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Davis v. Monroe County Board of Education: Scant Protection for the Student Body

Heather D. Redmond*

Introduction

In 1992, LaShonda Davis was a fifth-grader at Hubbard Elementary School (Hubbard) in Monroe County, Georgia.[1] During that school year, LaShonda was the victim of eight separate instances of sexual harassment perpetrated against her by G.F., a boy in several of her classes.[2] Those instances occurred, on average, once every twenty-two days over a six-month period.[3] After each instance of harassment, LaShonda informed a teacher or her principal; however, she alleged that the school took no disciplinary action against G.F.[4] In addition, LaShonda's mother notified the school board of the situation after several of the sexual

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1. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1393 (11th Cir. 1997).

2. These events were alleged in a complaint filed on LaShonda's behalf by her mother. *See id.* at 1394

3. *See id.* On one occasion, G.F. allegedly attempted to touch LaShonda's breasts and genital area and made vulgar statements such as "I want to get in bed with you" and "I want to feel your boobs." *Id.* at 1393. On another occasion, G.F. placed a door stop in his pants and acted in a sexually suggestive manner toward LaShonda during physical education class. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 634 (1999).

4. *See Davis*, 526 U.S. at 634. At one point, LaShonda's mother spoke with LaShonda's classroom teacher, Diane Fort, and the school principal, Bill Query. *See id.* She alleged that, during a conversation with Query in mid-May 1993, Query only said, "I guess I'll have to threaten him a little bit harder." *Id.* According to the complaint, no effort was made by anyone at the school to separate G.F. and LaShonda. *See id.* "On the contrary, notwithstanding LaShonda's frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G.F." *Id.*

harassment instances had occurred and the school failed to take action.[5]

LaShonda's mother, Aurelia Davis, filed a claim against the Monroe County Board of Education under Title IX of the Education Act Amendments of 1972[6] (Title IX).[7] The complaint alleged that the harassment by G.F. against LaShonda had "interfered with her ability to attend school and perform her studies and activities," and that the school's "deliberate indifference" created a hostile environment.[8] The United States District Court for the Middle District of Georgia dismissed the suit for failure to state a claim.[9] On appeal, the Court of Appeals for the Eleventh Circuit reversed.[10] The Eleventh Circuit then granted the Board's motion for rehearing en banc[11] and affirmed the district court's order dismissing Davis' Title IX claim against the Board.[12] Davis appealed that decision and the United States Supreme Court granted certiorari.[13]

The Supreme Court held that a private damages action may lie against a school board under Title IX in cases of student-on-student harassment:

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5. *See* Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 365 (M.D. Ga. 1994).

6. Pub. L. No. 92-318, § 901-07, 86 Stat. 373 (1972), *as amended by* 20 U.S.C. §§ 1681-1687 (1972). Title IX prohibits discrimination on the basis of sex in the provision of educational services by federally-funded educational programs. *See id.* Section 1681(a) provides that "[n]o person . . . 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 . . . ." § 1681(a). Under the statute a "program or activity" includes "all of the operations of . . . a local educational agency . . . or other school system." § 1687(2)(B).

7. *See Davis*, 526 U.S. at 634-38.

8. *Id.* at 638.

9. *See Aurelia D.*, 862 F. Supp. at 368. In reaching this conclusion, the court reasoned that "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." *Id.* at 367. Additionally, the court addressed Davis' argument that a Title IX cause of action could be based upon a school's inaction upon allegations of sexual harassment between students when the inaction was intended to discriminate against the child based on sex, stating simply that "this court finds no basis for such a cause of action in Title IX or case law interpreting it." *Id.*

10. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir. 1996).

11. *See* Davis v. Monroe County Bd. of Educ., 91 F.3d 1418, 1418 (11th Cir. 1996).

12. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997).

13. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 629 (1998).

> but only where the funding recipient[14] acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, . . . such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.[15]

The Supreme Court's decision in *Davis* raises a number of important issues. *Davis* established the basis for schools as third parties to be held liable when a student sexually harasses another student on school premises during school hours.[16] The requirements, however, for third party Title IX claims under *Davis* are extremely narrow, potentially acting as an effective bar to almost every other similar claim in the future. The effects of *Davis* on future court decisions and upon the schools themselves will likely be great; however, it remains to be seen if *Davis* will actually cause schools to change their sexual harassment policies.

This Comment supports the ultimate conclusion of the Supreme Court in *Davis*, that schools should not be immune from private claims for monetary damages under Title IX when a student sexually harasses another student. This Comment, however, argues that the standard drawn by the Court in *Davis* is too narrow, causing the purpose of Title IX to go unfulfilled due to such stringent requirements. This Comment concludes that *Davis* will encourage, rather than discourage, irresponsible behavior by school officials regarding student-on-student sexual harassment.

I. Background

A. Title IX Enacted to Solve Problems of Sexual Harassment

Sexual harassment interferes with students' ability to access

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14. For the purposes of Title IX a "funding recipient" is any educational program or activity that receives Federal financial assistance. *See* 20 U.S.C. § 1681(a) (1972). After a detailed discussion of the legislative history, text and function of Title IX, the Eleventh Circuit concluded that Title IX was enacted under Congress' authority under the Spending Clause of Article I. *See Davis*, 120 F.3d at 1397. The Supreme Court later adopted this conclusion. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. at 640 (1999). "When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'" *Id.* (quoting Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). This explanation provides the foundation for the Court's conclusion that "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct." *Id.*

15. *Davis*, 526 U.S. at 632.

16. *See id.* at 644.

and take full advantage of their educational opportunities and benefits.[17] A student who is harassed at school may suffer a drop in his or her grades,[18] may refuse to attend a certain class, or in severe cases, may refuse to attend school entirely.[19] The emotional and psychological effects of harassment also have an impact on a student's ability to learn.[20]

The statistics on peer sexual harassment[21] in America's schools are alarming.[22] In a 1993 survey conducted in seventy-nine schools throughout the country, 85% of the girls and 76% of

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17. *See* Department of Education, Office of Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12034 (1997) [hereinafter OCR Title IX Guidelines]. This interference can manifest itself in many ways:

> Sexual harassment . . . results in a loss of self-confidence and disillusionment with male faculty and the educational system, in general. It can produce doubts among women about their educational abilities, leading to lower academic success and avoidance of certain courses, majors, and careers . . . . Sexual harassment can also result in emotional and physical illness.

Margaret L. Andersen, *Sexual Harassment: Purely Academic?*, GENDER STUDIES NEWS AND VIEWS (1996) (last visited March 16, 2000) <http://www.firstsearch.oclc.org/FETCH:recno=1:resultset=6:format=T:numrecs=1:fcl=. . ./fstxt111.ht>.

18. *See, e.g.*, Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 69 (D.N.H. 1997). As a result of the harassment, the child in this case suffered a severe drop in her grades. *See id.* She was also "deeply depressed, not eating well, not sleeping well, crying frequently, spending time alone in her room, losing interest in sports, and losing the ability to concentrate on her academics." *See id.* at 67.

19. *See, e.g.*, Oona, R.S. v. Santa Rosa City Schools, 890 F. Supp. 1452, 1457-58 (N.D. Cal. 1995) (finding that the child suffered a severe drop in grades and was eventually removed from the school to be home schooled, as a result of the harassment); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1566 (N.D. Cal. 1993), *modified*, 949 F. Supp. 1415 (N.D. Cal. 1996) (noting that, as a result of the severe emotional and mental distress the peer harassment caused, the student was forced to transfer out of public school to attend private school).

20. *See supra* note 17.

21. Although defining what constitutes "sexual harassment" can be difficult, some researchers have attempted to empirically define the term on a continuum, ranging from gender harassment to sexual assault. *See* JOHN F. LEWIS & SUSAN C. HASTINGS, SEXUAL HARASSMENT IN EDUCATION 22 (1994).

> For example, one researcher defines sexual harassing behavior as (1) gender harassment including "generalized sexist statements and behavior that convey insulting, degrading, and/or sexist attitudes"; (2) seductive behavior including "unwanted, inappropriate, and offensive physical or verbal sexual advances"; (3) sexual bribery including "solicitation of sexual activity or other sex-linked behavior by promise or reward"; (4) sexual coercion includes "coercion or sexual activity or other sex-liked behavior by threat of punishment"; and (5) sexual assault includes "assault and/or rape."

Id. (citing MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 6 (1991)).

22. Peer harassment is the most frequent form of sexual harassment in school settings. *See* JUDITH BERMAN BRANDENBURG, CONFRONTING SEXUAL HARASSMENT: WHAT SCHOOLS AND COLLEGES CAN DO 7 (1997).

the boys surveyed reported experiencing unwanted sexual advances that interfered with their lives.[23] Most students reported that they were sexually harassed for the first time between grades six and nine.[24]

In response to these problems, Congress enacted Title IX of the Education Amendments of 1972 (Title IX).[25] Title IX provides that: "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 . . . ."[26] Although the language of Title IX does not clearly define the statute's purpose, its legislative history provides meaningful context. The sponsor of Title IX, Senator Birch Bayh, stated that Title IX was intended to:

> provide for the women of America something that is rightfully theirs—an equal chance to attend schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.[27]

This broad statement of Congressional purpose by the bill's strongest advocate finds support in later acts of Congress.[28] In the years since Title IX was originally enacted, Congress has explicitly rejected some of the standards set out by Supreme Court decisions that would limit Title IX's applicability.[29] In doing so, Congress

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23. *See* American Ass'n of Univ. Women Educ. Found., *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* 7 (1993) [hereinafter AAUW Survey].

24. *See id.*

25. 20 U.S.C. § 1681 (1972). According to the bill's sponsor, Senator Birch Bayh, the purpose of Title IX was to provide "women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 CONG. REC. 5804 (1972).

26. 20 U.S.C. § 1681(a) (1972). Title IX carves out exceptions for some educational decisions and certain educational institutions, *see* § 1681(a)(1)-(9); however, none of those exceptions were at issue in *Davis*.

27. 118 CONG. REC. 5808 (1972).

28. For example, Congress approved the implementing regulations for Title IX promulgated by the former Department of Health, Education and Welfare (HEW) in 1975, holding recipients of federal funding responsible even when the acts were committed by someone other than the recipient. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531-34 (1982). *See generally Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong. 1 (1975) (detailing testimony which connects Congressional intent in enacting Title IX with the broad provisions of the regulations promulgated by HEW).

29. After the Supreme Court decided Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (holding that states are immune from liability under Title IX, due to the Eleventh Amendment), Congress responded by enacting the Civil Rights

has prevented the Supreme Court from interpreting the language of Title IX in a way that may have rendered the statute ineffective in dealing with the issue of sexual harassment in schools.

B. Harassment Defined as Discrimination

Courts first addressed the issue of sexual harassment as a form of sex discrimination in the environment of the workplace.[30] Courts recognize two distinct forms of sexual harassment: "quid pro quo" and "hostile environment" sexual harassment.[31] Quid pro quo sexual harassment involves the conditioning of concrete employment benefits on sexual favors.[32] Hostile environment sexual harassment is conduct that has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[33] Although it was generally accepted that quid pro quo harassment was a form of sex discrimination, in *Meritor Savings Bank v. Vinson*,[34] the Supreme Court clearly established that a valid claim for hostile environment sexual harassment in the workplace constituted sex discrimination.[35] Because a claim of

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Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000(d)(7) (1986), which abrogated the states' immunity. Similarly, shortly after the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555, 573-74 (1984) (holding that Title IX was limited to the particular program receiving federal funding), Congress clarified that a "program or activity" under Title IX meant that the prohibition against discrimination applies to the entire institution if any part receives federal funds. *See* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1987) (overruling *Bell*).

30. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

31. *See* Michael Delikat & Lisa Swanson, *Sexual Harassment Litigation: The Changing Legal Landscape*, 604 PRACTISING LAW INST. LITIG. & ADMIN. PRAC. 7, 13 (1999), *available in* WL 604 PLI/Lit 7.

32. *See Vinson*, 477 U.S. at 62. Usually a claim for quid pro quo harassment requires a supervisory act of harassment "which culminate[s] in tangible and adverse employment action." Delikat & Swanson, *supra* note 31, at 14.

33. MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 3 (1991) (as defined by the EEOC). *See also Vinson*, 477 U.S. at 62. "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 64 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

34. 477 U.S. 57 (1986). *Vinson* dealt with a claim for employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(1) to 2000(e)(17). *See id.* at 60.

35. The Court in *Vinson* explained:

> 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

discrimination based upon a hostile working environment requires no showing of a tangible economic loss, the sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions . . . and create an abusive working environment.'"[36]

In Title VII, Congress explicitly defined "employer" to include any "agent" of an employer.[37] Thus, when an employee's supervisor or an executive of the company harasses an employee, courts can use agency principles to impute liability to the employer for the supervisor or executive's actions.[38]

A different situation is presented when a co-worker or third party acts in a hostile way toward an employee. Title VII speaks only to liability for "employers"; thus, in order to bring a claim for sexual harassment under Title VII, an employee must show that the employer "knew or should have known of the harassment in question and failed to take prompt remedial action."[39]

C. Title IX Protects Against Sexual Harassment in Schools

Sexual harassment is not an issue reserved solely for the workplace.[40] In 1979 the Supreme Court ruled that individuals can bring private suits against school districts based on violations

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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.

477 U.S. at 66 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

36. *Id.* at 67. The question of whether sexual harassment is sufficiently severe and persistent to state a claim under Title VII is a question to be determined with regard to the totality of circumstances. *See Henson*, 682 F.2d at 904; *see, e.g.*, Tomka v. Seiler Corp., 66 F.3d 1295, 1305 n.5 (2d Cir. 1995) (finding that isolated remarks or occasional episodes of harassment will not merit relief under Title VII); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577-78 (2d Cir. 1989) (holding that alleged instances of sexual harassment "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.").

37. *See* 42 U.S.C. § 2000e(b).

38. *See Vinson*, 477 U.S. at 72; *see also* Quinn v. Green Tree Credit Corp., 159 F.3d 759, 767 (2d Cir. 1998) (holding employers presumptively liable for all acts of harassment perpetrated by an employee's supervisor).

39. Sharp v. City of Houston, 164 F.3d 923, 929 (5th Cir. 1999) (quoting Williamson v. City of Houston, 148 F.3d 462, 464 (5th Cir. 1998)). *Accord Quinn*, 159 F.3d at 766 (finding employer liable where it knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action). For the purposes of Title VII liability, an employer can be said to have actual knowledge of the harassment if someone with authority to address the problems is notified. *See Sharp*, 164 F.3d at 930. An employer has constructive knowledge if, through the exercise of reasonable care it should have known what was going on but failed to address it. *See id.* "If the harassment complained of is so open and pervasive that the employer should have known of it, had it but opened its corporate eyes, it is unreasonable not to have done so, and there is constructive notice." *Id.*

40. *See supra* notes 17-24 and accompanying text.

of Title IX.[41] In 1992, the Supreme Court expanded that ruling to allow a student to recover damages, rather than solely injunctive relief, under Title IX.[42] Until very recently, however, there has been no consistent standard under which courts have analyzed Title IX claims when the denial of an educational opportunity does not come from a direct mandate of the school district.[43]

In 1998, the Supreme Court finally provided some guidance to lower courts as to the standard that must be used to evaluate Title IX cases involving the sexual harassment of a student by a teacher.[44] In *Gebser v. Lago Independent School District*,[45] a high school student brought a claim under Title IX against the school district after she and a teacher in her school had been discovered having sex.[46] At that time, the district had not distributed an official grievance procedure or a formal sexual harassment policy to the school.[47] The Court held that a student may not bring a private action for damages under Title IX "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination . . . and fails to adequately respond . . . [M]oreover . . . the response must amount to deliberate indifference to discrimination . . . ."[48]

As in the cases of co-worker harassment, a different situation is presented where one student harasses another student in the

41. *See* Canon v. University of Chicago, 441 U.S. 677 (1979).

42. *See* Franklin v. Gwinnett Pub. Sch., 503 U.S. 60 (1992). "The general rule . . . is 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." *Id.* at 70-71.

43. *Compare* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997) (finding a school liable for peer sexual harassment if the school knew or should have known that the harassment was occurring) *and* Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997) (finding that constructive knowledge of the harassment was sufficient to hold the school liable in peer sexual harassment cases) *with* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 519 U.S. 861 (1996) (holding that Title IX does not impose liability for peer hostile environment sexual harassment, absent allegations that the school district itself, through its own programs, directly discriminated based on sex) *and* Piwonka v. Tidehaven Indep. Sch. Dist., 961 F. Supp. 169 (S.D. Tex. 1997) (same).

44. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283-90 (1998).

45. 524 U.S. at 274.

46. *See id.* at 284. In *Gebser*, the student did not report the relationship to school officials; however, after they were discovered, the district terminated the teacher's employment. *See id.*

47. *See id.* at 291.

48. *Id.* at 289.

context of the school.[49] Because Title IX protects students from discrimination on the basis of sex only in the provision of educational services by federally funded educational programs,[50] a student plaintiff must show that the peer harassment amounted to discrimination *under* a federal program.[51] Until the Supreme Court's decision in *Davis*, the courts of appeals throughout the country, as well as a number of district courts,[52] were split on the issue of whether a student could maintain a cause of action under Title IX against the school when the violating actor was another student.[53]

Even those courts that agreed on the ultimate result of peer harassment cases differed considerably in their reasoning. In *Rowinsky v. Bryan Independent School District*,[54] the Fifth Circuit found that a student cannot make a claim for student-on-student

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49. *Compare* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 646 (1999) ("The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity."), *with Vinson*, 477 U.S. at 57; *Quinn*, 159 F.3d at 759; *Sharp v. City of Houston*, 164 F.3d ar 923 (explaining the differing standards used when a co-worker rather than a supervisor is the harasser).

50. *See* 20 U.S.C. § 1681(a) (2000).

51. *See* Doe v. University of Illinois, 138 F.3d 653, 661 (7th Cir. 1998).

52. *See, e.g.*, Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997) (requiring that the school knew of the harassment and intentionally failed to take proper remedial action, showing an intent on the part of the school to create a hostile environment for the plaintiff); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1377 (N.D. Cal. 1997) (finding that a plaintiff may maintain an action against the school district for peer harassment, but only where "the school district knew or should have known [of the conduct] in the exercise of its duties" and the school district failed to take steps reasonably calculated to end the harassment); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 173 (N.D.N.Y. 1996) (rejecting constructive notice as the proper standard and holding a school district liable only where the school or school board had actual knowledge of the conduct and failed to take action to remedy it); Wright v. Mason City Community Sch. Dist., 940 F. Supp 1412, 1420 (N.D. Iowa 1996) (requiring that the schoool district had actual knowledge of the conduct and intentionally failed to take appropriate remedial action because of the plaintiff's gender).

53. *See, e.g.*, Oona, R.S. v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998) (holding that, in the Ninth Circuit, it was clearly established that a school has an affirmative duty to take reasonable steps to remedy a known hostile environment created by a peer); *Doe*, 138 F.3d at 661 (finding that a student may bring claim against a school for peer sexual harassment); *Davis*, 120 F.3d 1390 (refusing to hold schools liable for peer sexual harassment); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 960 (4th Cir. 1997) (finding a school liable for peer sexual harassment if the school knew or should have known that the harassment was occurring); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996) (holding that Title IX does not impose liability for peer hostile environment sexual harassment, absent allegations that the school district itself directly discriminated based on sex).

54. 80 F.3d 1006 (5th Cir. 1996).

sexual harassment, reasoning that a school must intentionally discriminate against the student in order to be liable under Title IX.[55] Specifically, the court held that:

> In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.[56]

Of all the courts to have addressed this issue, the decision of the court in *Rowinsky* is by far the most generous to school districts.[57]

In *Doe v. University of Illinois*,[58] the Seventh Circuit held that a student could maintain a claim against a university for peer hostile environment sexual harassment.[59] The court in *Doe* rejected the reasoning of the Fifth and Eleventh Circuits, which had held that students could not bring such a claim when students were not acting as agents of the school during the harassing behavior.[60] The court in *Doe* reasoned that the plaintiff was not bringing a claim under principals of agency; rather, the claim was based upon the school's "own actions and inaction in the face of its knowledge that the harassment was occurring."[61]

In *Davis v. Monroe County Board of Education*,[62] the predecessor to the principal case, the Eleventh Circuit, sitting en banc, held that under Title IX, claims against the school board will not be allowed when the claims are based on school officials' failure to remedy a known hostile environment caused by the

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55. *Id.* at 1016.

56. *Id.*

57. *See* Kathleen A. Sullivan & Perry A. Zirkel, *Student to Student Sexual Harassment: Which Tack Will the Supreme Court Take in a Sea of Analyses?*, 132 ED. LAW REP. 609 (April 1999), *available in* 132 WELR 609.

58. 138 F.3d 653 (7th Cir. 1998).

59. *See id.* at 661.

60. *See id.* at 661-62 (citing the reasoning of the Fifth Circuit Court of Appeals in *Rowinsky*, 80 F.3d 1006, and the Eleventh Circuit Court in *Davis*, 120 F.3d 1390).

61. *Id.* at 662. Simply stated, a school cannot be liable on agency principles (*respondeat superior*) for the actions of its students, because the students are not agents of the school. Instead, if a school is going to be liable for peer sexual harassment, it must be based on some action or inaction of the school itself. Thus, in order to survive a motion for summary judgment, a plaintiff must allege that the school denied an educational opportunity to the student by failing to respond appropriately to remedy sexual harassment.

62. 120 F.3d 1390 (11th Cir. 1997).

sexual harassment of one student by another.[63] First, the court noted that Title IX was enacted pursuant to Congress' Spending Clause powers.[64] The court recited the rule that recipients who accept federal monies also accept the conditions that Congress has attached to the funds.[65] Under such circumstances, Congress must give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding.[66] The court concluded that Title IX did not allow claims against a school board for peer sexual harassment, because Congress did not provide unambiguous notice that a school could be sued for failing to remedy student-on-student sexual harassment when it enacted Title IX.[67]

II. The Decision: Davis v. Monroe County Board of Education

The Supreme Court granted certiorari in *Davis v. Monroe County Board of Education*, in order to resolve a conflict "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."[68] In its decision, issued May 24, 1999, the Court addressed the controversial issues raised in peer sexual harassment cases, and in doing so carved out a new claim for relief under Title IX.[69] In addition, the Court clarified the standard regarding peer hostile environment sexual harassment claims.[70]

In *Davis*, the Court held that a private damages action may lie against a school board under Title IX in cases of student-on-student sexual harassment.[71] The standard for peer harassment

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63. *See id.* at 1406.

64. *See* U.S. CONST. art. I, § 8, cl. 1; *see also Davis*, 120 F.3d at 1397. "When Congress conditions the receipt of federal funding upon a recipient's compliance with federal statutory directives, Congress is acting pursuant to its spending power." *Id.* (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598-99 (1983) (opinion of White, J.)).

65. *See Davis*, 120 F.3d at 1399; *see also* Pennhurst v. Halderman, 451 U.S. 1, 1-3 (1981) (recipients of federal funding under the Developmentally Disabled Assistance and Bill of Rights Act tied to obligations imposed under the Act).

66. *See Davis*, 120 F.3d at 1399.

67. *See id.* at 1406.

68. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 638 (1999); *See, e.g., supra* notes 52-53.

69. *See Davis*, 526 U.S. at 632.

70. *See infra* note 72.

71. *See Davis*, 526 U.S. at 632. In so holding, the Supreme Court reversed the en banc decision of the Eleventh Circuit dismissing Davis' claim. *See id.* at 634.

claims under Title IX,[72] however, was narrowly defined.[73] First, a plaintiff must bring a claim against a recipient of federal funding,[74] and that claim must be based upon misconduct of the recipient itself, not upon agency principles.[75] The Court dismissed the argument of the Monroe County Board asserting that Title IX failed to provide adequate notice to funding recipients informing them that they could be liable for student-on-student sexual harassment.[76] The Court also disagreed with the Board's contention that Davis sought to hold the Board liable for G.F.'s actions instead of its own.[77] The Court reasoned that in *Gebser v. Lago Vista Independent School District*, it had already specifically rejected the use of agency principles to impute liability to a school district for the misconduct of its teachers.[78] Instead, liability must arise from "an official decision by the recipient not to remedy the

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72. An action for student-on-student sexual harassment under Title IX may lie only where: (1) the action is against a recipient of federal funding and based upon the actions of the recipient itself; (2) the funding recipient had actual knowledge of the harassment; (3) the funding recipient acted with deliberate indifference; and (4) the harassment was so severe, pervasive and objectively offensive that it effectively barred access to an educational opportunity or benefit. *See id.* at 632.

73. In fact, the standard for peer harassment cases in the educational context under Title IX was drawn even more narrowly than the standard for peer harassment cases in the workplace under Title VII. An employer is liable where an employee experiences sexual harassment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (citing Henson v. Dundee, 682 F.2d. 897, 902 (11th Cir. 1982)). In addition, the plaintiff in an employment case must show that the employer knew or should have known of the conduct, and will prevail, unless the employer can show that it took immediate and appropriate corrective action. *See* Sharp v. City of Houston, 164 F.3d 923, 929 (5th Cir. 1999).

74. *See Davis*, 526 U.S. at 632. In *Davis*, there was no dispute that the Monroe County Bd. of Educ. was a recipient of federal education funding for Title IX purposes. *See id.* at 640.

75. *See id.* at 642. The Court noted that Davis was not bringing a claim against the Board under agency principles, but rather "attempt[ing] to hold the Board liable for its own decision to remain idle in the face of known student-on-student harassment in its schools." *Id.*

76. *See id.* Specifically, the Board contended that Title IX only proscribed misconduct by recipients of federal educational funds, not third parties. *See id.* They argued that it would be contrary to the purpose of Spending Clause legislation to impose liability on a funding recipient for the misconduct of third parties, over whom recipients have little control. *See id. See also* Brief for Respondents at 10, Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (No. 97-843) ("The definition of recipient does not include students. Nothing in the language of Title IX would put a recipient on notice that by accepting federal funds, it was opening itself up to unlimited liability for the actions of a student or third party individuals.").

77. *See Davis*, 526 U.S. at 642.

78. *See id.* at 642 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998)).

violation."[79] A standard set as high as "deliberate indifference to known acts of sexual harassment"[80] eliminated any risk that a recipient would be liable in damages for actions of a third party.[81] Moreover, the Court cited the regulatory scheme surrounding Title IX[82] as well as common law[83] in support of its contention that schools have been on notice for quite some time that they may be liable for their failure to respond to discriminatory acts of certain non-agents.[84]

Second, a plaintiff must show that the funding recipient had actual knowledge of the sexual harassment by the plaintiff's peer.[85] Although in *Davis*, the Court did not lay out its reasoning for this requirement, it did adopt this standard from the earlier decision in *Gebser v. Lago Vista Independent School District*,[86] where it reasoned that actual notice was required "to avoid diverting education funding from beneficial uses where a recipient who is unaware of discrimination in its programs is willing to

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79. *Id.*

80. This is the third requirement that the Court established in peer sexual harassment cases. *See supra* note 72 and *infra* note 88 and accompanying text.

81. *See Davis*, 526 U.S. at 643.

82. The Court pointed to two regulatory schemes as proof that the schools had notice of potential liability. First, the National School Boards Association, in March 1993, issued a publication for use by schools, which observed that federal funding recipients may be liable under Title IX for their failure to respond to student-on-student sexual harassment. *See id.* at 646 (internal citation omitted). Second, the Department of Education's Office for Civil Rights (OCR) adopted policy guidelines providing that student-on-student harassment falls within the scope of Title IX's proscriptions. *See Davis*, 526 U.S. at 646. (citing Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039-40 (1997) (hereinafter "OCR Title IX Guidelines")).

83. The common law has put schools on notice that they may be held liable under state law for their failure to protect students from the tortious acts of third parties. *See Davis*, 526 U.S. at 644 (citing Rupp v. Bryant, 417 So.2d 658, 666-67 (Fla. 1982); Brahatcek v. Millard Sch. Dist., 273 N.W.2d 680, 688 (Neb. 1979); McLeod v. Grant County Sch. Dist. No. 128, 320 P.2d 360, 362-63 (Wash. 1953)).

84. *See Davis*, 526 U.S. at 642.

85. *See id.* at 650. The Court expressly rejected the negligence standard, which would hold the funding recipient liable for its failure to react to harassment that it knew of or should have known of, noting that it had required actual knowledge for cases of teacher-student sexual harassment as well. *See id.* at 640 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998)). The Court held that Davis had alleged that the incidents of harassment had been reported; thus, she may be able to show actual knowledge. *See Davis*, 526 U.S. at 652-53.

86. *See Davis*, 526 U.S. at 640-43. Notably, *Davis* does not address the issue of who at the school must have actual knowledge of the harassment in order to impose liability under Title IX. *See, e.g.*, Canutillo v. Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398-400 (5th Cir. 1996) (finding that a school was not liable for the sexual molestation of a second-grade student by one of her teachers because the student and her mother only reported the harassment to the girl's homeroom teacher).

institute prompt corrective measures."[87]

Third, a plaintiff must show that the funding recipient was deliberately indifferent to these known acts of harassment.[88] The Court explained that "deliberate indifference" was the correct standard to hold the schools responsible for their own behavior.[89] "Deliberate indifference makes sense as a theory of liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action."[90] Where the misconduct occurs during school hours and on school grounds, the school has control over the students;[91] thus, the misconduct is taking place "under" an "operation" of the funding recipient.[92] When a funding recipient is deliberately indifferent to known acts of harassment against its students, and when the harassment is taking place in an environment under the recipient's control, then the recipient can be said to subject the student to discrimination in violation of Title IX.[93]

Fourth, a plaintiff must show that the harassment was "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."[94] This standard is necessary because, "in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that

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87. *Gebser*, 524 U.S. at 283.

88. *See Davis*, 526 U.S. at 650. The Court clarified that this standard "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." *Id.* at 648. "On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere 'reasonableness' standard." *Id.* at 648. In the *Davis* case specifically, the Court held that dismissal was improper, because the complaint suggested the Board "made no effort whatsoever either to investigate or to put an end to the harassment." *Id.* at 653.

89. *See id.*

90. *Id.*

91. *See infra* notes 123-125 and accompanying text.

92. *See id.* at 646 (citing Doe v. Univ. of Illinois, 138 F.3d 653, 661 (7th Cir. 1998)).

93. *See id.*

94. *Id.* At 652. "Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender." *Id.* Still, it is not necessary to show physical exclusion from an educational program, but only that the harassment "so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id. Cf.* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (using a similar standard for determining when harassment in the employment context is actionable as discrimination).

is upsetting to the students subjected to it."[95] The Court saw this standard as the appropriate way to "reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior."[96]

III. Analysis

A. The Right Answer

The Supreme Court in *Davis v. Monroe County Board of Education* correctly decided that a school district, as a recipient of federal funding, may be liable for damages under Title IX for discrimination in the form of student-on-student sexual harassment.[97] Not only does the availability of a cause of action against a school district for peer sexual harassment comport with the purpose and text of Title IX, but it also makes sense in light of the fact that schools should take responsibility for the well-being of its students while the students are in school.

1. A Cause of Action for Peer Sexual Harassment Comports with the Text and Purpose of Title IX.

Title IX was intended to "provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work."[98] Title IX should be accorded "a sweep as broad as its language" in order to give the statute "the scope its origins dictate."[99]

Notably, the text of Title IX neither explicitly includes nor excludes actions initiated by students against other students from its coverage.[100] Instead, the language of Title IX focuses on the

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95. *Davis*, 526 U.S. at 652.

96. *Id.* at 653.

97. *See id.* at 638.

98. 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh). According to Senator Bayh, the purpose of Title IX was to provide "women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh).

99. United States v. Price, 383 U.S. 787, 801 (1966).

100. *See* Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996) (student seeking damages from school district under Title IX for district's failure to prevent peer harassment). *See generally* 86 Stat. 373, as

benefited class, persons discriminated against on the basis of sex.[101] Thus, it would seem that Congress was not concerned with the identity of the perpetrator, but rather on a broader goal of ensuring that all students, regardless of sex, are able to take full advantage of their educational opportunities.[102]

Allowing school boards to ignore acts of sexual harassment against its students, no matter what the source, would reduce Title IX to a proscription against quid pro quo sexual harassment.[103] Consequently, hostile environment claims would be completely eradicated under Title IX, because intentional discrimination could be accomplished by indirect means, and then ignored by school officials. For example, Title IX would cover a claim by a student that her school forbids women from joining the baseball team.[104] However, if the same female was not explicitly banned from joining the team, but instead was forced to quit the team when the male players repeatedly sexually harassed her, the school could turn a blind eye and face no Title IX liability.[105] What would be left of Title IX in that case is an extremely narrow and

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amended, 20 U.S.C. §§ 1681-87; *supra* note 6 (quoting text of statute).

101. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 694 (1979).

102. *See supra* note 98.

103. *See supra* notes 31-36 and accompanying text.

104. 45 C.F.R. § 86.4 states:

> (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> (b) Separate teams . . . . [w]here a recipient operates or sponsors a team in a particular sort for members of one sex but operates or sponsors no such team for members of the other sex . . . members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. *Id.*

105. This student would be effectively barred from participating on the school baseball team as if the school had explicitly mandated such a ban. If Title IX does not mandate that a school take action to remedy this situation, an indirect ban on the female student's access to an educational benefit would be allowed to exist despite Title IX.

During oral arguments in *Davis*, the Supreme Court posed a similar hypothetical:

> Suppose you had a-a baseball field and the rules of the school said, after school there will be an hour for women—or the female students and an hour for the male students . . . . But, in fact the boys decide they want the—the field for 2 hours, and they're just not going to let the girls on. And they do that over and over and over again, and the athletic director knows about it but does nothing about it . . . . Is there a cause of action?

Official Transcript, United States Supreme Court, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644 (1999) (No. 97-843) at 30. Mr. Plowden, the attorney for Monroe County Bd. of Educ. responded, "I still would not agree that that's a violation of Title IX." *Id.* at 30-31.

easily circumvented protection for students against overt discrimination in school. This could hardly be said to fulfill the broad purpose of Title IX.

The Court in *Davis* recognized this danger and decided to hold schools responsible for failing to take action when faced with evidence of sexual harassment of a student.[106] "Where, as here, the misconduct occurs during school hours and on school grounds . . . the misconduct is taking place 'under' an 'operation' of the funding recipient" and therefore the school violates Title IX if it fails to act.[107]

2. A Cause of Action for Peer Sexual Harassment Follows Directly From Cases Holding Schools Accountable for the Actions of Its Teachers.

In *Gebser v. Lago Vista Independent School District*,[108] the Supreme Court determined that a school board could be held liable when a teacher sexually harasses a student.[109] Although the Court affirmed the dismissal of plaintiff's claim in that particular case, it clearly approved a cause of action under Title IX for teacher-student sexual harassment in limited circumstances.[110]

The Court's reasoning in *Gebser* can be directly applied to cases of student-on-student sexual harassment. *Gebser* rejected the idea that a school board could be held liable under agency principles for the conduct of its teachers.[111] Thus, any argument that teachers, and not students, are agents of a school for purposes of Title IX is irrelevant in the sexual harassment context.[112]

The language of Title IX does not explicitly deal with teacher-student sexual harassment any more than it deals with student-

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106. Davis v. Monroe County Bd. of Educ., 526 U.S. at 644.

107. *Id.* at 630; *see also* Verna Williams, *Running the Gauntlet No More: Using Title IX to End Student-to-Student Sexual Harassment*, 23 HUMAN RIGHTS, Fall 1996, (last visited Nov. 11, 1999) <http://www.abanet.org/irr/hr/gauntlet.html> ("[S]chools must provide students with an atmosphere in which they can learn. Allowing a sexually hostile environment is at odds with that duty.")

108. 524 U.S. 274 (1998).

109. *See id.*

110. *Id.* The Supreme Court narrowed the cause of action by ruling that "[d]amages may not be recovered . . . 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." *Id.* at 277.

111. *See id.* at 288-89 (permitting a damage recovery against a school for a teacher's sexual harassment of a student based on agency principles would frustrate the purposes of Title IX).

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

student sexual harassment.[113] Since Title IX liability is based solely upon the action or inaction of the school,[114] the Court in *Davis* appropriately held that it is not relevant whether the misconduct originated with a teacher or another student.[115]

3. Schools Have a Responsibility Toward Students While They are in School.

Holding schools liable when they fail to address peer sexual harassment is consistent with the notion that there is no one else present during school hours to take steps to remedy misconduct by students.[116] The casebooks are filled with stories of students and parents caught up in a situation wherein a school refused to act on evidence of serious sexual harassment by fellow students.[117]

Davis is the perfect example of a case where, if the school refused to remedy the sexual harassment of the student, the only option left for the parents outside of filing a lawsuit was to remove the student from the school.[118] LaShonda Davis endured six months of persistent and severe sexual harassment by a boy in her

113. *See* Doe v. Univ. of Illinois, 138 F.3d 653, 665 (7th Cir. 1998).

114. *See supra* note 61 and accompanying text.

115. *Accord Doe*, 138 F.3d at 665. The *Davis* court did find the identity of the perpetrator relevant for a limited purpose. *See Davis*, 526 U.S. at 652. "The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systematic effect on a program or activity." *Id.* Thus, the identity of the harasser is only relevant in determining the degree of harassment.

116. *See supra* notes 123-125.

117. *See* Murrell v. Sch. Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999) (a developmentally and physically disabled student was repeatedly sexually harassed and assaulted on school grounds by another student—despite knowledge of teachers and principle, no action was taken); Doe v. Univ. of Illinois, 138 F.3d 653 (7th Cir. 1998) (after repeated sexual harassment by a group of male students, female student reported incidents—only action taken by school was to suggest that the female student was herself to blame). *See also* LEWIS & HASTINGS, *supra* note 21, at 24 ("Sexual harassment is prohibited under Title IX, yet sex-biased peer interactions appear to be permitted in schools, if not always approved. Rather than viewing sexual harassment as a serious misconduct, school authorities too often treat it as a joke.") (quoting AMERICAN ASS'N OF UNIV. WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 73-74 (1992)).

118. *See e.g.*, *Oona, R.S. v. Santa Rosa City Schools*, 890 F. Supp. 1452, 1457-58 (N.D. Cal. 1995) (finding that the parents had essentially been forced to remove the child from the school to be home schooled, after the school failed to take appropriate actions to remedy pervasive harassment); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1566 (N.D. Cal. 1993), *modified on other grounds*, 949 F. Supp. 1415 (N.D. Cal. 1996) (noting that, as a result of severe emotional and mental distress caused by peer harassment, over a substantial period of time, the student was forced to transfer out of public school to attend private school).

fifth grade class.[119] Despite repeated efforts by LaShonda and her mother to notify the school and to remedy the situation, LaShonda's teachers, principal and school board failed to take action to protect LaShonda from her harasser.[120] As a result, LaShonda's previously high grades dropped and she became unable to concentrate on her studies.[121] Her father discovered that she had written a suicide note, and at one point LaShonda told her mother that she didn't know how much longer she could keep the boy off of her.[122]

It is at this point, if not much earlier, that a school needs to be held accountable for its inaction in the face of sexual harassment. During the time a student is at school, he or she is under the sole control of the teachers and administrators of the institution.[123] Parents rely on school officials to both protect and discipline their children.[124] It is well-recognized that during school hours, the nature of the relationship between a student and the school is akin to that of child and parent.[125] In this context, then, there must be a means by which parents and children can seek redress for damages caused by a school district's failure to remedy sex discrimination. The *Davis* Court correctly held that Title IX is that remedy.

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119. *See Davis*, 526 U.S. at 634.

120. *See id.*

121. *See id.*

122. *See id.*

123. State mandated school attendance, to some degree, gives rise to the conclusion that teachers and administrators have control over the student while the student is at school. *See* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993). This mandate, however, does not give rise to a constitutional duty on the part of the state to protect a student, as it does a prison inmate or one who is involuntarily institutionalized. *See id.* Still, courts have long held that students have somewhat limited individual rights while at school, because of the special need on the part of the school "to maintain an environment in which learning can take place." New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

124. *See* Oona, R.S. v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998) ("Parents have long had a right to expect school officials to do what they reasonably can to protect the children who are temporarily in their custody and to provide an appropriate learning atmosphere.").

125. "[T]he nature of [the state's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995). The Court has recognized the school officials' "comprehensive authority . . ., consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507 (1969).

B. The Wrong Standard

Although the ultimate conclusion of the Court in *Davis* was correct, the standard is too narrow.[126] The standard is neither an effective way to remedy the pervasive problem of sexual harassment in our schools, nor is it an accurate reflection of the purpose of Title IX. Moreover, the Court in *Davis* failed to explain why the standard for bringing a claim under Title IX is so different than the standard in cases brought under Title VII of the Civil Rights Act of 1964,[127] despite similarities in the language of the statutes.

1. Actual Knowledge

In *Davis*, the Court limited claims of peer sexual harassment under Title IX to cases where the recipient of federal funding had actual knowledge that the student was being harassed.[128] There was no discussion in *Davis* of any other standard for knowledge; the Court simply adopted its earlier holding in *Gebser*, that cases of teacher-student sexual harassment require actual knowledge.[129]

The actual notice standard is too narrow to deal with the problem of sexual harassment in schools effectively. The constructive notice standard is better.[130] It would impose liability

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126. A claim against a school in cases of student-on-student harassment may be brought "only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities .... [S]uch an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 631.

127. 42 U.S.C. § 2000e. Title VII provides:

> It shall be an unlawful employment practice for an employer—(a) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex .... or (2) to limit, segregate, or deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex ....

42 U.S.C. § 2000e-2(a)(1)-(2) (1970).

128. *See Davis*, 526 U.S. at 650; *accord Oona, R.S. v. McCaffrey*, 143 F.3d at 477 (requiring actual notice, because schools are liable only for their own discriminatory conduct under Title IX); Doe v. Univ. of Illinois, 138 F.3d 653, 663 (7th Cir. 1998) (reasoning that an actual notice requirement is the only way to prove a manifestation of intentional sex discrimination on the part of the school); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997), *amended*, 32 F. Supp. 2d 1360 (D.N.H. 1997) (deciding that the actual notice standard is necessary to prove that the school intended to create a hostile environment for the plaintiff); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1214 (E.D. Pa. 1997) (reasoning that actual notice is clearly required under the language of Title IX).

129. *See Davis*, 526 U.S. at 631.

130. There is a third standard, strict liability, whereby a school would always be

on a school when the school knew or should have known of the sexual harassment.[131] Prior to *Davis*, some federal courts regularly applied the constructive notice standard to cases of peer sexual harassment under Title IX.[132]

Notably, the broader constructive notice standard is used in the application of Title VII to cases of co-worker sexual harassment in the workplace.[133] Under this standard, "if the harassment complained of is so open and pervasive that the employer should have known of it, had it but opened its corporate eyes, it is unreasonable not to have done so, and there is constructive notice."[134]

The constructive notice standard should apply in cases of peer sexual harassment in the schools.[135] A school should not be allowed to escape liability simply because the child being harassed has not expressly reported the conduct to the principal. That is not to suggest that, in every circumstance, school officials should be expected to know of every action that takes place within their schools.[136] However, if sexual harassment in a classroom, hallway,

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liable when a student sexually harasses another student. No court has seriously considered using this standard in Title IX cases. In cases of supervisor sexual harassment under Title VII, however, strict liability (under agency principles) is applied. *See* Delikat & Swanson, *supra* note 31, at 17.

131. *See* Sullivan & Zirkel, *supra* note 57, at 611.

132. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997); Doe v. Oyster River Co-op. Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741 (E.D. Ky. 1996), *aff'd on other grounds*, 142 F.3d 360 (6th Cir. 1998); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996).

133. *See* Delikat & Swanson, *supra* note 31, at 27; *see, e.g.*, Sharp v. City of Houston, 164 F.3d 923, 929 (5th Cir. 1999).

134. *Sharp*, 164 F.3d at 930.

135. "[S]tudents are as much in need of, and indeed entitled to, a non-discriminatory atmosphere in the classroom as are employees in the workplace. No other result can be possible in light of the grave impact sexual harassment has on its victims." Williams, *supra* note 107.

136. Instead, clear but flexible guidelines under a constructive notice standard are possible:

> For example, if a school knows of some incidents of harassment, there may be situations where it will be charged with the notice of others—if the known incidents should have triggered an investigation that would have led to a discovery of the additional incidents. In other cases, the pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment—if the harassment is widespread, openly practiced, or well-known to students and staff.

OCR Title IX Guidelines, *supra* note 17, at 12042. Likewise, in the employment context, "[k]nowledge, actual or constructive, can be imputed to the employer from first-hand observation, internal complaints, the pervasiveness of the harassment, or the employer's indifference to sexual harassment, reflected by a failure to establish a policy and a grievance mechanism to redress it." LEWIS & HASTINGS,

or school bus, for example, is repeated and pervasive, then school officials should be required to open their eyes and investigate.[137]

Moreover, the Court's actual knowledge standard in *Davis* assumes that those students who are being harassed, and thereby denied educational opportunities, will always step forward and report the incidents. This is simply not realistic.[138] Adult employees are not always expected to bring sexual harassment to an employer's attention prior to bringing an action under Title VII.[139] So why, then, do we require children to confront the adults in their schools, even when pervasive and repeated harassment already occurs in the presence of adults?

Davis also leaves open the question of who at the school must have actual knowledge of the harassment in order to impose liability under Title IX. If actual knowledge must be the standard, then courts should require only that an agent or responsible employee[140] of the school be informed of the harassment, rather than only a principal or school board member.

Canutillo Independent School District v. Leija[141] illustrates the need for the broader knowledge requirement. In *Canutillo*, the Fifth Circuit held that the school was not liable for the sexual molestation of a second-grade student by one of her teachers because the student and her mother only reported the harassment to her homeroom teacher.[142] Although *Canutillo* dealt with teacher-student harassment, the same danger of non-reporting is apparent in peer harassment cases. Many students and parents will not always report the incident to the most powerful official at the school, but instead are more likely to report harassment to someone at the school with whom they feel comfortable, or who

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supra note 21, at 14-15.

137. Sixty-six percent of students report being sexually harassed in hallways at school, while 55% say the classroom is the most likely place to be harassed. *See* AAUW Survey, *supra* note 23, at 13.

138. Research has indicated that victims of sexual harassment do not freely report sexual harassment, nor are they encouraged to do so. *See* LEWIS & HASTINGS, *supra* note 21, at 1. "Some victims use internal strategies, such as enduring the behavior or blaming themselves. Self-blaming reduces the likelihood of reporting." Andersen, *supra* note 17. Additionally, researchers have found that girls are less likely to speak up and are more likely to tolerate harassment because of repercussions and retaliation. *See* LEWIS & HASTINGS, *supra* note 21, at 25.

139. *See supra* notes 133-134 and accompanying text.

140. *See* OCR Title IX Guidelines, *supra* note 17, at 12042 (giving examples of "responsible employees" as including a principal, campus security, bus driver, teacher, affirmative action officer or office staff).

141. 101 F.3d 393 (5th Cir. 1996).

142. *See* Canutillo v. Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398-400 (5th Cir. 1996).

has direct control over the classroom.[143]

The actual knowledge standard is too strict to be effective in the educational environment. A teacher or other school official could, under this standard, ignore blatant sexual harassment occurring within the classroom, unless the victim of the misconduct officially notified the appropriate authority in the school.[144] That result fails to provide students with equal educational opportunities as promised in Title IX, especially considering that the victims in these cases are schoolchildren, who do not often report even the most severe harassment.[145] Moreover, a child may not have the ability to identify the conduct as harassment.[146] Thus, allowing the schools to ignore harassment until actual notice has been given by the student to the appropriate individual denies educational benefits to students on the basis of sex in violation of Title IX.

2. Deliberate Indifference

To bring a claim under Title IX, *Davis* requires students to show that the school was deliberately indifferent to their claims of sexual harassment.[147] Like the actual knowledge standard, the deliberate indifference standard is too narrow to comport with the broad purpose of Title IX.[148]

All that a school district must show to avoid Title IX liability is that its conduct, in the face of known claims of sexual harassment, was not clearly unreasonable.[149] Again, the Court in *Davis* failed to justify this standard, except to say that this standard "is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action."[150] Aside from its "flexibility" argument, every assertion that "clear unreasonableness" is the correct standard is an attempt by the

143. *See also* Murrell v. Sch. Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999). In *Murrell*, the student and her mother repeatedly reported another student's aggressive sexual conduct and sexual assault to the teachers, in order to remedy the situation. *See id.* The principal of the school, however, was not informed until approximately six weeks later. *See id.* Once informed, the school district neither notified appropriate law enforcement officials nor disciplined the aggressor in any way. *See id.*

144. *See Canutillo*, 101 F.3d at 398-400.

145. *See supra* note 138 and accompanying text.

146. *See* LEWIS & HASTINGS, *supra* note 21, at 20.

147. *See Davis*, 526 U.S. at 650.

148. *See* 118 CONG. REC. 5808 (1972), *supra* note 98 (explaining this purpose).

149. *See Davis*, 526 U.S. at 650.

150. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999).

Court to justify its conclusion to the dissenting justices, who fear that schools could be held liable even when they take reasonable steps to remedy a problem but fail.[151] Under what circumstance will a district court judge determine that a school's response to a claim of sexual harassment is enough to overcome the "clearly unreasonable" standard?

There is no justifiable reason why the schools should not be held to a plain reasonableness standard under Title IX. A reasonableness standard would not even require a school to remedy the harassment.[152] Teachers and school officials, who are solely in charge and have custody of America's children for a great part of every day, should at the very least be expected to act reasonably.[153]

Again, an analogy to Title VII cases is useful. In the workplace, an employer is expected to show that, upon learning of an alleged incident of sexual harassment, it took immediate and appropriate corrective action.[154] This would be a much better standard for school liability under Title IX. "Immediacy" is a term that makes sense to reasonable people. "Appropriateness" is a standard that can be determined by looking at the totality of the circumstances.[155] Both of these terms can be more effectively applied to the educational environment than can "deliberate indifference." Nothing less than "immediate and appropriate" action should be required of school officials upon learning of severe and pervasive harassment of a student. Moreover, the immediate and appropriate standard, which has the virtue of retaining a school's flexibility to act, a significant concern of the Court in *Davis*.[156]

C. Consequences

The danger in drawing standards that are too easily met by the schools, as the Court did in *Davis*, is that those standards will

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151. "[T]he dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands." *Id.* At 648. "The dissent consistently mischaracterizes this standard to require funding recipients to 'remedy' peer harassment." *Id.*

152. A reasonableness standard, simply holding school officials liable for negligence, would not punish reasonable acts that unfortunately had bad results.

153. *See supra* notes 123-125 and accompanying text.

154. *See* Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998).

155. Delikat & Swanson, *supra* note 31, at 35 (noting that "the duty to investigate and take remedial action depends on the gravity of the allegations") (citing Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995)).

156. *See Davis*, 526 U.S. at 648.

then encourage, rather than discourage, irresponsible behavior by school officials regarding peer sexual harassment. If the requirements of Title IX can be met with closed eyes and token gestures, then there is nothing left to motivate schools to adopt aggressive sexual harassment policies for dealing with peer harassment.

The current guidelines set forth by the Department of Education Office for Civil Rights (OCR)[157] are more comprehensive than those in *Davis*. The OCR Title IX Guidelines require the school to act if an agent or responsible employee of the school knew, or should have known of the harassment through a reasonably diligent inquiry.[158] The OCR Title IX Guidelines also require that a school takes immediate and appropriate action to investigate and take steps reasonably calculated to end any harassment.[159]

It is unclear whether the OCR will make its guidelines more lenient toward schools in response to *Davis*. Hopefully, because the OCR does not have the ability to impose damages on a school district for sexual harassment,[160] its guidelines will remain justifiably strict against schools.

Conclusion

It is too early to tell what effect *Davis* will have on future Title IX decisions.[161]

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157. *See* OCR Title IX Guidelines, *supra* note 17. The OCR promulgated these Guidelines to:

> provide information intended to enable school employees and officials to identify sexual harassment and to take steps to prevent its occurrence [and] . . . to inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students . . . . Overall the Guidance illustrates that in addressing allegations of sexual harassment, the judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

Id.

158. *See supra* note 136 and accompanying text.

159. *See* OCR Title IX Guidelines, *supra* note 17, at 12042. *See also supra* notes 155-157 and accompanying text.

160. Upon hearing and investigating a complaint against a school for a violation of Title IX, the OCR will investigate and, if necessary, enter into an agreement with the school to ensure its compliance. *See* OCR Title IX Guidelines, *supra* note 17, at 12040. "If the school has taken each of these steps, OCR will consider the case against the school resolved." *Id.*

161. The two most recent cases relying on *Davis* give little assistance in this regard, because it is likely that both cases would have been decided the same way under a broader standard. In *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999), Murrell claimed that her mentally and physically disabled daughter had

Although students now have an option to complain under Title IX for peer sexual harassment, the facts in *Davis* suggest that courts need only allow Title IX claims that present the most severe and blatant disregard on the part of school officials.[162] The Court correctly decided *Davis*; however, it also opened the door to questionable behavior on the part of school officials that does not rise to the level of indifference exemplified by the *Davis* facts. Under *Davis*, schools have so much leeway in handling sexual harassment claims[163] that Title IX's goal of securing equal education for all students regardless of sex will likely remain unfulfilled.

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been sexually harassed by a male student on numerous occasions on school property. *See id.* at 1243-44. Although the school had been notified many times of the incidents, the principal refused to suspend the male perpetrator, but instead suspended the victim. *See id.* at 1244. Applying the *Davis* standard to these egregious facts, the court concluded that Murrell had presented a claim under Title IX. *See id.* at 1247-48.

In *Mosley v. Beaumont Indep. Sch. Dist.*, No. 09-97-502CV, slip. op., 1999 WL 682697 (Tex. App. Aug. 31, 1999), the student alleged a single act of harassment as the basis for a Title IX claim. *See id.* at 1. The court affirmed the dismissal of the action, because there was no allegation that the conduct had been sufficiently severe to deny the

student access to educational opportunities. *See id.* at 2-3.

162. *See Davis*, 526 U.S. at 630-48. Notably, in the recent *Murrell* case, the court interpreted the *Davis* standard to be even narrower than the standard itself would imply. "That standard makes a school district liable only where it has made a conscious decision to permit sex discrimination in its programs." *Murrell*, 186 F.3d at 1246. *See also supra* note 156.

163. *See id.*