannon*, 441 U.S. at 694–96.

80. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (pointing out that Congress "attaches conditions to the award of federal funds" under both Title VI and Title IX); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 69–71 (1992) (using the availability of damages under Title VI to support its decision that damages are also available under Title IX); *Cannon*, 441 U.S. at 694–716 (comparing the language and legislative histories of Titles VI and IX to determine whether Title IX's language supports a private cause of action).

B. Cannon v. University of Chicago:[81] *A Private Cause of Action for Public School Students*

Title IX does not expressly grant individuals a private cause of action for discrimination by funding recipients.[82] In *Cannon*, however, the Supreme Court held that the statute implies a private cause of action.[83] The *Cannon* Court supported its holding by emphasizing the similarities between the statutory language of Title IX and Title VI.[84] Because the courts had already implied a private remedy under Title VI when Congress passed Title IX,[85] the *Cannon* Court presumed that Congress expected the courts to also imply a private remedy under Title IX.[86] The Court's reliance upon this presumption was bolstered by Section 718 of the Education Amendments,[87] which authorized courts to award attorney's fees to prevailing private parties in private suits brought to enforce Title VI in elementary and secondary schools.[88] The *Cannon* Court reasoned that Section 718 "presumes the availability of private suits to enforce Title VI in the education context."[89] Accordingly, the Court determined that implying a private cause of action would help accomplish Title IX's goals and support federal efforts to end discrimination.[90] Consequently, *Cannon* laid the foundation for a Title IX sexual harassment doctrine.

C. Franklin v. Gwinnett County Public Schools: *The Court Implies a Money Damages Remedy for Title IX Actions*

The Court did not address the scope of permissible remedies available under Title IX until it decided *Franklin v. Gwinnett County Public Schools*.[91] *Franklin* resulted from a high school

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81. 441 U.S. 677 (1979).

82. *Id.* at 683.

83. *Id.* at 717 (rejecting the argument that Congress's failure to specify a remedy means that the remedy should not be implied).

84. *Id.* at 694–96.

85. *Id.* at 696 (citing Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967)).

86. *Id.* at 699 (expressing confidence in Congress's familiarity with judicial treatment of federal statutes).

87. *See* 20 U.S.C. § 1617 (1972) (repealed 1979).

88. *Id. See also Cannon*, 441 U.S. at 699.

89. 441 U.S. at 699.

90. *Id.* at 708–09 (emphasizing that eradicating discrimination is primarily an area of federal concern).

91. 503 U.S. 60 (1992).

student's allegation that a teacher had sexually harassed her.[92] The student filed suit under Title IX, seeking money damages.[93] In *Franklin*, the Court refused to depart from the general rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[94] The *Franklin* Court rejected the characterization of Title IX's silence on the remedy issue as a prohibition against money damages.[95] Instead, the Court viewed this silence as legislative permission to imply a remedy.[96]

Two amendments to Title IX, both passed after *Cannon*, strengthened the *Franklin* Court's position.[97] The first of these amendments "abrogated the States' Eleventh Amendment immunity under Title IX."[98] As a result, the Eleventh Amendment, read with *Cannon*, grants a private cause of action against a state for Title IX violations.[99] Additionally, Congress extended Title IX's scope via the Civil Rights Restoration Act of 1987[100] "to correct what it considered to be an unacceptable decision [by the Supreme Court] in *Grove City College v. Bell*."[101] At the same time, however, Congress did not disturb or attempt to alter the effects of *Cannon*.[102] Accordingly, the *Franklin* Court concluded that Congress intended to provide a money damages remedy in Title IX enforcement suits.[103] The Court's opinion in

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92. *Id.* at 63.

93. *Id.* at 62–65 (implying, through the discussion about the availability of monetary damages, that the petitioner had sought monetary damages).

94. *Id.* at 70–71, 73.

95. *Id.* at 71–73.

96. *Id.*

97. *Id.* (contrasting pre-*Cannon* statutory construction with the more traditional post-*Cannon* analysis).

98. *Id.* at 72 (citing the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7 (Supp. V 1988) (Rehabilitation Act)).

99. *Id.* at 72–73 (discussing the Rehabilitation Act's express provision for the same remedies against a state as are available against any other entity).

100. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1681–1688 (1994)).

101. *Franklin*, 503 U.S. at 73 (referring to the Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984)). The *Bell* Court held that the receipt of grants by private college students triggered Title IX coverage of the financial aid program only—not the entire institution. 465 U.S. at 573–74. The Civil Rights Restoration Act of 1987 "restore[d] the broad scope of coverage and . . . clarif[ied] the application of title IX," Pub. L. No. 100-259, 102 Stat. 28 (1988), by expressly stating that receipt of federal funds by one "program or activity" of an entity triggers Title IX protection over *all* of the entity's operations, 20 U.S.C. § 1687 (1994).

102. *See Franklin*, 503 U.S. at 73 (interpreting Congress's inaction as approval of the Court's holding in *Cannon*).

103. *Id.* at 76. The Court characterized equitable remedies such as back pay and prospective relief as "clearly inadequate." Back pay was inadequate because the petitioner

Franklin thus established school district liability for damages in cases involving a teacher's sexual harassment of a student,[104] but it left the definition of the "contours of that liability"[105] for another day. This task was taken up by the Court in *Gebser v. Lago Vista Independent School District.*[106]

D. Gebser v. Lago Vista Independent School District's *"Deliberate Indifference" Standard*

Like *Franklin*, *Gebser* involved a teacher's alleged sexual harassment of a student.[107] Unlike in *Franklin*, however, Lago Vista Independent School District officials did not know about the sexual harassment until a police officer discovered the student and teacher engaged in sexual intercourse.[108] Moreover, the *Lago Vista* school district subsequently fired the teacher.[109] Therefore, the *Gebser* Court distinguished the facts of the instant case from the *Franklin* scenario in which a school failed to stop known harassment.[110]

The *Gebser* Court delineated the availability of damages under Title IX by requiring that the funding recipient's response "amount to deliberate indifference to discrimination."[111] In other words, the Court recognized liability for sexual harassment under Title IX only for the recipient's discriminatory actions—not the discriminatory actions of another person or entity.[112]

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was a student at the time of the harassment. *Id.* Prospective relief was inadequate because petitioner no longer attended school in Gwinnett County. *Id.*

104. *Id.*

105. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281 (1998).

106. *Id.*

107. *Id.* at 277.

108. *Id.* at 278 (chronicling approximately two years of sexual encounters between the teacher and student).

109. *Id.* In *Franklin*, the investigation of the accused teacher was closed on condition of his resignation. 503 U.S. at 64.

110. 524 U.S. at 289–90 (rejecting the argument that imputed or constructive knowledge is sufficient to give rise to liability).

111. *Id.* at 290.

112. *Id.* at 283 (rejecting the application of agency principles in Title IX cases). The Court supported its rejection of agency principles to award damages under Title IX by emphasizing the differences between the language of Title IX and Title VII. *Id.* at 286. Title VII is distinguishable from Title IX because Title VII expressly prohibits discrimination and "applies to all employers without regard to federal funding." *Id.* Moreover, Title VII's central aim is the compensation of victims of discrimination, whereas Title IX's focus is on "'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.* at 287.

E. Spending Clause Jurisprudence

Another limitation on Title IX liability is the requirement that a funding recipient have adequate notice that its actions violate "federally imposed conditions."[113] This limitation attaches under Title IX because the Supreme Court "treat[s] Title IX as legislation enacted pursuant to Congress's authority under the Spending Clause."[114] The distinction is significant in view of the Court's characterization of Spending Clause legislation as a contract between the federal government and the recipient.[115] This portrayal necessarily imports contract principles into any judicial interpretation of Spending Clause legislation. Specifically, the Court bases the legitimacy of spending power legislation on a state's informed and willing acceptance of the federal government's terms.[116] Under Spending Clause doctrine, therefore, a state cannot be held to the federal government's terms if it is unaware of federal strings attached to spending power funding. Accordingly, Congress is required to "speak with a clear voice" when it attaches conditions to the receipt of federal funds.[117] Likewise, conditions cannot be attached to these funds retroactively.[118]

F. School Liability under Davis v. Monroe County Board of Education

The *Davis* Court considered whether the Monroe County School District had the requisite notice of potential liability for money damages,[119] and held that, in light of its previous holdings, inadequate notice does not bar a private damages action when the funding recipient's violation is intentional.[120]

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113. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (describing legislation passed under Congress's Spending Clause power as "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions").

114. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999). The Spending Clause provides that "Congress shall have Power To . . . provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

115. *Pennhurst*, 451 U.S. at 17.

116. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 585–91, 598 (1937) (distinguishing inducements tied to federal funding from coercion and upholding the State of Alabama's decision not to participate in a federal unemployment insurance program).

117. *Pennhurst*, 451 U.S. at 17.

118. *Id.* at 25 (stipulating that Congress's broad spending power does not include attaching conditions after states have already accepted the money).

119. *Davis*, 526 U.S. at 640.

120. *Id.* at 642 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74–75 (1992)).

The *Davis* majority reasoned that a recipient school intentionally violates Title IX when it is deliberately indifferent to known acts of sexual harassment.[121] The "deliberate indifference" standard seeks to limit the risk that the recipient will be liable in damages for the independent actions of a person or entity other than the recipient.[122]

Although a school is not held liable for the actions of the harasser, the harasser's identity *is* important.[123] Under *Davis*, a school is liable for its indifference when both the harasser and the context in which the harassment occurs are subject to the school's substantial control.[124] In the "substantial control" setting, therefore, a party's known sexual harassment compels the recipient school to take action.[125]

Establishing a school's actual knowledge and deliberate indifference is only the first prong of the *Davis* test.[126] *Davis*'s second prong requires the plaintiff to prove that the sexual harassment "is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[127] The *Davis* Court imported its "severe and pervasive" language from Title VII jurisprudence.[128] Unlike the Office of Civil Rights, however, the Court imports little else from Title VII.

IV. THE OFFICE FOR CIVIL RIGHTS SEXUAL HARASSMENT GUIDANCE AND *DAVIS* COMPARED

The Office for Civil Rights (OCR) issued its Sexual Harassment Guidance (Guidance) to provide "educational institutions with information regarding the standards that are used by the [OCR], and that institutions should use."[129] The Guidance incorporates the doctrines of Titles VI, VII, and IX.[130]

One area in which *Davis* departs from the Guidance is the standard for liability of a school for peer or third-party

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121. *Id.* at 643.

122. *Id.* at 642–43.

123. *See id.* at 644.

124. *Id.* at 644–45 ("A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.").

125. *Id.* at 645.

126. *Id.* at 642–43.

127. *Id.* at 652.

128. *Id.* at 651 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), which limited actionable sexual harassment under Title VII to that which is "sufficiently severe or pervasive").

129. Sexual Harassment Guidance, *supra* note 6, at 12,034.

130. *Id.* (listing the pertinent statutes).

harassment. For example, the OCR sets out the following guidelines:

> [A] school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[131]

The *Davis* Court, however, expressly rejected the OCR's "should have known" standard,[132] and required instead that the school have actual knowledge.[133]

The Court also deviated from the OCR in what it considers actionable sexual harassment. For example, the OCR asserts that the existence of a hostile environment may be evidenced by a decline in the victim's grades.[134] Moreover, a hostile environment may exist under OCR standards even without a decline in grades if the harassment makes it more difficult for the victim to maintain her or his grades.[135] In contrast, under the harsher *Davis* standard, a "mere 'decline in grades'" is not enough to prove that a hostile environment exists.[136]

The OCR would find a hostile environment where "a young woman is taunted by one or more young men about her breasts or genital area or both."[137] Yet this same young woman is left without a remedy under *Davis* because "[d]amages are not available for simple acts of teasing and name-calling . . . even where these comments target differences in gender."[138]

These differences exist in spite of assertions by the OCR that its guidance "provide[s] courts with ready access to the standards used by the agency that has been given the authority by law to interpret and enforce Title IX."[139] As the OCR states, "Courts generally benefit from and defer to the expertise of an agency with that authority."[140]

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131. *Id.* at 12,039.

132. 526 U.S. at 642 (refusing to impose a negligence standard of liability).

133. *Id.* at 650 (holding that "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have *actual knowledge*, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school") (emphasis added).

134. Sexual Harassment Guidance, *supra* note 6, at 12,041.

135. *Id.*

136. 526 U.S. at 652.

137. Sexual Harassment Guidance, *supra* note 6, at 12,041.

138. 526 U.S. at 652.

139. Sexual Harassment Guidance, *supra* note 6, at 12,036.

140. *Id.* The Court has characterized this deference principle as "well established."

Until the OCR revises its guidelines in accord with *Davis*, educators must choose between the two standards. The OCR remarks that inconsistencies between its Guidance and court decisions do not prevent schools from using OCR standards[141] and that "it is the better practice for these schools to follow the Guidance."[142] *Davis*'s precedential weight, however, all but denudes the current OCR Guidance of its authority in this area.[143]

V. STAYING BETWEEN THE LINES: DEFINING A STANDARD AFTER *DAVIS V. MONROE COUNTY BOARD OF EDUCATION*

The *Davis* test is necessarily fact-specific.[144] Because Title IX protects students of all ages who attend recipient schools,[145] one standard cannot possibly cover the myriad of potential liability scenarios.[146] The standard's fact-based approach will likely be a hindrance both to school districts trying to comply with Title IX and to plaintiffs seeking to establish liability for a school's noncompliance. Rather than waiting for the courts to articulate a definition of actionable peer harassment, the OCR should provide age-specific guidelines that will help schools protect both the alleged victim and the alleged harasser. Furthermore, schools should develop policies aimed specifically at preventing sexual harassment. The next section discusses the elements that should be included in such a policy.

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991). When the meaning of regulatory language is open to interpretation, a court should defer to the agency's reasonable interpretation. *Id.* at 150–51 (citing Ehlert v. United States, 402 U.S. 99, 105 (1971)). Moreover, when Congress delegates lawmaking powers to an agency, the agency's power to authoritatively interpret its own regulations is presumed. *Id.* at 151 (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 568 (1980)).

141. Sexual Harassment Guidance, *supra* note 6, at 12,036.

142. *Id.*

143. The OCR follows current law when it investigates complaints, even when the law "is inconsistent with OCR policy." *Id.*

144. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999) (stating that whether conduct meets the requirements of actionable harassment depends on multifarious factors such as "'circumstances, expectations, and relationships'") (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

145. Sexual Harassment Guidance, *supra* note 6, at 12,038 (discussing Title IX's applicability).

146. *See Davis*, 526 U.S. at 651–53 (citing numerous examples of how courts must view harassing conduct in its proper context and weigh factors in determining whether inappropriate conduct is actionable under Title IX).

A. *The Need for Age-Specific Guidelines*

The *Davis* majority stressed that its decision would not usurp school administrators' authority to discipline sexual harassers, as long as schools respond to known sexual harassers "in a manner that is not clearly unreasonable."[147] The Court acknowledged that the type and scope of a response which would allow the school to defeat a Title IX peer sexual harassment claim may vary depending upon the age of the harasser, and the setting in which the harassment occurs.[148] For example, the Court hypothesized that a grade school might be expected to exercise greater control over its students than would a university.[149] Yet the *Davis* Court would allow greater tolerance of gender-specific conduct when addressing the behavior of grade-school students.[150] Thus, if a grade-school principal attributes a student's sexually oriented harassment to immaturity or "just boys being boys,"[151] the school may not be liable under Title IX.[152] Under *Davis*, the victim cannot compel the school to protect her until after she is denied "equal access to education."[153] In essence, the *Davis* standard gives recipient schools permission to do nothing about gender-based behavior until the problem escalates to the point that the victim suffers severe, perhaps even irreparable, harm.[154]

It is too soon to know whether the Court's ruling in *Davis* will be a formidable barrier for victims of peer harassment or, as Justice Kennedy argued, just a "fence . . . made of little sticks."[155] Perhaps it will have the effects of both. Although the *Davis* Court made it difficult to establish a peer harassment claim under Title IX,[156] the mere threat of liability and loss of federal funding may

147. *Id.* at 649.

148. *Id.* at 650–52 (discussing hypothetical sexual harassment situations).

149. *Id.* at 649 (illustrating the *Davis* standard's flexibility).

150. *Id.* at 651–52 (recognizing that children often engage in conduct that would be unacceptable for adults).

151. The use of gender-specific terms should not imply that peer harassment affects only female students. For statistics relating to reported cases of peer harassment affecting both male and female students, refer to note 183 *infra* and accompanying text (citing an American Association of University Women study in which eighty-five percent of girls and seventy-six percent of boys surveyed reported being victims of sexual harassment).

152. *See Davis*, 526 U.S. at 648, 652 (urging courts to refrain from second-guessing a school administrator's disciplinary decisions and noting that mere name calling is not enough to create liability).

153. *Id.* at 652 (explaining the limitations on the availability of damages under Title IX).

154. *Id.* (emphasizing that damages are available only when the harassment is severe).

155. *Id.* at 657 (Kennedy, J., dissenting).

156. *Id.* at 652 (describing the "very real limitations" on a school's liability for peer harassment under Title IX).

compel school districts to enact meaningful programs geared toward educating our children about gender issues *before* harm occurs.

At least two years before the decision in *Davis*, the OCR recognized that sexual harassment of students by other students violated Title IX.[157] Accordingly, the OCR considers the eradication of sexual harassment of students a high priority.[158] To this end, the OCR publishes an array of reference materials in a variety of media to help schools, students, and parents confront the problem of sexual harassment.[159]

It is understandable that the OCR does not want to enact rigid standards and force them on recipient schools. After all, education is traditionally recognized as falling within the realm of state and local government control.[160] Nevertheless, in light of *Davis*'s recognition of Title IX liability for peer sexual harassment,[161] it would not be unreasonable for the OCR to provide age-specific guidelines to help both schools and students. Furthermore, educators want this information.[162] The OCR's response to these requests should be in the form of a clear and specific tool that will help schools protect both the alleged victims and the alleged harassers.

Existing guidance from the OCR provides educators, students, and parents with helpful information about certain issues. For example, the OCR clearly defines the two general types of sexual harassment,[163] and puts schools on notice that they can be held liable for sexual harassment perpetrated by employees, students, and third parties.[164] In addition, the OCR requires that every school have a published grievance procedure

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157. Sexual Harassment Guidance, *supra* note 6, at 12,034.

158. *Id.*

159. *Id.* (discussing comments and concerns of educators and providing general guidance on how to respond to sexual harassment in schools); OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC (1997), *available at* http://www.ed.gov/offices/OCR/ocrshpam.html (providing assistance in recognizing and dealing with sexual harassment) (on file with the *Houston Law Review*).

160. *Davis*, 526 U.S. at 658 (Kennedy, J., dissenting) (characterizing education as one of the "most traditional areas of state concern").

161. *Id.* at 643 (concluding that an intentional violation of Title IX occurs when a school is deliberately indifferent to a known act of harassment and that the school can be held liable for money damages for such indifference).

162. *See* Sexual Harassment Guidance, *supra* note 6, at 12,035–36 (discussing commenters' requests for additional guidance).

163. *Id.* at 12,038. "*Quid pro quo* harassment" occurs when the perpetrator implicitly or explicitly conditions a decision on the student's submission to sexual conduct. *Id.* "Hostile environment sexual harassment" occurs when unwelcome sexual behavior creates a hostile or abusive educational environment. *Id.*

164. *Id.* at 12,039.

to address sex discrimination complaints.[165] The OCR also attempts to give broad guidance on determining whether sexual conduct is sexual harassment of the sort that would expose a school to liability.[166] There is, however, room for improvement.

In its Guidance, the OCR adopts a confusing "on one hand, on the other hand" approach. For example, the OCR states:

> [F]ollowing an individual student and making sexual taunts to him or her may be very intimidating to that student but, in certain circumstances, less so to a group of students. On the other hand, persistent unwelcome sexual conduct still may create a hostile environment if directed toward a group.
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> . . . .
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> . . . Harassing conduct in a personal or secluded area . . . can also [be more threatening] than would similar conduct in a more public area. On the other hand, harassing conduct in a public place may be more humiliating.[167]

This is but one example of the contradicting hypotheticals used throughout the OCR's Guidance. Although "[e]ach incident must be judged individually,"[168] educators and students alike deserve more specific guidance.

One reason that this guidance is so indeterminate may be that the OCR attempts to address too many issues in one document. A better approach would be for the OCR to issue separate Guidance policies using standards appropriate to specific age categories. This approach would decrease the confusion caused by the double-speak in the existing OCR Guidance.

B. The Need for a Specific Sexual Harassment Policy in Schools

The OCR's final policy Guidance states that schools are not required to develop an explicit sexual harassment policy to deal with alleged sexual harassment.[169] Rather, school officials are instructed that they may use their own judgment in addressing conduct that does not rise to the level of harassment prohibited

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165. *Id.* at 12,040.

166. *Id.* at 12,040–42 (defining the several factors affecting the determination of whether sexual conduct is actionable as follows: whether the sexual conduct was unwelcome, severe, persistent, or pervasive; as well as whether the school was given notice of the conduct and made an appropriate response to it).

167. *Id.* at 12,042.

168. *Id.*

169. *Id.* at 12,038.

by Title IX.[170] Moreover, the OCR permits schools to use general disciplinary procedures even when the conduct is deemed sexual harassment by the school.[171] It is not until after these measures fail to stop the harassment from escalating that "schools must take additional steps to ensure that students know that the conduct is prohibited sex discrimination."[172]

The OCR's approach fails to consider the effect of the harassment on the victim(s) during this protracted course. Under the existing Guidance, schools can use their best judgment if the inappropriate conduct does not rise to the level of harassment prohibited by Title IX.[173] In order to be actionable under *Davis*, the harassment must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."[174] Although the *Davis* Court did not define what constitutes actionable denial of education benefits,[175] a "mere decline" in grades is probably not sufficient, nor is missing school because of harassment.[176]

Under *Davis*, a school is not liable for its inaction until after the victim has suffered extreme, and perhaps irreparable, harm.[177] Reading *Davis* and the OCR guidelines together, if a school official's judgment regarding how to handle harassment in its early stages is to do nothing, the school will not be liable under Title IX.[178]

This approach fails to protect students. Treating sexual harassment "merely as inappropriate behavior"[179] perpetuates this behavior by ignoring its harmful effects. Children should not have to suffer irreparable injury before the school steps in to protect them; they need and deserve protective adult guidance to learn the boundaries of appropriate behavior.

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170. *Id.* at 12,034.

171. *Id.*

172. *Id.*

173. *Id.* (describing the general scenario of a school's response to an incident of peer sexual harassment that ignores any consideration for the harm currently inflicted by the peer sexual harassment).

174. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 652 (1999).

175. *Id.* at 676 (Kennedy, J., dissenting) (criticizing the majority for failing to define what constitutes a denial of "equal access to education" in its test for peer sexual harassment).

176. *Id.* at 652–53.

177. *Id.* (discussing the limitations on a school's liability under Title IX). *See also* Christopher Bagley et al., *Sexual Assault in School, Mental Health and Suicidal Behaviors in Adolescent Women in Canada*, 32 ADOLESCENCE 361, 363 (1997) (reporting on the relationship between frequency of peer sexual harassment and emotional disorders, including increased frequency of suicidal gestures).

178. *Davis*, 526 U.S. at 652–53.

179. Sexual Harassment Guidance, *supra* note 6, at 12,034.

1. Harmful Effects of Peer Sexual Harassment. Peer sexual harassment accounts for the majority of sexual harassment that occurs in American high schools.[180] It affects both girls and boys.[181] One survey of public school students in grades eight through eleven revealed the pervasiveness of peer harassment.[182] Eighty-five percent of the girls and seventy-six percent of the boys surveyed reported that they were victims of peer sexual harassment.[183] Put differently, peer harassment in our schools is the "rule," not the exception.[184] Younger students also experience peer sexual harassment.[185] Girls most commonly experience sexual comments, gestures, or touching.[186] For some students, sexual harassment is a daily experience.[187]

Under *Davis*, not all the acts described above are actionable as sexual harassment.[188] Yet, despite the Court's characterization of these acts as harmless,[189] many students report decreased school performance as a result of persistent peer sexual

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180. Susan Fineran & Larry Bennett, *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, 43 SOC. WORK 55, 57–59 (1998) (comparing a number of peer sexual harassment studies and finding that almost eighty percent of adolescents experience such harassment).

181. *Id.*; *see also* Bruce Roscoe et al., *Sexual Harassment: Early Adolescents' Self-Reports of Experiences and Acceptance*, 29 ADOLESCENCE 515, 518 (1994) (discussing research findings in which, of the 281 females and 280 males studied, 103 males and 140 females reported having experienced peer sexual harassment).

182. Anne L. Bryant, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*, 63 J. SCH. HEALTH 355, 355 (1993) (discussing survey findings of a nationwide research study conducted by the American Association of University Women (AAUW)). In this study, sexual harassment was operationally defined by fourteen examples, including such activities as forced kissing, forced sexual activity other than kissing, "flashing" or "mooning," and making sexual comments, jokes, or gestures. *Id.*

183. *Id.*

184. Susan Fineran & Larry Bennett, *Gender and Power Issues of Peer Sexual Harassment Among Teenagers*, 14 J. INTERPERSONAL VIOLENCE 626, 637 (1999) [hereinafter *Gender and Power*].

185. Fineran & Bennett, *supra* note 180, at 58 (reporting the results of a survey of girls as young as nine years of age); *see also* Christine E. Beyer & Roberta J. Ogletree, *Sexual Coercion Content in 21 Sexuality Education Curricula*, 68 J. SCH. HEALTH 370, 370 (1998) (discussing the growing evidence that sexual harassment is occurring in younger adolescent groups).

186. Fineran & Bennett, *supra* note 180, at 59.

187. *Id.* Peer sexual harassment also affects college students, including students in professional schools. *See, e.g.*, Dewitt C. Baldwin, Jr., et al., *Residents' and Medical Students' Reports of Sexual Harassment and Discrimination*, 71 ACAD. MED. S25, S26 tbl.1 (1996) (summarizing that 26.2% of 581 medical students surveyed reported experiencing sexual harassment or discrimination by their classmates).

188. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651–52 (1999) (stating that "insults, banter, teasing, . . . and gender-specific conduct that is upsetting to the students subjected to it" are not actionable under Title IX).

189. *Id.* (explaining that some behaviors, while unacceptable in the workplace, are to be expected in the classroom, and that such behavior does not normally rise to the level of actionable harassment).

harassment.[190] They also report symptoms such as "loss of appetite; loss of interest in their usual activities; nightmares or disturbed sleep; feelings of isolation from friends and family; and feeling sad, nervous, or angry."[191] Some victims become suicidal.[192] Indeed, victims of peer harassment may suffer its effects for the rest of their lives.[193]

Another disturbing element of peer sexual harassment is the correlation between experiencing sexual harassment and perpetrating sexual harassment.[194] These findings beg the question of whether society's reluctance to openly deal with peer sexual harassment sets in motion a cycle of interpersonal abuse.[195]

2. Stopping the Cycle of Violence: Model Sexual Harassment Policies for Schools. Although Title IX does not require schools to have sexual harassment prevention programs,[196] implementing such policies is an important first step toward eliminating harassment in schools.[197] Educators, researchers, and many state education agencies agree that implementing antiharassment policies and programs serves to protect both the students and the schools from the harmful effects of sexual harassment.[198] In 1992, Florida's Department of

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190. Fineran & Bennett, *supra* note 180, at 55 (describing incidents of absenteeism, low grades, tardiness, and truancy).

191. *Gender and Power*, *supra* note 184, at 628.

192. *See* Bagley et al., *supra* note 177, at 363 (reporting the relationship between sexual assault or harassment and suicidal gestures and attempts).

193. *See* Fineran & Bennett, *supra* note 180, at 55 (explaining that poor school performance may render students ineligible for colleges or scholarships, thus limiting career choices).

194. *See Gender and Power*, *supra* note 184, at 637 (discussing research findings showing a strong link between victimization and perpetration); Larry Bennett & Susan Fineran, *Sexual and Severe Physical Violence Among High School Students: Power Beliefs, Gender, and Relationship*, 68 AM. J. ORTHOPSYCHIATRY 645, 650 (1998) (reporting research data showing that, out of 26 teenage sexual violence perpetrators, 73% had experienced sexual violence during the 12 months preceding the study); Bryant, *supra* note 182, at 357 (commenting that 98% of female respondents who admitted to sexually harassing a classmate at school had experienced sexual harassment themselves).

195. *See Gender and Power*, *supra* note 184, at 637–38 (calling for further exploration of the relationship between peer harassment and domestic violence).

196. Sexual Harassment Guidance, *supra* note 6, at 12,038 (explaining that schools are only required to have generalized discrimination grievance procedures).

197. L. Dean Webb et al., *What Schools Can Do to Combat Student-to-Student Sexual Harassment*, NAT'L ASS'N SECONDARY SCH. PRINCIPALS BULL., Jan. 1997, at 72, 74–75 (1997) (pointing out that having a separate sexual harassment policy helps schools to confront this issue directly).

198. Bagley et al., *supra* note 177, at 365 (describing sexual harassment as a "major problem which school administrators must address in terms of prevention, and school counsellors in terms of therapy"); Bryant, *supra* note 182, at 357 (pointing out that over half of the students surveyed "did not know whether their school had a sexual harassment

Education (FDOE) strongly encouraged its school districts to develop sexual harassment policies.[199] The FDOE recommendation stressed the importance of addressing the sexual harassment issue, described the pervasiveness of the problem, and provided guidance for developing a school sexual harassment policy.[200]

In 1997, Professor L. Dean Webb, in an article in the *National Association of Secondary School Principals Bulletin* (NASSPB), correctly predicted that *Davis* would "become the first case involving federal law in which monetary damages [could potentially be] awarded to a student victim of peer sexual harassment."[201] The article also urged school officials to take a zero-tolerance stance against peer harassment because "'[s]exual harassment is not something young people need to learn to tolerate.'"[202] It is worth noting that neither of the school districts in *Gebser* and *Davis* had sexual harassment policies in place at the time of their respective lawsuits.[203] Although neither Court decision rested on this fact,[204] it is possible that the *Davis* Court might have regarded the implementation of a sexual harassment policy as a mitigating factor, albeit *sub silentio*.[205]

a. Model Policies. One model for school districts wanting to design a sexual harassment policy is the FDOE. The guidelines

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policy" and calling on schools to develop sexual harassment policies); Michele Johnson Moore & Barbara A. Rienzo, *Sexual Harassment Policies in Florida School Districts*, 68 J. SCH. HEALTH 237, 238, 241 (1998) (reporting that sexual harassment occurs more frequently where there is no strong policy against it, and that developing such policies plays a key role in resolving harassment problems before they reach the courts); Roscoe et al., *supra* note 181, at 521 (recommending that intermediate schools hold educational sessions about sexual harassment); Webb et al., *supra* note 197, at 74–75 (stressing the need for a specific sexual harassment policy).

199. Moore & Rienzo, *supra* note 198, at 238.

200. *Id.*

201. Webb et al., *supra* note 197, at 73.

202. *Id.* at 78 (citation omitted).

203. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 635 (1999) (noting that the petitioners alleged that the Monroe County Board of Education did not have a policy on peer sexual harassment in place at the time of the alleged offenses); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291–92 (1998) (reporting the petitioner's assertion that the school district failed to implement effective policies and procedures for sexual harassment claims).

204. *Gebser*, 524 U.S. at 292 (refusing to award damages solely for violations of administrative rules). The *Davis* Court briefly mentioned the absence of a harassment policy but did not comment further. *See* 526 U.S. at 636, 653–54.

205. *Cf.* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (rejecting the argument that the existence of a general nondiscrimination grievance policy will insulate an institution from liability for sexual harassment when the policy "did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination").

list four main components: (1) a written sexual harassment policy statement clearly stating that sexual harassment is improper and "will not be tolerated"; (2) procedures that encourage reporting, assure prompt resolution, and protect the parties involved; (3) a comprehensive education and awareness program; and (4) sexual assault protocols.[206]

The NASSPB has also published a guidance policy, authored by Professor Webb, that is directed at helping school districts address the problem of peer sexual harassment.[207] Its recommendations closely mirror those of the FDOE.[208] Professor Webb suggests conducting a survey prior to developing any policy to determine the extent of existing peer sexual harassment.[209] He also suggests that schools should notify parents of the survey and allow parents to exclude their child from participation.[210]

b. The Need for Sexual Harassment Curricula. Education about sexual harassment is an essential ingredient in increasing awareness and changing negative behavior.[211] In fact, staff and student education has been described as "the necessary first step in preventing peer sexual harassment."[212] Accordingly, a school's sexual harassment education program should occur very early in the academic year.[213]

One method of training uses role-playing exercises designed to increase assertive communication and to help students face their harassers.[214] Students should also "learn to seek necessary assistance from teachers, counselors, and administrators."[215] It necessarily follows that school personnel must understand their obligations under Title IX.[216]

A recent study of sexual education curricula revealed a lack of materials and activities addressing sexual harassment.[217] It is

206. Moore & Rienzo, *supra* note 198, at 238 (reciting the FDOE's recommendations); *see also* Bryant, *supra* note 182, at 356 fig.1 (providing a sample sexual harassment policy for schools).

207. Webb et al., *supra* note 197, at 74–75.

208. *See id.* at 75 (listing elements of a sound sexual harassment policy).

209. *Id.*

210. *Id.* at 76. Webb also stresses the need for age-appropriate language. *Id.*

211. Moore & Rienzo, *supra* note 198, at 241 (emphasizing the need to increase awareness).

212. Webb et al., *supra* note 197, at 76.

213. *Id.* (encouraging early education for both students and staff).

214. Moore & Rienzo, *supra* note 198, at 241.

215. *Id.*

216. *Id.* (stressing that knowledgeable school personnel are in the best position to help students).

217. Beyer & Ogletree, *supra* note 185, at 372 (remarking on this as the study's most significant finding).

unclear why curriculum authors do not include this topic in their materials.[218] Considering how pervasive the problem is, students deserve the opportunity to "explore the concept of sexual harassment and clarify what it is, how to prevent it, and how to deal with it if it occurs"[219] within the classroom. Bringing these controversial topics out in the open helps empower potential victims and promotes positive outcomes for both the student and the school.[220]

One widely used resource for secondary schools is *Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools (Grades 6 through 12).*[221] The book, published by the National Education Agency, provides learning activities to promote discussion of peer sexual harassment in a variety of settings.[222] The book also presents many hypothetical situations that help students distinguish between acceptable and unacceptable conduct[223] and provides reprinted articles describing incidents of actual peer sexual harassment.[224]

c. Grievance Procedures. Effective student sexual harassment policies must include grievance procedures.[225] Grievance procedures should be designed so they are easy to implement and use,[226] and they should provide the involved parties with an equal opportunity to receive a fair hearing.[227]

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218. *See id.* at 372–73 (speculating that curriculum authors might believe that the topic is already being taught by schools, or that it should not be part of the course because it is too sophisticated or too controversial).

219. *Id.* at 374.

220. *Id.* (recommending the inclusion of sexual harassment topics in adolescent sexuality education).

221. NAN STEIN & LISA SJOSTROM, FLIRTING OR HURTING? A TEACHER'S GUIDE ON STUDENT-TO-STUDENT SEXUAL HARASSMENT IN SCHOOLS (GRADES 6 THROUGH 12) (1994).

222. *See id.* at 3–4 (suggesting that discussions take place in various classrooms and be conducted by male and female teams).

223. *See, e.g., id.* at 48–49 (describing harassment of a girl on the playground and the taunting of a boy by his female classmate).

224. *Id.* at 89–106 (reprinting an article written by Adrian Nicole LeBlanc, which first appeared in *Seventeen*, Sept. 1993).

225. Webb et al., *supra* note 197, at 77; *see also* Sexual Harassment Guidance, *supra* note 6, at 12,040 (explaining the Title IX requirement that schools adopt and publish grievance procedures). Schools that fail to adopt effective grievance procedures may be liable for harassment even if the school does not have notice of the harassment. *Id.*

226. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX GRIEVANCE PROCEDURES: AN INTRODUCTORY MANUAL 15 (1987) [hereinafter GUIDELINES].

227. *Id.* (describing due process considerations). The elements that the OCR has identified for evaluating whether a school's grievance policy is prompt and equitable include the following:

(1) Notice to students, parents of elementary and secondary school students, and employees of the procedure, including where complaints may be filed;

(2) Application of the procedure to complaints alleging harassment carried out

The Complaint. Schools have wide discretion in deciding what information should be required in a grievance.[228] The OCR suggests that complaints include the complainant's name, a description of the alleged Title IX violation, and any helpful background information the complainant has.[229] In addition, the school may ask complainants "to specify the corrective or remedial action desired, if known."[230]

The Coordinator. Under Title IX, institutions must designate a Title IX coordinator.[231] This designated coordinator should receive a copy of all grievances.[232] School systems may also increase accessibility to the grievance procedure by designating additional persons to receive grievances at the local level.[233] When written grievances are required, schools should provide assistance in preparation of the grievance as needed.[234]

Complexity. Another related consideration is the number of steps involved in the grievance process. The number of steps should be adequate to ensure progression through appropriate administrative levels, yet not be so numerous as to prolong the process unnecessarily.[235] The OCR anticipates that, if the final local administrative decision is binding, it should be made by the highest governing body of the agency.[236]

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by employees, other students, or third parties;

(3) Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;

(4) Designated and reasonably prompt timeframes for the major stages of the complaint process;

(5) Notice to the parties of the outcome of the complaint; and

(6) An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Sexual Harassment Guidance, *supra* note 6, at 12,044 (citations omitted). Schools may also provide for an appeals process. *Id.*

228. GUIDELINES, *supra* note 226, at 16.

229. *Id.*

230. *Id.*

231. *Id.* at 2. The Title IX coordinator is responsible for coordinating agency efforts to conform to Title IX requirements and investigating Title IX complaints. *Id.*

232. *Id.* at 16.

233. *Id.* at 16–17 (suggesting that a local education agency may make the grievance procedure more convenient by allowing filing with designated persons at each school).

234. *Id.* (pointing out that Title IX protection should not hinge upon the complainant's ability to express herself in writing).

235. *Id.* at 17–18.

236. *Id.* at 18 (reasoning that, because a person may file a federal complaint under Title IX regardless of the outcome of the school's internal investigation, he or she is never truly bound at the local level and that therefore only the school's highest governing body should make these locally "binding" decisions).

Grievance Panels. Grievance procedures should be impartial and discreet.[237] Some commentators suggest "the use of panels to investigate complaints of academic sexual harassment."[238] Panel members should receive training about sexual harassment and how to deal with both the alleged victim and alleged perpetrator fairly and confidentially.[239] The panel membership should also reflect the diversity of the institution.[240]

Access to Institutional Records. Access to institutional records is an issue that frequently arises during the grievance procedure.[241] Two primary considerations in this area are confidentiality and the cost of reproducing records.[242]

The school should discuss its confidentiality policies and the complainant's concerns when the complaint is initially filed.[243] If the student requests total anonymity, the school should explain that honoring the request might limit the school's response.[244] The student should also be told "that Title IX prohibits retaliation."[245] The confidentiality request should be evaluated "in the context of [the school's] responsibility to provide a safe and nondiscriminatory environment for all students."[246] The following are factors for consideration:

> [T]he seriousness of the alleged harassment, the age of the student harassed, whether there have been other complaints or reports of harassment against the alleged harasser, and the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.[247]

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237. *Id.* at 23–24.

238. *E.g.*, MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 43–45 (1991) (reasoning that the use of trained panels may help lessen "the humiliating and disorienting impact of sexual harassment").

239. *Id.* at 44–45.

240. *Id.* at 45 (asserting that many students feel more comfortable confiding in someone with whom they identify).

241. GUIDELINES, *supra* note 226, at 24.

242. *Id.*

243. Sexual Harassment Guidance, *supra* note 6, at 12,043 (explaining that the scope of a school's response to a complaint may depend upon realistic limits imposed by the complainant's desire for confidentiality).

244. *Id.* Even after giving the student requesting confidentiality notice of the limits confidentiality may place on the scope of the school's response, the school still has a duty under Title IX to "take all reasonable steps" to investigate and address the complaint. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

One way to protect any confidential information contained in records is to remove all names and redact any information not relevant to the validity of the complaint.[248]

Because the costs of reproducing school records can be substantial, the OCR suggests that the institution assume responsibility for these costs.[249] By paying for the reproduction of records, the school promotes due process and increases the likelihood of identifying noncompliance with Title IX.[250] Moreover, a complainant who cannot obtain relevant records "may simply file a Federal complaint with the [OCR]."[251] Should this occur, the institution is required to "provide all records relevant to the evaluation of the complaint and, possibly, of overall compliance with Title IX."[252] Thus, paying for reproduction of records "may serve to minimize the filing of Federal complaints, and ultimately" decrease the expense associated with federal complaints.[253]

d. Federal Complaints. Persons alleging Title IX violations may also file a complaint with the OCR under Title IX.[254] The federal complainant need not be the victim of the alleged harassment.[255] The deadline for filing a federal complaint is 180 days from the date of the alleged discrimination.[256] If the complainant has already filed a complaint with the institution, the federal complaint must be filed "within 60 days after the last act of the institutional grievance process."[257]

The OCR requests that complaint letters provide the following information:

> [W]ho was discriminated against; in what way; by whom or by what institution or agency; when the discrimination took

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248. *See* GUIDELINES, *supra* note 226, at 24–25 (requiring, if the school maintains or stores records and the complainant has requested confidentiality, that names and other non-relevant data be redacted, and stating that many agencies employ this technique at all stages of a complaint).

249. *Id.* at 24.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX AND SEX DISCRIMINATION 3–4 (1998) (allowing "anyone" to file a complaint with the OCR, but also providing for a more flexible filing deadline if the complainant has also filed a grievance with the school directly).

255. *Id.* at 3 (stating that the complainant may file on behalf of another individual or a group).

256. *Id.* The filing time may be extended for good cause by the Enforcement Office Director. *Id.*

257. *Id.* at 4.

> place; who was harmed; who can be contacted for further information; the name, address and telephone number of the complainant(s) and the alleged offending institution or agency; and as much background information as possible about the alleged discriminatory act(s).[258]

If the OCR determines that the institution has violated Title IX, the OCR will encourage voluntary compliance and negotiate remedies.[259] If the institution refuses to comply, the OCR will commence with enforcement proceedings.[260]

VI. FUTURE CAUSES OF ACTION: WHAT LIES AHEAD ON THE TITLE IX HORIZON?

The Court's recognition of a cause of action for peer sexual harassment in *Davis* is the most recent, and perhaps the last, extension of liability under Title IX sexual harassment doctrine. Nevertheless, at least one more extension of liability remains—sexual harassment of student teachers by the students whom they are assigned to teach. In this situation, the student teacher has not yet obtained a teaching certificate and has not graduated from his or her teaching program and, thus, is also a student.

One researcher relates being "astonished" by the results of her interviews with sixteen women regarding their experiences as student-teachers.[261] In one instance, a male high-school student, Sean, made unwanted overtures toward Kara, a female student-teacher; Sean followed Kara around the school, attempted to take her identification card, and tried to photograph her.[262] Kara asked Sean to stop to no avail.[263] The situation finally "erupted" when Sean asked Kara for a date in the presence of her supervising teacher.[264] The supervising teacher immediately notified the principal, who responded by warning Sean that another such incident would put Kara's certification at risk, thus implying that the she was somehow responsible for Sean's

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258. *Id.* at 3–4. Assistance from the OCR may be obtained by calling 1-800-421-3481. *Id.* at 5.

259. *Id.* at 4.

260. *Id.* Enforcement actions include referral to the Department of Justice or initiating administrative proceedings to terminate federal funding of the particular program or activity. *Id.*

261. Judith Harmon Miller, *Gender Issues Embedded in the Experience of Student Teaching: Being Treated Like a Sex Object*, J. TEACHER EDUC., Jan.–Feb. 1997, at 19, 19 (relating female student-teachers' experiences of harassment by male students).

262. *Id.* at 23.

263. *Id.*

264. *Id.*

actions.[265] Had the school followed through with its threat and denied Kara her certification, she arguably would have a claim against the high school under Title IX.[266] At the present, however, whether a student-teacher has an actionable claim under Title IX for a school's deliberate indifference to a student's harassment remains an open question.

VII. CONCLUSION

Davis v. Monroe County Board of Education is significant for its recognition of a cause of action for a school's deliberate indifference to known peer sexual harassment under Title IX. This recent addition to the Court's Title IX doctrine is a wake-up call to educators, students, and parents that more needs to be done to change the manner in which our children interact with each other.

For too long, peer sexual harassment has been characterized as "just part of growing up" or "just boys being boys." Peer sexual harassment is not, however, mere child's play; it "is a pervasive problem in schools that creates a hostile school environment for students who have been victimized, as well as for those who observe harassing behaviors."[267]

Most children are taught, from an early age, that it is wrong to lie, cheat, or steal. They learn to look both ways before crossing the street, not to run with scissors, and not to throw rocks. Perhaps another lesson warrants emphasis—treating one another with dignity and respect. Schools are the training ground for adult life. Many victims of harassment suffer psychological harm, decreased school performance, and may even become harassers themselves.[268] Young harassers who go undisciplined may grow up to become adult harassers.[269] Schools can help stop peer harassment by implementing policies to educate students and school employees about all forms of sexual harassment, and that demonstrate what a student can do if he or she is subjected to sexual harassment.[270]

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265. *Id.* at 23–24.

266. *See* GUIDELINES, *supra* note 226, at 1 (stating that under Title IX no person shall be subjected to discrimination under an educational program receiving federal funds).

267. Kopels & Dupper, *supra* note 3, at 458–59.

268. *Gender and Power*, *supra* note 184, at 628, 637–38.

269. Roscoe et al., *supra* note 181, at 522 (noting the results of studies which illustrate that many sexual offenders committed their first sexual offense in their adolescence and that subsequent offenses tended to occur more frequently and become more severe over time).

270. *See* Kopels & Dupper, *supra* note 3, at 454–55 (suggesting that schools take intervening steps to prevent peer sexual harassment and recommending policies to ensure

Schools need not carry this burden alone; parents and government also have a role in curbing peer sexual harassment. The Court's holding in *Davis* places schools on a legal tightrope, balancing the rights of alleged victims against those of the alleged perpetrators. The OCR should provide schools, students, and parents with age-appropriate guidance on what conduct may be considered sexual harassment under Title IX, and what type of school response will sufficiently protect the rights of both the victims and the harassers. Instead of the "one guidance fits all" approach now used by the OCR, sexual harassment guidance should be tailored to age groups and educational levels. This approach would promote quantifiable standards of behavior and support the clear notice standard of Spending Clause legislation.[271]

The parental role in the fight against peer sexual harassment centers on the parents' obligation to instill in their children both self-respect and respect for others.[272] Accordingly, parents should also reinforce and support the school system's efforts to create a safe learning environment.[273]

This Comment suggests elements for a model school sexual harassment policy that would provide a framework schools can use to protect themselves from Justice Kennedy's predicted "avalanche" of litigation.[274] More important, implementing a sexual harassment policy helps protect students by empowering them with the knowledge and resources to stop sexual harassment before harm occurs.

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that "students and employees understand the nature of sexual harassment").

271. Because Title IX compliance is a condition for a school to receive federal funds, tailored guidelines would provide a clearer "voice" for the school to follow than OCR's current "one guidance fits all." *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1980) (reiterating the Supreme Court's finding that, "[b]y insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly"); refer also to Part III.E *supra* (explaining that, under Spending Clause precedent, the federal government must give states clear notice of any conditions attached to the receipt of federal funds).

272. *See* Maureen O. Nash, *Student on Student Sexual Harassment: If Schools are Liable, What About the Parents?*, 31 CREIGHTON L. REV. 1131, 1151 (1998) (stating that parental involvement is crucial and that students must be given rules of behavior early on as opposed to mere guidance or indoctrination on gender equality).

273. Some commentators argue that schools should seek to hold parents financially responsible for damages incurred by the school because of the child's harassing activities. *See, e.g., id.* at 1132.

274. Davis v. Monroe Educ., 526 U.S. 629 657, 681 (1999) (Kennedy, J., dissenting) (predicting unlimited Title IX liability that would "breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment").