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Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX

In late September 1996, six-year-old Johnathan Prevette kissed a girl in his first-grade class on the cheek.¹ The school’s administrative decision to punish Johnathan’s amorous overture² triggered a “media frenzy” in which commentators from Ann Landers³ to Katha Pollitt⁴ expressed their views on the appropriate way to handle the situation. Some writers took the opportunity to note that while the reaction to Johnathan’s kiss may have seemed excessive, such overreaction by a school district to an incident of sexual harassment is unusual.⁵

¹. See First-Grader Must Remember This: A Kiss Is More Than Just a Kiss, NEWS & OBSERVER (Raleigh, N.C.), Sept. 25, 1996, at A3.

². See id. The principal was informed of the kiss and decided that Johnathan should be punished under the school’s sexual harassment policy. See id. His punishment took the form of an in-school suspension in which Johnathan was barred from a coloring/ice cream party. See id. In addition, Johnathan was warned that any more kissing would result in his being suspended from school. See id.

³. See Ann Landers, Ann Landers, WASH. POST, Nov. 3, 1996, at F3. Landers, in response to a letter questioning “American justice” when a six-year-old is suspended from school for kissing a classmate on the cheek while Baltimore Oriole Roberto Alomar is allowed to play the rest of the season after spitting in an umpire’s face, asserted that “6-year-old Johnathan Prevette should have been ‘spoken to’ but not punished. Six-year-olds don’t know what sexual harassment is. I recently read that the superintendent of schools in Johnathan’s district is taking steps to revise the sexual harassment code to take age into account.” Id.

⁴. See Katha Pollitt, Kissing & Telling, NATION, Nov. 4, 1996, at 9. The mishap involving Johnathan was followed by another elementary-school kissing incident when seven-year-old De’Andre Dearinge, a New York student, was suspended for five days after he kissed a female classmate and pulled a button off her skirt. See id. Pollitt criticized the “media frenzy” surrounding the two incidents and noted that while there was a great deal of media attention surrounding Johnathan and De’Andre’s relatively harmless exploits, more serious incidents of sexual harassment in our schools were not given the same attention by the media. See id. Specifically, Pollitt described two other situations involving sexual harassment that escaped notice by the press:

In California, a jury awarded Tianna Ugarte $500,000 because her school failed to act when she was menaced daily (including death threats) in sixth-grade; meanwhile, the Supreme Court refused to hear the case of two Texas eighth-graders who were regularly groped and called whores by boys on their school bus. Id. Pollitt concluded that while Johnathan’s and De’Andre’s respective school districts might have, considering the ages of the children in question, overreacted to their situations, some action in response to the boys’ behavior was appropriate. See id.

⁵. See Hanke Gratteau, What’s in a Kiss?: Plenty: When It Leads to the Sexual Harassment Girls Routinely Endure at School in North America, CALGARY HERALD, Oct. 16, 1996, at A15. Gratteau noted:

The truth is, the story of Johnathan Prevette is not the norm, not by far. The
Another commentator noted that a large part of the Johnathan Prevette fiasco stemmed from the fact that the “proper” response on the part of a school district—one that would not expose a school district to potential liability—is not clear.6

Although the recent incident involving Johnathan brought the issue of sexual harassment in education to the forefront of the mainstream media, the issue has concerned the social science and academic communities for several years.7 Commentators have noted

norm is that girls are harassed in school, and their harassers are rarely punished. In a U.S. survey, 76 per cent of 1,600 middle- and high-school girls had experienced unwanted sexual comments, jokes, gestures or looks at school . . . . Sixty-five per cent had been grabbed and/or pinched. More than one in 10 had been forced to perform a sexual act other than kissing . . . .

At a top-notch suburban school near San Francisco, for instance, eighth-grade girls endured boys who grabbed their buttocks and breasts in the hallways. Girls were regularly called “slut,” “bitch” and “ho.” . . . At another middle school a girl told me she was the manager of the boys’ basketball team until one of the players walked up to her and, without a word, reached out and grabbed both of her breasts.

Id. at A15. Gratteau concluded that the sympathy extended to Johnathan while the plight of so many girls is ignored is testimony to “how entrenched the status quo really is. [Johnathan’s] tale effectively reassures us that dealing with sexual harassment—as suspected all along—is much ado about nothing.” Id. at A15; see also Liza N. Burby, Dishonor Students; Too Often, Sexual Harassment Goes with the Territory at School; And Most Kids Believe There’s Nothing They Can Do About it, NEWSDAY, Oct. 12, 1996, at B1 (describing different situations involving sexual harassment, examining possible reasons for its increasing prevalence in American school systems, and concluding with a call for schools to adopt sexual harassment policies with clear guidelines that are communicated regularly to the students); Ellen Goodman, The Truth Behind ‘The Kiss,’ BOSTON GLOBE, Oct. 13, 1996, at D7 (criticizing the media furor over the school’s reaction to Johnathan’s kiss and emphasizing the real problem of sexual harassment in our schools and the impact it often has on its victims); Kathy Walt, More Than Just a Peck on the Cheek/Girls Take Action to Stop Nightmare of Sexual Harassment in the School House, HOUS. CHRON., Oct. 13, 1996, at D1 (discussing the serious problem of sexual harassment in schools and the controversy surrounding the school district’s role in reacting to and remedying the problem).

6. See Andrew Phillips, Kissing and Correctness: Two Little Boys Are Busted for Bussing, MACLEAN’S, Oct. 14, 1996, at 49. According to Phillips, both Johnathan’s and De’Andre’s school districts reacted out of concern that the school district could face a lawsuit if “real or perceived” sexual harassment was not properly addressed. See id.

7. See generally COMBATTING SEXUAL HARASSMENT IN HIGHER EDUCATION (Bernice Lott & Mary Ellen Reilly eds., 1996) (consisting of articles describing the problem of sexual harassment in higher education and appropriate university policies and procedures); ROBERT O. RIGGS ET AL., SEXUAL HARASSMENT IN HIGHER EDUCATION: FROM CONFLICT TO COMMUNITY (1993) (describing various aspects of sexual harassment in education and effective policies and practices for eliminating the problem); SEXUAL HARASSMENT IN THE EDUCATIONAL ENVIRONMENT (Dan Wishnietzky ed., 1992) (consisting of a variety of articles discussing various aspects of the issue of sexual harassment in education); SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER (Michele A. Paludi ed., 1996) (consisting of a variety of articles regarding sexual harassment at the post-secondary level).
that research reveals that sexual harassment is disturbingly prevalent in our nation’s school systems. At least two commentators have described the problem of sexual harassment in education as having reached “epidemic proportions.” Moreover, commentators have noted that a study by the American Association of University Women revealed that four out of five high school students have been the victims of sexual harassment. Studies have also shown that sexual harassment is pervasive in education at the university level.

In addition, many researchers have described the effects of sexual harassment in education. Some of those effects include physical and emotional harm, as well as the deprivation of the opportunity for a fair education. Sexual harassment, whether in the

8. See generally Louise Fitzgerald, The Prevalence of Sexual Harassment, in COMBATTING SEXUAL HARASSMENT IN HIGHER EDUCATION 55 (Bernice Lott & Mary Ellen Reilly eds., 1996) (summarizing findings of research regarding sexual harassment of students and female faculty); Alexandra A. Bodnar, Comment, Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School, 54 REV. L. & WOMEN’S STUD. 549, 554-59 (1996) (summarizing the findings of several studies done at the primary and secondary levels regarding the incidence of peer sexual harassment and citing at least one study in which four out of five students reported that they had been the target of sexual harassment); Kristin M. Eriksson, Note, What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment, 83 GEO. L.J. 1799, 1800 n.12 (describing the results of two studies). The first of the two studies described by Eriksson found that “81% of girls in grades eight through eleven have experienced unwanted sexual behaviors during their lives, and, of those who reported experiencing harassment, 58% reported experiencing harassment ‘often’ or ‘occasionally.’” Id. The second study found that “89% of girls surveyed ages nine to nineteen, have received suggestive gestures, looks, comments, or jokes, 83% have been touched, pinched, or grabbed; and 39% reported that this harassment happened on a daily basis.” Id.


10. See Bodnar, supra note 8, at 556 (citing the results of a 1993 survey sponsored by American Association of University Women); Jill Suzanne Miller, Note, Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims, 1995 U. ILL. L. REV. 699, 701 (1995) (same).

11. See, e.g., Stefanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & EDUC. 459, 460-61 (noting that at least one study has found that “between twenty and thirty percent of all female undergraduate students reported having experienced some form of sexual harassment by the faculty and staff of their college and universities” and that the number of women who report having been sexually harassed increases when women are asked to report peer sexual harassment).

12. See, e.g., SHOOP & EDWARDS, supra note 9, at 53-66 (describing physical, psychological, behavioral, and educational consequences of sexual harassment in education).

13. See id. at 56-57.
workplace or in education, "devastates one's physical well-being, emotional health, and vocational development." Another commentator summarized the effect of sexual harassment in education by stating: "Sexual harassment is more than just a moral, legal, or financial concern. It is a concern over protecting an atmosphere that is most conducive to our academic ideals. In a condition of fear or emotional discomfort, academic goals cannot be achieved."

The past decade has also seen an increasing amount of discussion in the legal community regarding several aspects of sexual harassment in education. Recently, the literature has centered around the development of sexual harassment law under Title IX of the Education Amendments of 1972. One area that has received particular attention is the set of circumstances under which an educational institution may be monetarily liable for sexual harassment that takes place in its schools. A review of the literature reveals much well-researched discussion regarding the proper standard for institutional liability. However, an analysis of


15. Jonathan D. Fife, Foreword to Riggs et al., supra note 7, at xvi.

16. See 20 U.S.C. §§ 1681-1688 (1994). See generally Thomas M. Melsheimer et al., The Law of Sexual Harassment on Campus: A Work in Progress, 13 Rev. Litig. 529, 535-41 (1994) (summarizing the existing status of sexual harassment law under Title IX); Roth, supra note 11, at 499-519 (describing how the different types of sexual harassment are actionable under Title IX); Miller, supra note 10, at 714-22 (summarizing how Title VI and Title VII should be used to interpret sexual harassment claims under Title IX).


18. See generally Carrie N. Baker, Comment, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271, 289-323 (1994) (discussing the way Title IX should be interpreted to address sexual harassment in education effectively); Bodnar, supra note 8, at 584-89 (suggesting how Title IX should be changed to better
the case law reveals the reason for the confusion at the school district level regarding the appropriate reaction to sexual harassment and a school's potential liability. At this time, there is no definitive answer as to the "proper" action a school district should take to avoid a potential lawsuit.

This Comment explores the issue of sexual harassment in education, focusing on the various rationales and standards adopted by federal courts in formulating the appropriate standard of institutional liability for sexual harassment in education. The purpose of this Comment is to provide a general overview of the standards adopted by various courts, as well as a brief summary of the trends that have emerged. First, the Comment briefly reviews the development of sexual harassment law under Title VII of the Civil Rights Act of 1964. Second, it explores the development of sexual harassment law under Title IX. Third, the Comment summarizes the cases in which federal courts have addressed the issue of institutional liability for sexual harassment in education, identifying and discussing any trends that have emerged in the area of institutional liability. This Comment concludes with a summary


19. See infra notes 24-45 and accompanying text

20. 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII makes it unlawful for "an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." Id.

21. See infra notes 46-72 and accompanying text.

22. See infra notes 73-724 and accompanying text. It is important to note that people who allege sexual harassment in the educational context also may file a claim in federal court in the form of a civil rights action brought under 42 U.S.C. § 1983 (1994). See, e.g., Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1462 (N.D. Cal. 1995) (finding that a § 1983 claim may be based on a Title IX violation). The treatment of sexual harassment claims brought in the civil rights context is outside the scope of this Comment. For a discussion of the issue of civil rights actions stemming from sexual harassment in education, see generally Jeff Homer, A Student's Right to Protection from Violence and Sexual Abuse in the School Environment, 36 S. TEX. L. REV. 45 (1995) (describing the treatment of sexual harassment claims brought by students against both employees and fellow students under 42 U.S.C. § 1983); Karen Mellencamp Davis, Note, Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Sexual Abuse, 69 IND. L.J. 1123 (1994) (describing constitutional claims that may be brought under 42 U.S.C. § 1983 for peer sexual harassment in the educational
of the recently proposed standards for the determination of institutional liability for sexual harassment in education issued by the Department of Education's Office of Civil Rights ("OCR") and the potential impact those standards will have on existing case law.\textsuperscript{23}

I. A REVIEW OF SEXUAL HARASSMENT LAW

A. Title VII

Before turning to the development of sexual harassment law under Title IX, a brief look at sexual harassment law as it developed under Title VII is helpful for two reasons. First, the legal theory of sexual harassment developed in the context of Title VII.\textsuperscript{24} In 1979, Catharine A. MacKinnon, a prominent feminist scholar, suggested that sexual harassment constituted prohibited sex discrimination under Title VII.\textsuperscript{25} In 1980, the Equal Employment Opportunity Commission ("EEOC") issued guidelines explicitly defining sexual harassment as a violation of Title VII.\textsuperscript{26}

Second, a discussion of sexual harassment law under Title VII is warranted because most federal courts that have addressed sexual harassment claims brought under Title IX have applied the context); Adam Michael Greenfield, Note, \textit{Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection from Peer Abuse in Public Schools}, 43 DUKE L.J. 588 (1993) (analyzing the application of 42 U.S.C. § 1983 to sexual harassment claims brought by students in the educational context); John W. Walters, Note, \textit{The Constitutional Duty of Teachers to Protect Students: Employing the "Sufficient Custody" Test}, 83 KY. L.J. 229 (1994-95) (describing the standard by which a school may be liable under 42 U.S.C. § 1983 for physical abuse suffered by one of its students).


26. The EEOC currently defines sexual harassment in the following manner:

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

29 C.F.R. § 1604.11(a) (1996).
substantive law from Title VII by analogy. 27 Although a few courts have reasoned that, because Title IX was modeled after Title VI, 28 the substantive law from Title VI ought to apply, 29 the majority of the courts that have addressed sexual harassment claims brought under Title IX have applied the substantive law from Title VII. 30

There are two basic theories upon which a claim of sexual harassment under Title VII may be based. The first, quid pro quo sexual harassment, involves a proposition that makes some aspect of employment conditional upon the granting of sexual favors. 31

27. See, e.g., Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1192 (11th Cir. 1996) (finding that the Office of Civil Rights ("OCR") relied on Title VII principles in defining proscribed behavior under Title IX).

28. See 42 U.S.C. § 2000d (1994). Title VI provides, in relevant part, that "[a]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.

29. See, e.g., Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1566 (N.D. Cal. 1993), rev'd 54 F.3d 1447 (9th Cir. 1995) (stating that because Title IX is based upon Title VI, it should be interpreted in a similar manner).


second type of sexual harassment that is actionable under Title VII is known as hostile work environment sexual harassment. In 1986, the United States Supreme Court explicitly held that hostile work environment sexual harassment was actionable under Title VII in Meritor Savings Bank v. Vinson. The Court specified that in order for a hostile work environment to be actionable under Title VII, the harassment must be severe or pervasive enough to "alter the conditions of [the victim's] employment and create an abusive working environment." The Meritor Court did not, however, expressly address how severe or pervasive the harassment had to be to satisfy the standard. As a result, in the wake of Meritor, there has been a great deal of discussion in the legal community regarding the facts necessary to sustain a claim of hostile environment sexual harassment.

In 1993, the Supreme Court attempted to clarify the issue and addressed the standard by which a hostile work environment should be evaluated in Harris v. Forklift Systems, Inc. The Harris Court held that the consideration of whether an environment was hostile enough to constitute a violation of Title VII should take "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." The Court noted that the severity of the conduct that gives rise to a hostile work environment claim must be measured from both an objective and a subjective perspective. Finally, the Court described

32. 477 U.S. 57, 73 (1986). In support of its holding, the Court noted that EEOC Guidelines defined actionable sexual harassment as including conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Id. at 65 (relying on 29 C.F.R. § 1604.11(a)(3) (1985)).
33. Id. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
36. Id. at 21.
37. See id. The Court noted that [c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would
the factors that should be considered in determining whether a hostile work environment has been created.\textsuperscript{38}

The United States Supreme Court briefly addressed the issue of whether an employer may be held liable for sexual harassment perpetrated by an employee in the workplace in \textit{Meritor}.\textsuperscript{39} The Court began its analysis by summarizing the arguments made by the parties regarding the appropriate standard of employer liability for hostile work environment sexual harassment.\textsuperscript{40} The Court declined to resolve the issue and stated: "We ... decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."\textsuperscript{41}

With the above language, the Court seemed to implicitly endorse the standards of liability adopted by the EEOC in the regulations pertaining to employer liability for sexual harassment. The guidelines adopted by the EEOC set out specific standards for employer liability for sexual harassment perpetrated by supervisors or agents, as well as for sexual harassment perpetrated by regular employees (co-employee harassment).\textsuperscript{42} According to those guidelines, an employer always is liable for sexual harassment perpetrated by one of its supervisors.\textsuperscript{43} Additionally, the guidelines mandate that an employer "is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized

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\textsuperscript{38} See id. at 21-22. The factors listed by the Court include:

[T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.


\textsuperscript{40} See \textit{id.} at 69-72.

\textsuperscript{41} Id. at 72. The Court specified that employers are not always liable for sexual harassment perpetrated by supervisors but, at the same time, the employer cannot necessarily escape liability by asserting its lack of notice. See id.

\textsuperscript{42} See 29 C.F.R. § 1604.11(c), (d) (1996).

\textsuperscript{43} See \textit{id.} § 1604.11(c).
or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." Finally, the EEOC guidelines state that with respect to co-employee sexual harassment, "an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

B. Title IX

Title IX prohibits sex discrimination in federally-funded educational programs. According to Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." In order to establish a prima facie case of discrimination under Title IX, a plaintiff must establish the following elements: "(1) that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that his or her exclusion from the program was on the basis of sex." The OCR is responsible for enforcing the regulations that govern the interpretation of Title IX. Specifically, the OCR has the power to terminate an educational institution's federal funding if the OCR's investigation of a Title IX complaint reveals that a school has violated Title IX. One commentator has

44. Id.
45. Id. 1604.11(d).
47. 20 U.C. § 1681(a) (1994). At least one commentator has noted that Title IX was enacted "to fill a gap in existing civil rights legislation." Eriksson, supra note 8, at 1803. Title VI prohibits some forms of discrimination in federally funded institutions, but gender is not among the protected classes. See id. In addition, Title VII, 42 U.S.C. § 2000e (1994), when originally enacted, specifically exempted educational institutions. See id.
49. See Nixon, supra note 17, at 241-42.
50. See id. at 242. Another commentator has described the role of the OCR as follows:

Under the statute, student victims of any form of sex discrimination, including sexual harassment, may file a written complaint with the [OCR]. If OCR determines that a Title IX violation has occurred, it will attempt to bring the institution into compliance through informal means. If compliance is not
suggested, however, that this procedure is insufficient in redressing the harm suffered by student victims of sexual harassment.51

Fortunately, there is another route open to students who are not satisfied with the process available through the OCR. In Cannon v. University of Chicago,52 the United States Supreme Court held that a private individual who has been the victim of sexual harassment in a school subject to Title IX can sue the school for a violation of the statute.53 The Cannon Court acknowledged that a private right of action was not expressly authorized by the statute.54 The Court reasoned, however, that a private cause of action could be inferred from the statute if doing so would be in accordance with the congressional intent behind the statute.55 The Court concluded that Congress had intended for individuals to be able to bring a private cause of action and held that the private plaintiff has a viable cause of action against the school under Title IX.56

achieved informally, OCR may initiate administrative proceedings to terminate federal funding or ask the Department of Justice to seek enforcement through the courts.


51. See Limbrick, supra note 50, at 611-12. Limbrick supported her assertion with the following reasoning:

First, the transient nature of student life and the inevitable delays in the administrative process typically deny the victim any personal or timely benefit from the school's eventual reform. Second, settlement or negotiation with OCR ordinarily occurs without victim participation. Third, the punishment imposed on the institution for noncompliance with Title IX does not compensate the victim. Finally, the termination of government funding ultimately will harm students if sanctioned schools are compelled by funding reductions to eliminate programs or classes.

Id.

52. 441 U.S. 677 (1979).

53. See id. at 717.

54. See id. at 683.

55. See id. at 688. The Court noted that the issue should be analyzed under the standard set by the Court in Cori v. Ash, 422 U.S. 66 (1975). See Cannon, 441 U.S. at 688.

56. See Cannon, 441 U.S. at 717. Specifically, the Court concluded:

When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation. Title IX presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present.

Id. at 717. The first federal court to hear a sexual harassment claim brought by an individual under Title IX was the district court in Alexander v. Yale University, 459 F.
The case that provided the most significant impetus for the recent increase in sexual harassment claims in the educational context was Franklin v. Gwinnett County Public Schools. The Court's holding in Franklin allows a private plaintiff to pursue monetary damages for a school's violation of Title IX. Christine Franklin, a high school student in the Gwinnett County School District, was sexually harassed from the beginning of her tenth-grade year through her junior year by Andrew Hill, a teacher and athletic coach employed by the high school. In addition, Franklin alleged that the school district became aware of the sexual harassment, took no action to stop the behavior, and discouraged her from filing a sexual harassment claim. As a result of the school's inaction, Franklin filed a claim for damages in federal court, asserting that the school was liable under Title IX.

The Franklin decision was devoted almost entirely to the determination of whether the implied right of action recognized in Cannon could support a plaintiff's claim for monetary damages. The Court began with a description of the historic procedure used by courts to determine the appropriate remedy for violation of a legal right. After considering how the remedy issue had been handled by modern Supreme Court decisions, the Court concluded 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."

The Court then considered whether Congress intended to limit the application of the general rule in the enforcement of Title IX.
The Court first looked to amendments adopted by Congress after the *Cannon* decision and concluded that Congress had legislated with "full cognizance" of the *Cannon* holding. After analyzing the relevant legislation, the Court concluded that Congress "did not intend to limit the remedies available in a suit brought under Title IX." The Court then held that "a damages remedy is available for an action brought to enforce Title IX."

In spite of *Franklin*’s rather straightforward holding, the Court’s failure to address several major issues in the area of sexual harassment in education has created much confusion in the lower courts. Specifically, courts have split with respect to whether a claim for hostile environment sexual harassment can be maintained under Title IX. Both the *Franklin* and *Cannon* cases involved students filing claims under Title IX. As a result, lower courts have split with regard to whether Title IX affords employees of educational institutions a private right of action. Lower courts also have split

would not help in deciding the remedies available for such action. See id. The Court reasoned that "[s]ince the Court in *Cannon* concluded that [Title IX] supported no express right of action, it is hardly surprising that Congress also said nothing about the applicable remedies for an implied right of action." *Id.* at 71.

66. *Id.* at 72.
67. *Id.* The Court cited Congress’s adoption of two amendments to Title VII, pointing out that the legislation “cannot be read except as a validation of *Cannon*’s holding.” *Id.*
68. *Id.* at 76.
69. Compare *Alexander v. Yale Univ.*, 631 F.2d 178, 183 (2d Cir. 1980) (holding that a student’s claim of hostile environment sexual harassment was not actionable under Title IX), with *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996) (describing the elements required to establish a prima facie case of hostile environment sexual harassment). Several commentators have acknowledged the Court’s failure to specifically identify the claim in *Franklin* as one involving hostile environment sexual harassment, but have concluded that because the student did not allege that an educational benefit was conditioned on sexual consideration, the claim at issue was most likely one of hostile environment sexual harassment. See Melsheimer et al., *supra* note 16, at 544-45; Vargyas, *supra* note 17, at 378; Baker, *supra* note 18, at 284, 286; Matson, *supra* note 17, at 294; Miller, *supra* note 10, at 711. Most courts, however, have come to the conclusion that hostile environment cases can be maintained under Title IX. See infra notes 504-08, 706 and accompanying text.
71. Compare *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 145 (W.D. Tex. 1994) (holding that an employee can maintain a private cause of action under Title IX), with *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995) (holding that Title VII afforded university employee the exclusive means of relief), *cert. denied*, 116 S. Ct. 357 (1996), and *Howard v. Board of Educ. of Sycamore Community Unit Sch. Dist. No. 427*, 893 F. Supp. 808, 815 (N.D. Ill. 1995) (holding that Title VII preempts Title IX employment discrimination action); see also infra notes 155-244 and accompanying text (discussing several Title IX sexual harassment claims that have been maintained by employees of educational institutions).
over individual defendants' liability under Title IX. 72

One major issue that has caused a division in both district and circuit courts is the proper standard for holding an educational institution liable for the sexual harassment suffered by its employees or students. The next section of this Comment summarizes lower court decisions since Franklin, explores the standards of institutional liability that have been adopted by these courts with respect to different types of sexual harassment situations, and identifies trends that have developed. 73

II. TITLE IX CASE LAW PERTAINING TO STANDARDS FOR INSTITUTIONAL LIABILITY

Since the Supreme Court's decision in Franklin, there has been a marked increase in the number of sexual harassment cases filed under Title IX. 74 For the purpose of this Comment, the cases that have been decided since Franklin are organized in the following manner. First, the Comment discusses the cases involving quid pro quo sexual harassment. 75 Next, it considers the cases involving

72. The majority of courts that have considered the issue of individual liability have held that individuals cannot be sued under Title IX for sexual harassment situations. See Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) (dismissing a Title IX claim against individual defendants); Seamons v. Snow, 864 F. Supp. 1111, 1116 (D. Utah 1994) (dismissing claims against individual defendants because neither individual defendant was an "education program or activity" within the meaning of the statute); Bustos v. Illinois Inst. of Cosmetology, No. 93-5980C, 1994 WL 710830, at *2 (N.D. Ill. Dec. 15, 1994) ("Thus, the goal of Title IX is to prevent institutional discrimination; consequently, the implied right of action created by Title IX extends only to institutional actors."); Slaughter v. Waubonsee Community College, No. 94-2525C, 1994 WL 663596, at *2-*3 (N.D. Ill. Nov. 18, 1994) (dismissing action against college professor for quid pro quo sexual harassment on basis that only institutions may be sued under Title IX); Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994), modified, Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996) (dismissing plaintiff's claims against individuals under Title IX because only federally funded institutions can be held liable under the statute); Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1522-25 (M.D. Ala. 1994) (dismissing Title IX claims against individual through analysis of claim under Title VII law); Hastings v. Hancock, 842 F. Supp. 1315, 1317 (D. Kan. 1993) (noting that an educational institution is the proper defendant in a Title IX action).

73. See infra notes 140-47 and the accompanying text (discussing trends in quid pro quo cases under Title IX); notes 225-44 (discussing trends in employee perpetrator/employee victim hostile environment cases); notes 504-35 (discussing trends in employee perpetrator/student victim hostile environment cases); and notes 706-25 (discussing trends in student perpetrator/student victim hostile environment cases).


75. See infra notes 83-147 and accompanying text.
hostile environment sexual harassment. Within the hostile environment category, the cases are organized according to the status of the perpetrator and the victim of the sexual harassment: Employee Perpetrator/Employee Victim, Employee Perpetrator/Student Victim, and Student Perpetrator/Student Victim.

This Comment studies the standards for institutional liability for acts of sexual harassment. For the purpose of understanding the scope of Title IX, however, it is important to note that in addition to those listed above, an educational institution also may be liable under Title IX for other situations involving sexual harassment. For example, educational institutions may be sued under Title IX for unlawful retaliation against both employees and students who report incidents of sexual harassment. Moreover, several universities also have been sued by people accused of sexual harassment who allege that the school's handling of the sexual harassment claim violated the due process rights of the accused. Finally, at least one university has been sued under Title IX for allegedly creating a hostile environment through its handling of a sexual assault claim filed with the university by a female student.

A. Quid Pro Quo Sexual Harassment

1. The Claim Under Title IX

As of 1996, the only federal courts that had considered the viability and proper standard for a claim of quid pro quo sexual harassment under Title IX were district courts. Several of the cases help clarify the proper standard for institutional liability under Title IX.
The following section summarizes the findings of these various courts with respect to the proper standard of institutional liability under Title IX for quid pro quo sexual harassment. First, the opinion of the court that refused to adopt a standard of liability for quid pro quo sexual harassment under Title IX is discussed, followed by a summary of the cases that expressly adopted a standard for quid pro quo sexual harassment.

In *Slater v. Marshall*, the court briefly addressed the standard for institutional liability under Title IX for quid pro quo sexual harassment perpetrated by a professor on a student. Linda Slater was a student at Montgomery County Community College ("MCCC") when she was allegedly sexually harassed by Professor Richard Marshall. The defendant, MCCC, attempted to have Slater's complaint dismissed as containing an unactionable hostile environment sexual harassment claim. The court, however, acknowledged that Slater insisted that she had alleged quid pro quo sexual harassment and concluded that the court would not "disregard plaintiff's own theory of her claim." The court concluded that Slater had adequately alleged quid pro quo harassment and denied the defendant's motion to dismiss.

Slater contended that MCCC would be "absolutely" liable for the professor's actions if she satisfied the elements of quid pro quo harassment. The court responded to her argument by stating that the standard of liability she advocated, which was based on a First Circuit decision, was not correct. According to the *Slater* court, the

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86. See infra notes 88-96 and accompanying text.
87. See infra notes 97-139 and accompanying text.
89. See *id.* at 258.
90. See *id.* at 260. The court, in dicta, noted that the Third Circuit had not addressed whether hostile environment sexual harassment was actionable under Title IX. See *id.* at 260 n.3 (citing *Bougher v. University of Pittsburgh*, 882 F.2d 74, 77 (3d Cir. 1989)). The *Slater* court also noted, however, that other courts had recognized that hostile environment sexual harassment is actionable under Title IX. See *id.*
91. *Id.* at 260.
92. See *id.*
93. See *id.* at 260 n.4.
First Circuit's cite of "Meritor, in dicta, for the proposition that there is absolute liability for quid pro quo harassment, ... must be an error." After concluding that Slater's theory of absolute institutional liability for the quid pro quo sexual harassment of a student by a professor employed by the university was not the proper standard, the court never explained what the proper standard of institutional liability was. As a result, the Slater decision merely contributes to the considerable confusion in this area.

Fortunately, the remaining district court decisions not only clarify the proper standard for institutional liability for a quid pro quo sexual harassment situation, but also are consistent with one another. In Hastings v. Hancock, the United States District Court for the District of Kansas became the first district court to address definitively an educational institution's potential liability resulting from a quid pro quo sexual harassment situation between a teacher and a student. Juana Serda was a student of a hairstyling school when she was subjected to sexual harassment by the school's director and filed suit against the school under Title IX. Serda brought both hostile environment and quid pro quo sexual harassment claims against the school. According to the district court, the particular issue in the case was whether the Morrisons, the owners of the hairstyling school, were liable under Title IX for the harassment of a student by Hancock, the director of the school.

The Hastings court observed that the parties had focused on the plaintiff's claims of hostile environment harassment. In doing so, the court essentially avoided the question of the proper standard for institutional liability for quid pro quo situations, but recognized that some courts "have held that claims of quid pro quo sexual harassment by an employee with direct supervisory authority over the harassed lead to direct liability on the part of the employer." The Hastings court then concluded that, in light of Meritor Savings
the same standard of institutional liability should apply to educational institutions for both quid pro quo and hostile environment sexual harassment. The court addressed the school’s liability for both the quid pro quo and hostile environment sexual harassment through the application of agency principles.

In Saville v. Houston County Healthcare Authority, Della Saville, a student at a school of nurse anesthesia, was the target of sexually inappropriate behavior from her supervising nurse anesthetist, Michael Shanks. Saville claimed that Shanks downgraded her clinical evaluations because of her response to his inappropriate sexual behavior. She reported one incident to her supervisor which was subsequently reported to Shanks’s supervisor. As a result, Shanks was counseled, given a written warning, and told that further inappropriate behavior would result in his termination. In addition, Saville was assured that she would no longer have to work directly with Shanks. In spite of that assurance, the director of the program refused to assign Saville to supervisors other than Shanks, and Shanks remained one of Saville’s evaluators. Saville eventually was dismissed from the nurse anesthetist program because of lack of progress in her clinical work. Subsequently, Saville filed suit against the school, alleging

104. 477 U.S. 57, 72 (1986) (suggesting that agency principles should be used to determine employer liability for both types of sexual harassment).

105. See Hastings, 842 F. Supp. at 1318-19 n.2. The Hastings court reasoned that the Meritor decision established that Congress intended for courts to look to agency principles to establish institutional liability in both quid pro quo and hostile environment cases. See id.

106. See id. at 1318-20. For a detailed discussion of the court’s analysis regarding the issue of institutional liability, see infra notes 349-54 and accompanying text.


108. See id. at 1519-20. Saville’s complaint recounted incidents of sexually inappropriate comments made to her by Shanks. See id. at 1519. There was, however, one particular “key” incident in Saville’s complaint that involved a situation in which Shanks grabbed Saville’s buttocks in the recovery room. See id. at 1520.

109. See id. at 1520. Saville alleged that after she informed Shanks of how upset and offended she was by his actions, he informed her that she was “in trouble” with her clinical work. See id.

110. See id.

111. See id.

112. See id.

113. See id.

114. See id. at 1520-21. The court noted that it was not clear whether Saville’s poor clinical performance resulted from the hostile environment in which she was working or a true inability to perform. See id. at 1520.
that the school's handling of her situation violated Title IX.\textsuperscript{115}

The \textit{Saville} court considered whether the facts of the case were sufficient for the maintenance of a quid pro quo claim and concluded that "[w]hile this is not the classic quid pro quo case, a jury could conclude that Shanks's poor evaluations, and ultimate discharge, resulted from her refusal to acquiesce in Shanks's sexual innuendo and touching."\textsuperscript{116} Thus, the court concluded that Saville had alleged facts sufficient to survive the school's motion for summary judgment on the quid pro quo claim.\textsuperscript{117}

In its consideration of the issue of the institution's potential liability for the quid pro quo harassment, the \textit{Saville} court applied analogous law from Title VII\textsuperscript{118} and concluded that, in order to hold the school liable, Saville needed to prove that Shanks was an agent of the school.\textsuperscript{119} As a preliminary matter, the \textit{Saville} court noted that Shanks's actions clearly were not within the scope of his employment.\textsuperscript{120} However, the court pointed out that under the relevant Title VII law from the Eleventh Circuit, a supervisor who was aided in the harassment by the existence of the agency relationship may be deemed an agent for the purposes of Title VII.\textsuperscript{121} After detailing other factors to be considered in determining whether a supervisor is an agent of an institution, the court noted that the agency determination was ultimately a question for the finder of fact.\textsuperscript{122} With respect to the quid pro quo claim, the court stated that if a jury found that Shanks was acting as an agent of the institution, the

\begin{footnotes}
\item[115] \textit{See id.} at 1521. Saville also brought a claim under Title IX for hostile environment sexual harassment. For a discussion of the court's treatment of the hostile environment claim, see \textit{infra} notes 326-41 and accompanying text.
\item[116] \textit{Saville}, 852 F. Supp. at 1527.
\item[117] \textit{See id.}
\item[118] \textit{See id.} Saville also alleged that the sexual harassment she suffered constituted unlawful employment discrimination under Title VII. \textit{See id.} at 1521. The district court noted that "the substantive standards to be applied to the claims under Title IX should be the same as those under Title VII." \textit{Id.} (citing Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988)).
\item[119] \textit{See id.} at 1527. The court noted that in \textit{Meritor Savings Bank v. Vinson}, 477 U.S. 57, 72 (1986), the United States Supreme Court explained that an employer is not "automatically liable" for the sexual harassment perpetrated by its employees, but may be directly liable for illegal harassment perpetrated by its agents. \textit{See Saville}, 852 F. Supp. at 1527.
\item[120] \textit{See Saville}, 852 F. Supp. at 1527.
\item[121] \textit{See id.} (citing Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1559 (11th Cir. 1987)).
\item[122] \textit{See id.} The court pointed out that a supervisor need not have the power to hire and fire in order to be considered an agent of the institution. \textit{See id.}
\end{footnotes}
institution would be directly liable for his acts of harassment.\textsuperscript{123}

Another district court addressed the issue of quid pro quo sexual harassment in the educational context in \textit{Kadiki v. Virginia Commonwealth University}.\textsuperscript{124} Amna Kadiki was a student at Virginia Commonwealth University and was enrolled in a biology course taught by Associate Professor Michael Fine.\textsuperscript{125} As a result of Kadiki's unsatisfactory performance on a make-up examination, Fine requested that Kadiki review the examination with him.\textsuperscript{126} During the meeting, which took place when the two were alone in Fine's office, Fine sexually harassed Kadiki.\textsuperscript{127} Michael Casanovas, a friend of Kadiki, contacted Fine after the incident to defend Kadiki.\textsuperscript{128} During their conversation, Fine said that he would give Kadiki an "A" if she would speak to Fine before reporting the incident.\textsuperscript{129} As a result of these incidents, Kadiki filed a quid pro quo and two other types of sexual harassment claims under Title IX.\textsuperscript{130} Specifically,

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123. \textit{See id.} at 1527-29. The court noted some of the factors that supported the conclusion that Shanks was acting as an agent of the institution: Shanks was employed as an instructor by the institutional defendants. He supervised and evaluated Saville's clinical work; the institutional defendants appear to have relied on his evaluations. After Saville complained to the director of the [nursing school] about a comment Shanks had allegedly made to her, and stated that she did not want the director to discipline Shanks because she was afraid it would hurt her in school, the director did not assure her that Shanks had no authority to affect her status. Saville believed Shanks had authority over her, and the institutional defendants appear to have held him out as having such authority. \textit{Id.} at 1527.


125. \textit{See id.} at 748.

126. \textit{See id.}

127. \textit{See id.} The following facts, which were undisputed by the parties, describe the incident in Fine's office:

Fine placed Plaintiff over his knees and spanked her repeatedly with his hand because her score fell below a previously agreed-upon level. The parties also agree that Fine told Plaintiff that she could retake the same examination the next day, but that she should bring her hairbrush with her and be prepared for another spanking if she did not achieve or exceed a certain score. Fine purportedly told Plaintiff that her spanking would be "worse" the second time around. After the incident, Plaintiff sought medical care for sore buttocks. \textit{Id.} (citations omitted).

128. \textit{See id.}

129. \textit{See id.}

130. \textit{See id.} at 749. In addition to the quid pro quo claim, Kadiki filed a hostile environment claim. For a discussion of the hostile environment claim, see \textit{infra} notes 371-80 and accompanying text. Kadiki also filed a claim under Title IX for retaliation. \textit{See Kadiki}, 746 F. Supp. at 749. A discussion of Kadiki's retaliation claim is beyond the scope of this Comment.
\end{flushleft}
Kadiki claimed that Fine, through the conversation with Casanovas, offered her a grade in exchange for her delay in reporting his behavior. In addition, Kadiki alleged that Fine had conditioned her taking of the second exam on her acceptance of additional sexually inappropriate behavior.

The Kadiki court prefaced its analysis of the quid pro quo claim with the observation that Title VII law would guide the substantive analysis of the claim. The court pointed out that quid pro quo sexual harassment had been defined in the employment context by the United States Supreme Court as a situation "where a defendant's 'unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature' are directly connected with the plaintiff's receipt of a job or education related benefit." The Kadiki court then set out the elements a plaintiff must establish to maintain a quid pro quo sexual harassment claim under Title VII.

The court pointed out that the element of quid pro quo harassment pertaining to institutional liability is automatically satisfied when the perpetrator of the harassment is a supervisor, and concluded that, in the case at bar, the school was "automatically" liable for any sexual harassment Kadiki suffered. The court

131. See Kadiki, 746 F. Supp. at 749.
132. See id. Specifically, the exam was conditioned on Kadiki's acceptance of a second spanking should she fail to perform well on the exam. See id.
133. See id. at 749-50. The court acknowledged that the United States Supreme Court had not expressly addressed whether Title VII standards ought to apply to Title IX sexual harassment claims. See id. at 749. However, the Kadiki court noted that it could be inferred from the Supreme Court's decision in Franklin that principles from Title VII should apply to Title IX actions brought by students. See id. at 750.
134. Id. at 750 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).
135. The court, applying Title VII law by analogy, stated that a plaintiff must establish that:

(1) The employee belongs to a protected group. (2) The employee was subject to unwelcome sexual harassment. (3) The harassment complained of was based on sex. (4) The employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit or cause of a tangible job detriment to create liability. Further, as in typical disparate treatment cases, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of [a] prohibited criterion in making the employment decision. (5) The employer . . . knew or should have known of the harassment and took no effective remedial action.

Id. at 751 (citing Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990)).
136. See id.
137. See id. at 752.
reasoned that "a professor is authorized by his educational employer to design the curriculum and manage the classroom . . . . Given these job characteristics, a professor is analogous to a workplace supervisor, and knowledge of any quid pro quo harassment of a student by a professor should be imputed to his employer." In essence, the Kadiki case stands for the proposition that when a professor, in the course of his or her professional responsibilities, engages in quid pro quo harassment, the university that employs that professor will be liable.

2. Trends for Quid Pro Quo Under Title IX

It is rather easy to discern the trend in the federal courts that have addressed the appropriate standard of institutional liability under Title IX for a student's experience of quid pro quo sexual harassment by a teacher. The Slater court limited its holding to the observation that a university is not "absolutely" liable for a teacher's acts of sexual harassment. However, that district court did not define the circumstances under which there might be institutional liability for a situation involving a professor's quid pro quo harassment of a student. It may be meaningful that the Slater court did not criticize the applicability of agency principles to the determination of institutional liability for quid pro quo sexual harassment. As the following summary of the remaining cases demonstrates, no court has held that an educational institution should always be liable for quid pro quo sexual harassment perpetrated by one of its employees. Thus, it is possible to reconcile the Slater opinion with those of the other district courts that explicitly have addressed the issue of institutional liability for quid pro quo sexual harassment.

The remaining district courts adopted similar standards with respect to an institution's liability for a student's experience of quid pro quo sexual harassment perpetrated by a teacher. The district

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138. Id. The court added that the knowledge may be imputed only if the harassment occurred as part of the professor's professional responsibilities. See id.

139. See id.

140. See Slater v. Marshall, 906 F. Supp. 256, 260 n.4 (E.D. Pa. 1995). It is interesting that the Slater court relied upon the First Circuit's decision in Lipsett v University of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988), where the Lipsett court cited Meritor Savings Bank v. Vinson, 477 U.S. 57, 70-71 (1986), for the proposition that an employer bears absolute liability for quid pro quo sexual harassment perpetrated by an employee. See Slater, 906 F. Supp at 260 n.4. A closer reading of the Lipsett case reveals that the First Circuit also recognized that an employer's liability for situations such as the one in Slater do not always result in a finding of employer liability. See Lipsett, 864 F.2d at 900.
court in Hastings concluded that the school's liability for the quid pro quo sexual harassment should be resolved through the application of agency principles.\textsuperscript{141} The district courts in Saville and Kadiki concluded that if the perpetrator of the quid pro quo harassment qualifies as a "supervisor" of the student victim, then the school is automatically liable for the harassment.\textsuperscript{142}

Under the holdings of the above courts, a school's liability for quid pro quo sexual harassment is determined through the application of agency principles.\textsuperscript{143} By applying the applicable law of agency to the student/teacher scenario, a school will be automatically liable for a teacher's quid pro quo sexual harassment of a student if the harassment occurs within the scope of the harasser's teaching duties.\textsuperscript{144} In addition, even if the quid pro quo harassment takes place outside the scope of the harasser's teaching duties, the school may still be liable if the harasser was aided by apparent authority.\textsuperscript{145} Therefore, according to the above cases, in a case of quid pro quo sexual harassment perpetrated by an employee, a school almost always will be liable for the harassment unless the school successfully argues that the employee was acting outside the scope of his authority and was not aided in the harassment by apparent authority.

In considering whether agency principles supply the appropriate standard for the determination of an educational institution's liability for quid pro quo sexual harassment, it is important to recognize that, because of the nature of a quid pro quo sexual harassment claim, the perpetrator of the harassment will most likely be in an agency relationship with the school. In other words, quid pro quo harassment involves a situation in which an educational benefit has been made conditional on the granting of a sexual favor.\textsuperscript{146} In order to be in a position to grant an educational benefit to a student, the perpetrator of the harassment must be someone to whom the educational institution has granted some authority, or at least some appearance of authority. Because of the idea that some kind of


\textsuperscript{143} These principles are summarized in the RESTATEMENT (SECOND) OF AGENCY (1958). One section of the Restatement pertains to the standards under which an employer may be held liable for the acts of her employees. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

\textsuperscript{144} See id. § 219(1).

\textsuperscript{145} See id. § 219(2)(d).

\textsuperscript{146} See supra note 31 and accompanying text.
agency relationship must exist for the quid pro quo harassment to be possible, it seems equitable to apply agency principles to the determination of whether an educational institution ought to be liable for the actions taken by the person to whom it entrusted authority.\footnote{147}

\section*{B. Hostile Environment}

A claim for hostile environment sexual harassment can develop in a number of contexts. For the purposes of this Comment, the hostile environment claims are categorized by the types of individuals involved in the claim.\footnote{148} The first category includes cases that consist of sexual harassment claims that have been brought under Title IX in the employment context (i.e., employee/employee).\footnote{149} The second category consists of student victims of hostile environments created because of the actions of an employee of the school.\footnote{150} Many of these cases involve situations in which teacher/student sexual abuse has occurred.\footnote{151} The final category consists of cases where peer sexual harassment allegedly has created a hostile educational environment.\footnote{152}

\footnotetext[147]{In addition, commentators have endorsed the application of agency principles to the determination of institutional liability in the educational context. See Roth, supra note 11, at 513; Stacy, supra note 18, at 1341.}

\footnotetext[148]{At least one court has noted that hostile environment claims should be categorized by the type of individuals involved in the harassment. See Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 951 (W.D. Tex. 1995), rev'd, 101 F.3d 393 (5th Cir. 1996).}

\footnotetext[149]{See infra notes 155-244 and accompanying text. These claims involve cases in which an employee of an educational institution alleges that a hostile environment has been created because of the actions of another employee at the school.}

\footnotetext[150]{See infra notes 245-535 and accompanying text.}

\footnotetext[151]{Because the abuser rarely conditions the sexual acts on an educational benefit, these situations do not amount to quid pro quo harassment. Instead, the claims are often treated as hostile environment sexual harassment claims. See, e.g., Does v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554, 568 (M.D. Ala. 1996) (finding that sexual abuse by a teacher is a form of sex discrimination under Title IX). But even in the cases where the facts would seem to satisfy the standard for quid pro quo sexual harassment, students may choose to bring a claim for hostile environment sexual harassment. See, e.g., Slaughter v. Waubonsie Community College, No. 94-2525C, 1996 WL 579296, at *3 (N.D. Ill. Nov. 18, 1994); see also Pinkney v. Robinson, 913 F. Supp. 25, 28 (D.D.C. 1996) (describing a university employee's claim of hostile environment sexual harassment when the facts seem to be sufficient for the maintenance of a claim of quid pro quo sexual harassment). But see Bolon v. Rolla Pub. Schs., 917 F. Supp. 1423, 1429 n.3 (E.D. Mo. 1996) ("Sexual intercourse between high school students and their teachers does not appear to fit at all into the "hostile environment" category. A teenaged student's susceptibility to coercion by an adult role model inherently contains the elements of 'quid pro quo' activity . . . .").}

\footnotetext[152]{See infra notes 536-725 and accompanying text.}
the courts have split with regard to the proper standard for institutional liability.\textsuperscript{153} Moreover, further complicating the issue, the courts have often split with regard to whether hostile environment sexual harassment is even a viable cause of action under Title IX.\textsuperscript{154} The different conclusions the courts have reached with respect to the viability of hostile environment claims will also be discussed.

1. Employer Perpetrator/Employee Victim

Few federal courts have addressed the problem of hostile environment sexual harassment in the educational context when both the perpetrator and the victim of the harassment are employees of the educational institution.\textsuperscript{155} All of the courts that have considered claims in this context have recognized, at least implicitly, the viability of the claim.\textsuperscript{156} A review of those decisions reveals three different standards for institutional liability.

a. Standards of Liability

\textit{(1) Negligence}

\textit{Lipsett v. University of Puerto Rico}\textsuperscript{157} is the only decision by a circuit court of appeals that has addressed the issue of institutional liability for hostile environment sexual harassment under Title IX in the employment context. Annabelle Lipsett was a resident at the medical school at the University of Puerto Rico when she was subjected to sexual harassment.\textsuperscript{158} The harassment constituted both

\begin{itemize}
\item \textsuperscript{153} See infra notes 225-44, 504-35, 706-25 and accompanying text.
\item \textsuperscript{154} See infra notes 505-08, 706 and accompanying text.
\item \textsuperscript{156} The issue in all of the cases discussed below is the appropriate standard of liability for a hostile environment sexual harassment claim brought under Title IX. None of the cases explicitly addresses the viability of such claims. However, the various courts' analysis of school liability under the cause of action stands as implicit recognition of the fact that such claims are actionable.
\item \textsuperscript{157} 864 F.2d 881 (1st Cir. 1988).
\item \textsuperscript{158} See id. at 887-88, 891. The plaintiff alleged the following specific incidents of harassment:
\begin{quote}
[T]he barrage of commentary by \ldots other residents\ldots that women in general, and the plaintiff in particular, should not be surgeons; the pointed threats made by [one resident] to other residents and to the plaintiff herself that he would drive her out of the Program; the repeated and unwelcome sexual advances made to the plaintiff by [senior residents]; the hostile behavior directed against the plaintiff by these men once it became clear to them that she would not accede to
\end{quote}
quid pro quo and hostile environment sexual harassment, but the court's discussion of the proper standard for institutional liability pertained primarily to Lipsett's claim of hostile environment sexual harassment.159

Before considering the merits of Lipsett's claims, the court stated that it would use the law developed under Title VII to analyze Lipsett's claims under Title IX.160 In justification of that application, the Lipsett court noted that the only guidance the United States Supreme Court had offered with respect to the interpretation of Title IX was that it should be given "'a sweep as broad as its language.'"161 The court also noted that other circuit courts had applied Title VII law to the interpretation of various issues under Title IX.162 Finally, the court reasoned that the application of the substantive law from Title VII to sexual harassment issues arising under Title IX was in conformity with the legislative history of Title IX.163 The court specified, however, that Title VII ought to apply to sexual harassment situations arising under Title IX only in the context of employment discrimination.164

After summarizing the relevant sexual harassment law under

their demands; the degrading pinups—including the Playboy centerfolds, the sexually explicit drawing of the plaintiff's body, and the list containing sexually charged nicknames of the female residents—plastered on the walls of the male residents' rest facility; and finally, the plaintiff's particular nickname, "Selastraga," which translated literally means, "she swallows them."

Id. at 903.

159. See id. at 899-901.

160. See id. at 896.

161. Id. (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).

162. See id. at 896-97 (citing Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987); O'Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986); Nagel v. Avon Bd. of Educ., 575 F. Supp. 105, 106 (D. Conn. 1983)).

163. See id. at 897. The court summarized the relevant portion of the legislative history:

One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964... Title VII, however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.


164. See id. The court reasoned that the "[p]laintiff here was both an employee and a student in the program .... We have no difficulty extending the Title VII standard to discriminatory employment by a supervisor in this mixed employment-training context."

Id.
Title VII, the court turned to the issue of institutional liability. In its analysis, the court relied primarily on the Supreme Court's decision in *Meritor Savings Bank v. Vinson*. According to the *Lipsett* court, the determination of institutional liability should not be made with strict adherence to agency principles. Instead, the *Lipsett* court emphasized that the harassing acts of employees do not always result in employer liability. The *Lipsett* court ultimately adopted the following standard of institutional liability for hostile environment sexual harassment under Title IX in the employment context:

[A]n educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it. ... [T]his standard also applies to situations in which the hostile environment harassment is perpetrated by the plaintiff's coworkers.

After applying the above standard to the facts at bar, the *Lipsett* court concluded that the plaintiff had sufficiently alleged a prima facie case of hostile environment sexual harassment. Additionally, according to the court, the facts were sufficient to support a finding that the defendant institution had actual or constructive notice of the harassment to survive the defendant's motion to dismiss.

The United States District Court for the District of Maryland adopted a standard similar to that of *Lipsett* in *Ward v. Johns Hopkins University*. Theresa Cusimano and Beth Ward were employees of Johns Hopkins University at the Center for Social Organization of Schools. Cusimano and Ward both claimed that

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165. See id. at 897-98.
166. See id. at 899-901.
168. See id. The *Lipsett* court emphasized the language in the *Meritor* opinion where the Court instructed that "Congress wanted courts to look to agency principles for guidance in this area." See id. at 900 (quoting *Meritor*, 477 U.S. at 72). According to the *Lipsett* court, the most important aspect of the *Meritor* decision was that it declined to adopt a standard under which the employer is always automatically liable for the harassment perpetrated by its employees. See id. at 900-01.
169. See id. at 901.
170. Id. (citations omitted).
171. See id. at 905-07, 914-15.
173. See id. at 369.
Mark Christian, another employee of Johns Hopkins University, sexually harassed them. Neither Ward nor Cusimano had received a copy of the university's sexual harassment policy and no supervisor in their office had ever received training in sexual harassment.

Both Cusimano and Ward brought claims for hostile environment sexual harassment under Title IX.

As a preliminary matter, the Ward court summarized the applicable Fourth Circuit law pertaining to hostile environment sexual harassment under Title VII. Next, the court considered whether the Title VII standard ought to apply to hostile environment sexual harassment claims brought under Title IX. Addressing the defendant's argument that Title VII standards should not apply to the Title IX issue at bar, the court noted the persuasive support for

174. See id. at 370. Cusimano, a college graduate who was employed full-time by the university, alleged that "every time she encountered him, Christian touched her in some way." Id. In addition, Christian visited Cusimano at her apartment where he revealed to her that he had a gun. See id. Cusimano alleged that she told one of her supervisors that she was uncomfortable with Christian because he behaved toward her in what she perceived to be a sexually inappropriate manner. See id. She did not, however, inform any supervisors of Christian's visit to her apartment. See id.

Ward, who was a college student employed temporarily in the office for the summer, claimed that Christian sexually harassed her during her first three weeks of employment. See id. at 371. The conduct Ward complained of included Christian's leering at her, commenting to other male students about her, and repeatedly asking her to go on dates. See id. Ward also complained that Christian kissed her twice. See id. Ward complained to her mother, Barbara McHugh, who also worked in the office. See id. McHugh subsequently spoke with the Associate Director of CSOS about Christian's inappropriate behavior. See id. The director discussed the allegations with Christian, who inquired whether it was Ward or Cusimano who had made the complaints. See id.

175. See id. at 372.

176. See id. at 369. Ward also alleged that the sexual harassment she suffered violated Title VII. See id.

177. See id. at 372-74. Specifically, the court considered whether the Fourth Circuit standard regarding the analysis of a hostile environment sexual harassment claim was consistent with the standard adopted by the United States Supreme Court in Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). See Ward, 861 F. Supp. at 373-74. For a description of the Harris standard, see supra notes 35-38 and accompanying text. The Ward court ultimately concluded that the standard in the Fourth Circuit was consistent with that adopted by the Supreme Court. See Ward, 861 F. Supp. at 373-74 (citing Paroline v. Unisys Corp., 879 F.2d 100, 104-05 (4th Cir. 1989)).

178. See Ward, 861 F. Supp. at 374-75.

179. See id. at 374. The court dismissed the defendant's reliance on Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa.), aff'd on other grounds, 882 F.2d 74 (3d Cir. 1989). See Ward, 864 F. Supp. at 374. The Ward court pointed out that while the district court in Bougher had held that Title VII standards should not apply to Title IX sexual harassment actions, the Third Circuit declined to adopt that portion of the lower court's holding. See Ward, 861 F. Supp. at 374. In addition, the Ward court noted that the Bougher decision could be distinguished from the case at bar because Bougher had
the proposition that Title VII substantive law ought to apply to
sexual harassment claims under Title IX. The court also pointed
out that the legislative history of Title IX supported the application
of the substantive law from Title VII and concluded that "[i]n light
of the cases discussed, the legislative history and the Supreme
Court's directive to give Title IX 'a sweep as broad as its language,'
the Court determines that Plaintiffs' Title IX claims are
appropriately analyzed under the standards applicable to cases
brought under Title VII." After analyzing the plaintiffs' prima
facie cases under the relevant standard, the court found that both
Cusimano and Ward satisfied the standard and thus could survive
the defendant's motion for summary judgment.

The Ward court then turned to a discussion of the proper
standard for institutional liability. The court pointed out that in
order to find an employer liable under Title VII for the harassing
actions of one of its employees, the plaintiff must show that the
employer had actual or constructive knowledge of the hostile
environment and failed to take prompt and adequate action in
response to the situation. The Ward court reasoned that in order
to satisfy the standard for institutional liability in the educational
context, the plaintiff must first show that the university knew or
should have known of the harassment. The court ultimately

involved a student victim of sexual harassment, while Ward involved employee victims. See id.

180. See Ward, 861 F. Supp. at 374 (discussing Lipsett v. University of Puerto Rico, 864 F.2d 881, 899-901 (1st Cir. 1988), and Mabry v. State Board of Education, 813 F.2d 311, 316 (10th Cir. 1987)).

181. See Ward, 861 F. Supp. at 375. The Court quoted the same relevant legislative
history cited by the Lipsett court. See supra note 163.


183. See id. at 375-77. In describing the standard to be applied to the plaintiffs' claims,
the Ward court summarized the controlling standard from Paroline v. Unisys Corp., 879 F.2d 100, 104-05 (4th Cir. 1989). See Ward, 861 F. Supp. at 375-77. In order to succeed on
a hostile environment claim, a plaintiff in the Fourth Circuit must establish the following
elements: "(1) that the conduct in question was unwelcome, (2) that the harassment was
based on sex, (3) that the harassment was sufficiently pervasive or severe to create an
abusive working environment, and (4) that some basis exists for imputing liability to the
employer." Id. at 375 (quoting Paroline, 879 F.2d at 104-05).


185. See id. at 376 (citing Paroline, 879 F.2d at 106).

186. See id. The Ward court acknowledged that there was precedent in the Title IX
context for the idea that a university may be deemed to have constructive knowledge of
the harassment if any university official knew of the harassment, unless the official could
show that he or she took steps appropriate to halt the behavior. See id. (quoting Lipsett v.
University of Puerto Rico, 864 F.2d 881, 898-901 (1st Cir. 1988)).
concluded that the university's actual or constructive knowledge of the harassment and whether the university took appropriate action in response to the complaints were genuinely disputed facts in the case. 187

(2) Direct Knowledge of or Participation in Hostile Environment

In Howard v. Board of Education of Sycamore Community School District No. 427, 188 the District Court for the Northern District of Illinois adopted a different standard for institutional liability than that adopted by the Lipsett and Ward courts. Karol K. Howard was chair of the music department and band director for Sycamore High School. 189 While employed by the school, Howard was the victim of sexual harassment. 190 Howard complained of the harassing behavior to officials at the school, but in spite of her complaints, the harassing behavior was never addressed by the school. 191 Instead, the board of education eventually forced Howard to resign from her position. 192 As a result of the school’s inaction, Howard filed a complaint against the school board for several violations of Title IX. 193

The Howard court never explicitly identified Howard's claim as one alleging a hostile environment. However, because the complaint did not allege that any condition of her employment was contingent on her granting sexual favors, it seems as though her claim was one of hostile environment sexual harassment. The bulk of the court's opinion with respect to the Title IX sexual harassment claim concerned the proper standard for determining whether the institution should be liable for the harassment suffered by Howard. 194 According to the court, the determination of institutional liability

187. See id. at 377.
188. 876 F. Supp. 959 (N.D. Ill. 1995).
189. See id. at 964.
190. See id. Sexually offensive notes referring to Howard were posted. See id. In addition, Howard witnessed sexually offensive comments about female students made by a male teacher as well as by male students. See id.
191. Both Jeffrey Welcker, the principal of the high school, and Julie Wheeler, the executive director of business at the high school, were informed of the harassing behavior. See id. Neither official made any effort to correct the hostile environment once they were informed of the complaints. See id. In fact, Welcker told Howard that if she did not stop complaining about the harassing behavior, "heads would roll." Id.
192. See id.
193. See id. Howard's complaint also included several allegations of violations of Title VII. See id. at 964-65. Howard's allegations under Title IX were against the Board. See id. at 965. Her claims included sex discrimination, sexual harassment, and retaliatory discharge. See id. This Comment discusses only the sexual harassment claim.
194. See id. at 973-75.
consisted of one issue: "whether plaintiff need allege under Title IX that the Board knew of, or participated in, the alleged acts of sexual harassment beyond merely alleging that Welcker, the high school principal, was involved in and knew of the discriminatory conduct."

The *Howard* court began its analysis by rejecting the proposition that agency principles, typically applied in sexual harassment situations under Title VII, should apply to the determination of institutional liability in Title IX cases. In reaching this decision, the court relied primarily on *Floyd v. Waiters,* another district court case. At the same time, the court dismissed as unpersuasive the holdings of one court of appeals and several other district courts. The *Howard* court's reasoning for why Title VII standards for institutional liability should not be imported to consideration of the same issue under Title IX echoed the reasoning of the *Floyd* court. According to the *Howard* court, Congress explicitly defined "employer" in Title VII as including any "agent" of an employer. That language, the *Howard* court noted, is conspicuously absent from Title IX. This court will not read into Title IX language expressly included in Title VII, but left out of Title IX. When Congress enacted Title IX, it expressly revoked the former exclusion in Title VII that prohibited Title VII claims from being brought against an educational institution. Had Congress desired to expressly incorporate the agency language of Title VII into Title IX, it very easily could have done so then or since.

195. *Id.* at 974. The school board argued that in order to succeed, Howard must show that the board harbored some intent to discriminate. *See id.* at 966. In addition, the board argued that in order to satisfy that standard, Howard had to show that the board had actual knowledge of the harassing conduct of its employees. *See id.* Finally, the school board argued that they could not be vicariously liable for the actions of their employees unless Howard could show that the school board knew of the actions. *See id.*

196. *See id.* at 974.

197. 831 F. Supp. 867 (M.D. Ga. 1993). For a discussion regarding why the *Howard* court's reliance on the *Floyd* decision is misplaced, see *infra* note 387 (describing how *Floyd* can be fundamentally distinguished from the facts of *Howard*).


200. *See id.*


202. *Id.*
Thus, the Howard court concluded that agency principles do not apply to the determination of institutional liability in hostile environment sexual harassment claims in the educational context.\textsuperscript{203} Instead, according to the court, in order to hold an educational institution liable for sexual harassment, a plaintiff must show that the school had direct knowledge of or participated in the conduct of the harassing employee.\textsuperscript{204} As a result of its holding with respect to institutional liability, the court dismissed Howard's Title IX claim against the school board but gave her leave to amend the complaint to fulfill the adopted standard.\textsuperscript{205} Finally, the court cautioned Howard that Welcker's position as principal was not enough to satisfy the pleading requirement of showing that the school board had knowledge of or was directly involved in the harassing behavior.\textsuperscript{206}

(3) Lack of Actual or Constructive Knowledge and an Effective Complaint Procedure in Place

A third standard for institutional liability was adopted by the Federal District Court for the District of Columbia in Pinkney v. Robinson.\textsuperscript{207} Ivy J. Pinkney was William J. Robinson's confidential executive secretary from September 8, 1989, through November 26, 1991.\textsuperscript{208} Robinson was Dean of the District of Columbia School of Law.\textsuperscript{209} During that time, Robinson sexually harassed Pinkney.\textsuperscript{210} The reason for Pinkney's termination on August 27, 1991, was in dispute, and Pinkney subsequently filed a complaint with the EEOC alleging that Robinson's actions violated Title VII.\textsuperscript{211} After receiving a right-to-sue letter from the EEOC, Pinkney filed a complaint in

\textsuperscript{203} See id.
\textsuperscript{205} See Howard, 876 F. Supp. at 974 ("Thus, this court finds that absent allegations that the Board knew of, or was directly involved in, any of the alleged discriminatory conduct . . .[,] plaintiff cannot maintain a claim against the Board under Title IX.").
\textsuperscript{206} See id. at 974-75 n.10.
\textsuperscript{208} See id. at 27.
\textsuperscript{209} See id.
\textsuperscript{210} See id. According to Pinkney, Robinson "engaged in a repeated and consistent pattern of sexual harassment [that] included explicit remarks and innuendo, fondling his sexual organs in Ms. Pinkney's presence, offensive and unwanted touching, and other harassing and degrading acts." Id. (citations omitted).
\textsuperscript{211} See id. Pinkney alleged that she was fired for refusing to submit to Robinson's advances. See id. According to Robinson, Pinkney was fired because of her poor performance. See id.
district court which included an allegation that the sexual harassment violated Title IX.\(^{212}\)

The court began by noting that the central argument raised by the defendant on the motion for summary judgment was that Pinkney had failed to allege facts sufficient to support a finding of institutional liability.\(^ {213}\) The defendants argued that in order for institutional liability to exist, a plaintiff must show that the school had actual or constructive knowledge of the harassment.\(^{214}\) The defendants pointed out that Pinkney did not dispute the fact that she did not notify anyone at the school of Robinson's misconduct until well after her departure.\(^ {215}\) Pinkney, in response, argued that giving notice to the educational institution was not necessary for a Title IX action for sexual harassment,\(^ {216}\) and that the defendants should be liable based on agency principles.\(^ {217}\)

The Pinkney court began its analysis of the proper standard for institutional liability under Title IX by considering whether the substantive law from Title VII ought to apply by analogy.\(^ {218}\) The court observed that the Supreme Court had never explicitly

\(^{212}\) See id. at 28. For the purposes of this Comment, only the Title IX claim will be discussed. Because of Pinkney's allegation that she was terminated because of her refusal to submit to Robinson's sexual advances, it would seem as though she had a viable claim of quid pro quo harassment. See id. at 27. The court's opinion, however, contained only a discussion of Pinkney's claim for hostile environment sexual harassment. See id. at 31-34.

\(^{213}\) See id. at 31.

\(^{214}\) See id.

\(^{215}\) See id.

\(^{216}\) See id. Pinkney relied on the Supreme Court's decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), pointing out that the Supreme Court had rejected the premise that an employer can escape liability by using its lack of notice of the harassment. See Pinkney, 913 F. Supp. at 31 (citing Meritor, 477 U.S. at 72). In addition, Pinkney pointed to Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), in which the First Circuit had held that

"an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known of the harassment's occurrence, unless that official can show that he or she took appropriate steps to stop it."

Pinkney, 913 F. Supp. at 31-32 (quoting Lipsett, 864 F.2d at 901).

\(^{217}\) See Pinkney, 913 F. Supp. at 32.

\(^{218}\) See id. The court cited a number of cases that supported the contention that Title VII substantive law should apply to the situation at bar. See id. (citing Murray v. New York College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995); Preston v. Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203, 206 (4th Cir. 1994); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993); Lipsett, 864 F.2d at 896-98; Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 (10th Cir. 1987); O'Conner v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986)).
addressed the issue\textsuperscript{219} and concluded:

Even though the Supreme Court has not expressly reached the question whether the remedies under Title IX are equivalent to those of Title VII, both the legislative history underlying Title IX and the EEOC's employment discrimination guidelines lead this Court to conclude that, at least in the employment context, the same rules should apply to determine liability.\textsuperscript{220}

The \textit{Pinkney} court ultimately adopted the following standard for determining institutional liability:

\begin{quote}
[F]or an employer to avoid liability for its supervisor's sexual harassment creating a hostile work environment, an employer must not only show that it lacked actual or constructive knowledge of the harassment, but the employer must demonstrate that it has an effective and responsive system ("energetic measures") in place at the time of the alleged harassment and that this system was one of which the victim knew or should have known and which he or she could have relied upon for a prompt and effective remedy.\textsuperscript{221}
\end{quote}

After applying the standard to the case at bar, the court concluded that deciding the issue on a motion for summary judgment was inappropriate.\textsuperscript{222} According to the court, the defendants' evidence failed to establish several facts necessary to escape institutional liability, including that they had taken energetic measures to discourage the sexual harassment, that there was a system in place that \textit{Pinkney} could have utilized to redress the behavior she experienced, or that \textit{Pinkney} knew or should have known of such a system.\textsuperscript{223} Consequently, the court denied the defendants' motion for summary judgment.\textsuperscript{224}

\begin{footnotes}
\item[219] \textit{See id.}
\item[220] \textit{Id.} According to the court, the legislative history of Title IX supported the idea that it was meant to be Title VII's analogue for discrimination in education. \textit{See id.} at 32 (citing H.R. REP. No. 92-554, at 51-52 (1972), \textit{reprinted in 1972 U.S.C.C.A.N.} 2462, 2512). In addition, the court noted that both the Supreme Court and the Department of Justice have emphasized that Title VII case law and EEOC guidelines are to be given great weight in construing the law of Title IX. \textit{See id.} (citing \textit{Meritor Sav. Bank v. Vinson}, 477 U.S. 57, 66-72 (1986); 28 C.F.R. § 42.604 (1995)).
\item[221] \textit{Id.} at 34.
\item[222] \textit{See id.}
\item[223] \textit{See id.}
\item[224] \textit{See id.}
\end{footnotes}
b. Trends in Employee Perpetrator/Employee Victim Case Law

Little consistency exists among the courts that have addressed the appropriate standard for institutional liability for hostile environment sexual harassment under Title IX in the employment context. Three different standards of institutional liability arose from the single circuit court of appeals and the three district court decisions. Arguably, the most difficult standard for a plaintiff to meet was adopted by the district court in Howard v. Board of Education of Sycamore Community School District No. 427. According to the Howard court, in order for a plaintiff to prove that the school should be liable for hostile environment sexual harassment, the plaintiff must show that the school had actual knowledge of the harassment or directly participated in it. The most disturbing implication from the Howard court's standard of liability stemmed from the court's apparent dismissal of the relevance of the fact that school officials had been informed by the plaintiff of the harassment. The practical implication from the Howard decision is that a school may effectively ignore the hostile environment sexual harassment suffered by its employees and escape liability. According to the standard applied by the Howard court, even if the school has actual knowledge of the harassment, it will escape liability so long as it refrains from "participating" in the harassment.

On the other hand, the standard for institutional liability adopted by the court in Pinkney v. Robinson is arguably the easiest for a plaintiff to satisfy. It seems that under the Pinkney standard, once a plaintiff successfully alleges that the actions of her supervisor have created a prima facie case of hostile environment sexual harassment under Title IX, the burden shifts to the school to demonstrate why there should not be institutional liability. However, the Pinkney court did assert that the issue of institutional liability under Title IX should be resolved through application of agency principles. Therefore, the holding of Pinkney is

226. See id. at 974.
227. See id. at 964.
229. See id. at 34. The court seemed to assert that if a school is to escape institutional liability, it must show that it lacked both actual and constructive knowledge of the harassment and that it had an effective system for addressing sexual harassment in place. See id.
230. See id. at 33-35.
presumably limited to hostile environment sexual harassment perpetrated by a supervisor and experienced by an employee. The specific standard for institutional liability for a hostile environment created by a co-employee may differ. Finally, the standard for institutional liability adopted by the First Circuit in Lipsett v. University of Puerto Rico and by the district court in Ward v. Johns Hopkins University seems to take a middle ground between the standards adopted by the Pinkney and Howard courts. According to Lipsett and Ward courts, an educational institution will be liable for hostile environment sexual harassment under Title IX if a plaintiff can show that the school had actual or constructive notice of the harassment and the school failed to take appropriate action to remedy the harassment. Upon close examination, the standards adopted by the courts appear to differ slightly. According to the Lipsett court, once a plaintiff establishes the existence of the hostile environment and the school's actual or constructive knowledge of the harassment, the burden shifts to the school to show that appropriate steps were taken to remedy the harassment. In comparison, under the Ward standard, the plaintiff must demonstrate the existence of the hostile environment, the school's actual or constructive knowledge of the harassment, and that the school failed to take appropriate steps to remedy the environment. Therefore, a plaintiff under the Ward standard faces a slightly higher burden.

231. See id. at 33-34. The court emphasized that agency principles should not be strictly applied to every situation involving sexual harassment, and noted that under the relevant law for the District of Columbia Circuit, "where a supervisor wields his or her power as a supervisor, power which arises from the existence of the agency relation, employer liability is appropriate even if the employer lacked actual or constructive knowledge of the harassment." Id. at 34 (discussing Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995), and RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)).

232. It would arguably be more difficult to contend that a co-employee's harassing actions should result in institutional liability through the application of agency principles. It is unlikely that an employee is acting within the scope of employment when committing the harassing acts. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958). Additionally, it may be difficult to argue that a co-employee was aided in the harassment by apparent authority. See id. § 219(2)(d).

233. 864 F.2d 881 (1st Cir. 1988).


235. See Lipsett, 864 F.2d at 901; Ward, 861 F. Supp. at 376.

236. See Lipsett, 864 F.2d at 901 ("[A]n educational institution is liable ... if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it." (emphasis added)).

One possible explanation for the lack of clarity in sexual harassment law under Title IX may be directly related to the confusion in the analogous area under Title VII. This section of this Comment has pertained to standards of institutional liability adopted by courts considering hostile environment sexual harassment in education when the claims have occurred in the employment context. The majority of the courts considering Title IX claims turned to the analogous standards under Title VII for guidance. The application of the law of Title VII to sexual harassment claims brought by employees in the Title IX context is appropriate because failing to apply the Title VII standards would essentially treat plaintiff employees differently simply because they work in an educational environment. The legislative history of Title IX supports the idea that it was meant to give those in education the same protection as provided by Title VII to those in employment outside the educational context. Therefore, especially in the educational employment context, the substantive law from Title VII should be applied to sexual harassment claims brought by employees under Title IX.

However, the decision to apply the substantive law of Title VII to hostile environment sexual harassment claims brought under Title IX does not offer a definitive answer to the appropriate standard for institutional liability. The United States Supreme Court refused to adopt a particular standard of employer liability in Meritor Savings Bank v. Vinson. The Court's refusal to guide this area of the law has resulted in a great deal of commentary in the legal community.

238. See supra notes 155-224 and accompanying text.


240. See supra notes 163, 181, 220.


242. See generally David Benjamin Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors, 81 CORNELL L. REV. 66 (1995) (exploring the problems that arise when agency law is applied to hostile environment sexual harassment situations and the development of the law of employer liability under Title VII); Ronald Turner, Title VII and Hostile Environment Sexual Harassment: Mislabling the Standard of Employer Liability, 71 U. DET. MERCY L. REV. 817 (1994) (discussing the confusion regarding the issue of employer liability under Title VII and clarifying the appropriate standard to be applied in hostile environment cases); Laura E. Fitz Randolph, Note, Title VII—Employer Liability for Sexual Harassment, 64 GEO. WASH. L. REV. 1168 (1996) (discussing the standard of employer
Because of the lack of a definitive standard in this area of Title VII jurisprudence, and subsequent cloudiness in the development of Title IX law, a school district interested in ascertaining its potential liability for hostile environment sexual harassment suffered by and perpetrated by school employees should turn to the relevant Title VII law in its Circuit.\textsuperscript{243} As this summary of cases has demonstrated,\textsuperscript{244} it is likely that some form of agency law will be applied to the determination of institutional liability.

2. Employee Perpetrator/Student Victim

This Comment considers more sexual harassment cases in this context than in the other categories. Many of the cases involve either sexual relationships between teachers and students at the secondary level\textsuperscript{245} or teacher/student sexual abuse at the elementary level.\textsuperscript{246} This section discusses these cases in the following manner: first, the cases that have explicitly addressed the viability of hostile environment sexual harassment claims are discussed;\textsuperscript{247} then cases addressing the appropriate standard for imputing liability for the employee's actions to the school are analyzed, according to the standard adopted.\textsuperscript{248}

a. Viability of the Claim

The United States District Court for the Northern District of California was the first federal court to address substantively the viability of a hostile environment claim under Title IX in the teacher/student context in Patricia H. v. Berkeley Unified School
District. Patricia H., the mother of Jackie H. and Rebecca H., was involved in a romantic relationship with Charles Hamilton, who was employed by her children's school district as a band teacher. During a trip taken by Patricia H. and Hamilton, Jackie H., age twelve, was allegedly sexually molested by Hamilton. Jackie H.'s allegations were reported to the police and the superintendent of the school district. Rebecca H., age ten, also alleged that she had been sexually molested by Hamilton. Patricia H. alleged that Hamilton's presence at the same school as her daughters created a hostile educational environment. The primary issue considered by the court was whether a cause of action for hostile environment sexual harassment could be maintained under Title IX.

Because the issue before the court presented a novel question, the court reasoned that other civil rights laws provided the most appropriate precedent for guidance and concluded that Title VII principles should apply to the Title IX sexual harassment issue at bar. The court recognized, however, that other courts applying Title VII law to sexual harassment under Title IX had split in regard to the determination of whether a hostile environment sexual harassment claim was viable under Title IX, as the court adopted a standard for institutional liability. See id. at 1297. The case, however, is included in this section of this Comment regarding the viability of hostile environment sexual harassment claims because of the detail with which the Patricia H. court treated the issue. If the decision had been included in the section of this Comment concerning the categories of liability described in the remaining subsections, it would have been included in the "negligence" section. See infra notes 362-433 and accompanying text.

249. 830 F. Supp. 1288 (N.D. Cal. 1993). The analysis of the court in Patricia H. actually went further than the determination of whether a hostile environment sexual harassment claim was viable under Title IX, as the court adopted a standard for institutional liability. See id. at 1297. The case, however, is included in this section of this Comment regarding the viability of hostile environment sexual harassment claims because of the detail with which the Patricia H. court treated the issue. If the decision had been included in the section of this Comment concerning the categories of liability described in the remaining subsections, it would have been included in the "negligence" section. See infra notes 362-433 and accompanying text.

250. See Patricia H., 830 F. Supp. at 1293.

251. See id. at 1294. The court stated that Jackie H. told her mother that "while at Lake Tahoe, Hamilton forced her to handle his genitals and made lewd and lascivious remarks to her, and that in the second week of January 1988, when the family was back in Berkeley, Hamilton climbed into bed with her while naked and rubbed against her." Id.

252. See id.

253. See id. at 1295.

254. See id. at 1296.

255. See id. at 1289.

256. See id. at 1289-93. The court noted that the law developed under Title VI had been considered persuasive authority by at least one court because Title IX was patterned after Title VI. See id. at 1290 (citing Cannon v. University of Chicago, 441 U.S. 677, 694 (1979)). The Patricia H. court noted, however, that because most case law regarding sex discrimination has been developed under Title VII, most federal courts have concluded that Title VII is the more appropriate law to use in construing sex discrimination claims under Title IX. See id. (citing Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 (10th Cir. 1987); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1366-67 n.2 (E.D. Pa. 1985), aff'd mem., 800 F.2d 1136 (3d Cir. 1986)).

257. See id. at 1292.
to the role and extent of the applicability of the Title VII law. In fact, one specific area of division had been whether a hostile environment sexual harassment claim could be maintained under Title IX.

In deciding the viability issue, the Patricia H. court ultimately was persuaded by the Supreme Court's decision in Franklin v. Gwinnett County Public Schools. The court noted that in Franklin, neither the court of appeals nor the Supreme Court had identified the claim at issue as either quid pro quo or hostile environment sexual harassment; however, the Supreme Court had acknowledged that a student should have at least the same protection in education as an employee has in his or her place of employment. Thus, the court concluded that one could infer from the Franklin decision that Title IX does permit a claim of hostile environment sexual harassment and adopted that conclusion as its holding.

The Patricia H. court analyzed the hostile environment claim through the application of the relevant Title VII law from its jurisdiction. The court also recognized that "the age of the victim(s), the frequency, duration, repetition, location, severity, and scope of the acts of harassment; [and] the nature of context of the incidents" should be considered in evaluating whether a hostile

258. See id. at 1290-93.
259. See id. at 1291. The court noted that the First Circuit had recognized that a hostile environment claim was a viable cause of action under Title IX. See id. (citing Lipssett, 864 F.2d at 898-901). The court also pointed out that the only court which had held that a hostile environment claim could not be maintained under Title IX was the district court in Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989), aff'd on other grounds, 882 F.2d 74 (3d Cir. 1989). The Third Circuit, however, in reviewing the decision, decided the case on a statute of limitations issue and refused to adopt the holding of the lower court with respect to the hostile environment claim. See Patricia H., 830 F. Supp. at 1291 (citing Bougher v. University of Pittsburgh, 882 F.2d 74, 77 (3d Cir. 1989)).
261. See id. at 1292.
262. See id.
263. See id. at 1293. The court noted that because Franklin did not involve a situation in which an educational benefit was made conditional on the granting of sexual favors, the facts in Franklin created a hostile environment claim. See id. at 1292.
264. See id. at 1296-97 (citing Ellison v. Brady, 924 F.2d 872, 878-81 (9th Cir. 1991)). In Ellison, the Ninth Circuit recognized that the mere presence of an employee who had engaged in harassing conduct might create an actionable hostile work environment. See Ellison, 924 F.2d at 883. The Ellison case was also the first federal case to hold that the severity of the harassing conduct should be considered from the perspective of a reasonable victim—in that case, a reasonable woman. See id. at 880.
Adopting a "reasonable victim" standard for the purpose of determining whether a hostile environment existed, the court held that it was unable to determine, as a matter of law, whether such an environment existed in the present case.

Finally, the Patricia H. court did, very briefly, address the standard for institutional liability for the hostile environment. The court stated that the school district could be found liable if it "failed

265. Patricia H., 830 F. Supp. at 1296.

266. See id. ("Like the Ninth Circuit and the [Office of Civil Rights], this Court adopts the perspective of a 'reasonable victim' to determine whether, as a matter of law, plaintiffs have stated a claim under Title IX."). In Ellison, the Ninth Circuit supported its decision to adopt the reasonable victim standard by reasoning: "If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy." Ellison, 924 F.2d at 878. In addition, the Ellison court pointed out that a sex-blind "reasonable person" standard tended to be male-biased and ignored the experience of women. See id. at 879. A number of other circuit courts have followed the Ninth Circuit in adopting a reasonable victim standard for hostile environment sexual harassment causes of action. See, e.g., King v. Frazier, 77 F.3d 1361, 1363 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 62 (1996); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); Burns v. McGregor Elec. Indus., 989 F.2d 959, 964 (8th Cir. 1993); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482-83 (3d Cir. 1990). The adoption of the "reasonable woman" standard for the consideration of hostile environment claims has been controversial and has fostered a great deal of debate in the legal community. See generally Edward Cerasia, II, Harris v. Forklift Systems, Inc.: An Objective Standard, but Whose Perspective?, 10 LAB. L. REV. 253, 262-64 (1994) (discussing the Harris Court's use of the reasonable person standard and questioning whether lower courts will interpret it as rejecting or accepting a reasonable woman standard); Gillian K. Hadfield, Rational Women: A Test for Sex-Based Harassment, 83 CAL. L. REV. 1151, 1175-89 (1995) (presenting a "rational woman test" that relies upon an economic analysis of what factors distort women's employment choices unequally); Sharon J. Bittner, Note, The Reasonable Woman Standard After Harris v. Forklift Systems, Inc.: The Debate Rages On, 16 WOMEN'S RTS. L. REP. 127, 135-37 (1994) (arguing that the reasonable woman standard should not be adopted); Deborah B. Goldberg, Note, The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases, 2 CARDozo WOMEN'S L.J. 195, 200-13 (1995) (discussing the reasonable woman standard, its future, and its merits); Kathryn R. McKinley, Comment, Changing Our Perspective: Should Washington Adopt the Reasonable Victim Standard of Viewing Hostile Environment Claims?, 30 GONZ. L. REV. 315, 331-41 (1994-95) (discussing the reasonable victim standard and advocating its adoption in Washington).

267. See Patricia H., 803 F. Supp. at 1297. ("The question, whether a reasonable female student of Jackie H.'s age, having experienced the harassment she alleges, would find Hamilton's mere presence at BHS created a hostile environment, is one for the jury."). The court added that summary judgment was not sought with respect to Rebecca H.'s claim and therefore was not addressed by the court. See id. at 1297 n.15.

268. See id. at 1297. The court noted that "[l]iability of the BUSD defendants is conditioned on both a finding of hostile environment and their knowing failure to act." Id. (emphasis added).
to take reasonable steps to aid Jackie H. and Rebecca H.," but did not specify whether liability for the school's failure to act was conditional on the school's constructive or actual knowledge of the harassment. The court noted that under the relevant law from Title VII, an employer could be liable for a hostile environment "if it fails to take 'immediate and appropriate' action 'reasonably calculated' to remedy the harm complained of." The Patricia H. court held that the question of institutional liability—i.e., whether the school had reacted appropriately to Patricia H.'s complaints—should be resolved by a jury.

The United States District Court for the Northern District of Illinois was the next court to consider the viability of a hostile environment sexual harassment claim in Bustos v. Illinois Institute of Cosmetology. Joann Bustos, Kimberly Listowski, and Claudia Whelen were students at the Illinois Institute of Cosmetology when Charles Cross, the president and principal owner, allegedly subjected them to a hostile educational environment. The court held that Title VII principles should be used to analyze the plaintiff's hostile environment claim under Title IX. Applying the Title VII standard from Harris v. Forklift Systems, Inc., the court concluded that there were questions of material fact with regard to whether a hostile environment had been created by Cross's conduct. Although the court recognized the viability of a hostile environment claim under Title IX, it did not reach the issue of institutional liability.

A year later, the United States District Court for the Eastern District of Pennsylvania implicitly recognized the viability of hostile environment sexual harassment under Title IX when it allowed the
plaintiff to amend his complaint to include a claim against the school under Title IX for the sexual abuse he suffered at the hands of his teacher in *Doe v. Methacton School District*. The court cited *Franklin v. Gwinnett County Public Schools* in support of the proposition that the plaintiff must prove discriminatory intent in order to obtain damages under Title IX. In addition, the court reasoned that "the Supreme Court appears to impose liability on the school district under agency principles for intentional sex discrimination by its agent, the teacher, who was not even a party to the action." In allowing the amended complaint, the court stated that the facts at bar supported a viable cause of action against the school district.

The First Circuit was the first court of appeals to endorse the viability of a hostile environment sexual harassment claim in the Title IX context for a hostile environment created by an employee of the school in *Brown v. Hot, Sexy & Safer Productions, Inc.* In *Brown*, two fifteen-year-old students, Jason P. Metsiti and Shannon Silva, filed suit under Title IX alleging that a hostile environment had been created through the school’s sponsorship of an assembly consisting of an AIDS awareness program. Jason and Shannon alleged that the assembly contained sexually explicit monologues and involved minors in sexually explicit skits. The plaintiffs also alleged that in the weeks following the assembly, many students

282. Id. at *1.
283. See id.
285. See id. at 529.
286. See id. The complaint specified that the woman running the assembly:

1) told the students that they were going to have a “group sexual experience, with audience participation”; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as “erection wear”; 6) referred to being in “deep sh—” after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor’s entire head and blow it up; 8) encouraged a male minor to display his “orgasm face” with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a “nice butt”; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.

*Id.*
mimicked some of the assembly's sexually explicit routines, which exacerbated the harassment suffered by the plaintiffs. 287 Jason and Shannon alleged that the school-sponsored assembly created a sexually hostile educational environment for which the school district should be liable. 288

The Brown court began its analysis by stating, without offering its reasoning, that the substantive law from Title VII should apply to the analysis of the plaintiffs' sexual harassment claims under Title IX. 289 The court summarized the elements required to establish a prima facie case of hostile environment sexual harassment and recognized that the standard set out by the Supreme Court in Harris v. Forklift Systems, Inc. should apply to the facts of the case at bar. 290 After applying that standard, the court concluded that the facts alleged were weak with respect to every one of the Harris factors. 291 As a result of its findings, the court held that the plaintiffs' claims for violations of Title IX should fail and affirmed the district court's motion to dismiss. 292 Because the Brown court held that the plaintiffs failed to establish the existence of a hostile environment, it never reached the issue of the appropriate standard for institutional

287. See id.
288. See id. at 539-40.
289. See id. at 540 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 73-75 (1992); Lipsett v. University of Puerto Rico, 864 F.2d 881, 899 (1st Cir. 1988)).
290. According to the Brown court, the establishment of a hostile environment sexual harassment claim under Title IX required that the plaintiff show:

(i) that he/she is a member of a protected class; (ii) that he/she was subject to unwelcome sexual harassment; (iii) that the harassment was based on sex; (iv) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's education and create an abusive educational environment; and (v) that some basis for employer liability has been established.

Id.
291. See id. Specifically, the court summarized the factors to be considered in measuring whether an environment is "hostile," discussed the level of harm that must be suffered by the plaintiff, and stated that the factors must be viewed both objectively and subjectively. See id. For a description of these aspects of the Harris standard, see supra notes 35-38 and accompanying text.
292. See Brown, 68 F.3d at 540. First, the court noted that the offensive behavior occurred only once. See id. at 540-41. The court stated that a one-time episode was not necessarily per se insufficient in sustaining a hostile environment claim, but the frequency of the behavior was one factor affecting the determination of whether the offensive action was severe or pervasive. See id. at 541 n.3. Second, the court determined that the actions which took place during the assembly were not objectively severe enough to create a hostile environment. See id. at 541. Third, the court pointed out that the actions during the assembly were not threatening or humiliating. See id. Finally, the court concluded that the assembly did not sufficiently alter the plaintiffs' educational environment. See id.
293. See id. at 529, 541.
liability.

In *S.B.L. v. Evans,* the United States Court of Appeals for the Eighth Circuit considered the appropriate standard of institutional liability for the sexual abuse a student suffered at the hands of a teacher. While James Evans was a teacher of a combined fifth and sixth-grade class, he was convicted of sexually assaulting S.B.L. and B.D.C., two students in his class. S.B.L. and B.D.C. subsequently filed a lawsuit in federal district court against the school district alleging that the school had violated Title IX. The Eighth Circuit heard the case for the narrow purpose of setting the appropriate standard of liability for such situations.

The *S.B.L.* court ultimately avoided resolving the issue. After noting that institutional liability under Title IX was clearly an issue upon which judicial opinions have differed wildly, and that the parties had presented four different legal theories upon which institutional liability under Title IX may be premised, the court concluded that the factual issues of the case had not been adequately developed to permit the determination of the appropriate standard of liability. As a result, the Eighth Circuit's decision in *S.B.L.* stands for little more than the fact that these claims are viable in the Title IX context.

The United States District Court for the Middle District of Alabama is the most recent federal court to recognize explicitly the viability of hostile environment sexual harassment claims under Title IX in *Does v. Covington County School Board of Education.* The district court did not, however, adopt a definitive standard of institutional liability for hostile environment sexual harassment

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294. 80 F.3d 307 (8th Cir. 1996).
295. See id. at 308-11.
296. See id. at 308.
297. See id.
298. The district court noted that the Eighth Circuit had never addressed the issue of institutional liability under Title IX. See id. at 309. In addition, the district court recognized that lower courts were split with regard to the proper standard for such situations. See id. As a result, the district court certified the question of institutional liability under 28 U.S.C. § 1292(b) (1994), which permits a higher court to address a specific issue when it involves "controlling question[s] of law as to which there [are] substantial ground[s] for difference of opinion." *S.B.L.*, 80 F.3d at 309, 311 (quoting 28 U.S.C. § 1292(b)).
299. See *S.B.L.*, 80 F.3d at 311.
300. See id.
301. See id.
302. See id. (declining to state the standard for institutional liability in abstract terms).
claims under Title IX. The plaintiffs, male students of Michael Smith, a male third-grade teacher, alleged that they had been sexually abused by the teacher for periods of one year or more. The plaintiffs also alleged that the school district knew or should have known of Mr. Smith’s propensity to engage in such behavior. Finally, the plaintiffs alleged that the school failed to investigate complaints filed by the students or to provide counseling to the students who had been victimized. The plaintiffs filed a lawsuit alleging that the school had violated Title IX.

As a preliminary matter, the court recognized that sexual harassment qualified as prohibited sexual discrimination in violation of Title IX and characterized the claim brought by the plaintiffs as a hostile environment claim. The court used the test set out by the Eleventh Circuit in Davis v. Monroe County Board of Education to analyze the plaintiff’s claims. Summarizing the prima facie elements of a hostile environment claim, the court concluded that the plaintiffs could not satisfy the standard without alleging specific

304. See id. at 560-61. The plaintiffs alleged that the acts of abuse took place in the classroom, on school outings, in school buses, and in the teacher’s home. See id. at 561.

305. See id. The stepmother of at least one of the children stated in her deposition that she personally went to the principal and voiced her concerns that her stepson was being sexually abused by Smith. See id. In addition, one of the members of the Board of Trustees of the elementary school voiced his concerns to the principal that Smith exhibited inappropriate behavior toward the boys in his classroom. See id. at 563.

306. See id. at 564.

307. See id. at 560.

308. See id. at 567-68. The court cited Davis v. Monroe County Board of Education, 74 F.3d 1186, 1193 (11th Cir. 1996), in support of its conclusion that sexual harassment was actionable under Title IX. See Covington County Sch. Bd. of Educ., 930 F. Supp. at 567. The court acknowledged that the facts in Davis were different than those in the present case because Davis involved peer sexual harassment. See id. The court reasoned, however, that “the Eleventh Circuit’s reasoning applies equally, or with even greater force, when the harasser is a teacher.” Id. at 567.


310. 74 F.3d 1186 (11th Cir. 1996). For a discussion of the Eleventh Circuit’s decision in Davis, see infra notes 652-76 and accompanying text.


312. The court found that in order to maintain a claim for hostile environment sexual harassment, a plaintiff must establish:

“(1) that [he] is a member of a protected group; (2) that [he] was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of [his] education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.”

Id. at 568 (quoting Davis, 74 F.3d at 1194).
acts of abuse.\textsuperscript{313} Notwithstanding its finding that the plaintiffs failed to establish a prima facie case of sexual harassment, the \textit{Covington County} court stated that in order for the school to be liable for the teacher's conduct, the plaintiffs must provide evidence that either the superintendent of the school or individual board members had notice, either actual or constructive, that the harassment was occurring.\textsuperscript{314} Other courts have recognized the viability of a Title IX cause of action in this context and have developed a number of standards for considering those claims.

b. Standards of Liability

\textit{(1) Strict Liability}

In \textit{Bolon v. Rolla Public Schools},\textsuperscript{315} the court adopted strict liability as the appropriate standard for institutional liability for situations involving a sexual relationship between a teacher and a student.\textsuperscript{316} The plaintiff was a sixteen-year-old student in Daniel Heitert's class when the two began a sexual relationship.\textsuperscript{317} The relationship continued for approximately five months until the plaintiff's parents discovered the relationship and informed school officials.\textsuperscript{318}

The court acknowledged that the standard for imputed liability

\textsuperscript{313} See id. at 568-69. Specifically, the court found that the plaintiffs failed to meet the second, third, and fourth elements of hostile environment sexual harassment. The court, however, granted the plaintiffs leave to amend the complaint to meet the standard adopted by the court. See id. at 569.

\textsuperscript{314} See id. at 570. The court directed the plaintiffs to submit a brief regarding whether a constructive notice standard was appropriate for situations involving the sexual abuse of students by a teacher. See id. In addition, the court pointed out that one possible theory of constructive notice might result from the pervasiveness of the abusive acts themselves. See id. The court noted that in at least one Eleventh Circuit decision, pervasive harassment gave rise to an inference of constructive knowledge. See id. (citing Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982)).

\textsuperscript{315} 917 F. Supp. 1423 (E.D. Mo. 1996).

\textsuperscript{316} See id. at 1427-29. The United States District Court for the Western District of Texas was actually the first court to adopt a standard of strict liability for the determination of institutional liability for situations involving teacher-student sexual abuse, but the Fifth Circuit overruled the case and the strict liability standard. See Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 954-55 (W.D. Tex. 1995), rev'd, 101 F.3d 393, 400 (5th Cir. 1996). For a discussion of the standard adopted by the Fifth Circuit, see \textit{infra} notes 444-88 and accompanying text.

\textsuperscript{317} See Bolon, 917 F. Supp. at 1427. After the relationship began, Heitert informed the plaintiff that she need not "worry about her grade in his class." \textit{Id}.

\textsuperscript{318} See \textit{id}.
under Title IX for situations like the one in Bolon was not clear.\(^{319}\) After summarizing and categorizing the different standards adopted by other courts,\(^{320}\) the court turned to the Supreme Court decision in Franklin v. Gwinnett County Public Schools\(^{321}\) for guidance and concluded that the proper standard for institutional liability under Title IX was one in which intentional discrimination by teachers is imputed to the school district under the principles of respondeat superior, regardless of whether the intentional discrimination is the creation of a hostile environment, the demand for sexual favors, the removal of females from the classroom, or any other intentional discrimination based on sex in violation of Title IX.\(^{322}\)

The court clarified the above standard by describing it as one of strict liability\(^{323}\) and offered numerous public policies that supported the adoption of such a standard.\(^{324}\) Having stated the standard, the court denied the defendants' motion for summary judgment, reasoning that there were material issues of fact in dispute.\(^{325}\)

(2) Agency Principles or Negligence

In Saville v. Houston County Healthcare Authority,\(^{326}\) the district court held that institutional liability could be determined through the application of agency principles or by showing that the school had

\(^{319}\) See id.

\(^{320}\) See id. The court stated that the different approaches for the determination of institutional liability have included:

1. the agency principles contained in the \textit{Restatement (Second) of Agency} § 219(2)(b) (1958) (essentially a negligence or recklessness standard);
2. knowledge or direct involvement by the school district;
3. the Title VII standards of employer liability in sexual harassment cases (i.e., "knew or should have known" for hostile environment and strict liability for quid pro quo harassment); and
4. strict liability.

\textit{Id.} (citations omitted).


\(^{322}\) Bolon, 917 F. Supp. at 1427-28.

\(^{323}\) See id. at 1428.

\(^{324}\) See \textit{id.} at 1428-29. First, the court noted that the Supreme Court had held that Title IX was to be given "a sweep as broad as its language." \textit{Id.} at 1428 (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)). Second, the court emphasized that children's mandatory school attendance supports the notion that schools have a high duty to protect the interests of children. \textit{See id.} Finally, the court concluded that any standard other than strict liability would frustrate the purpose of Title IX. \textit{See id.} at 1429.

\(^{325}\) See \textit{id.} at 1429.

knowledge of the harassment and failed to react appropriately. The Saville court first concluded that Title VII substantive standards should apply to the Title IX sexual harassment claims and then analyzed the plaintiff’s claim using the relevant Title VII law from the Eleventh Circuit. In addition, the court incorporated the standard for the consideration of the severity of the environment adopted by the Supreme Court in Harris. After applying the relevant standard, the court concluded that the evidence presented by Saville established a prima facie case of hostile environment sexual harassment.

In keeping with its reasoning that Title VII principles ought to apply to the consideration of Title IX sexual harassment, the Saville court initially applied agency principles to the determination of institutional liability. The court noted that while the institution was not “automatically liable” for the harassment perpetrated by one of its employees, it may be held directly liable for the harassing actions of one of its agents. The court concluded that the institution could be liable for the harassment if Saville established that Shanks, her supervisor, was an agent of the institution.

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327. See Saville, 852 F. Supp at 1527-28. Saville also brought a quid pro quo sexual harassment claim. See id. at 1528. For a discussion of the court’s analysis of the quid pro quo claim, see supra notes 116-23 and accompanying text. Saville filed claims under both Title VII and Title IX. See Saville, 852 F. Supp. at 1519.

328. See Saville, 852 F. Supp. at 1521. The court offered little detail as to the basis for its conclusion and merely pointed out that the defendants argued that Title VII should apply and that Saville did not dispute the argument. See id.

329. See id. at 1526. The court stated that in order for a plaintiff to establish a prima facie case of hostile environment sexual harassment, the plaintiff must prove:

1. that the employee belongs to a protected group;
2. that the employee was subject to “unwelcome” sexual harassment;
3. that the harassment complained of was based on sex; and
4. that the harassment complained of affected a “term, condition, or privilege” of employment in that it was sufficiently severe or pervasive “to alter the conditions of the [victim’s] employment and create an abusive working environment.”

Id. (quoting Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th Cir. 1987)).

330. See id. at 1526 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)). The court summarized the Harris standard, noting that in order to determine whether a hostile environment has been created, all the circumstances of the situation must be considered. See id. For a description of the Harris standard, see supra notes 35-38 and accompanying text.

331. See Saville, 852 F. Supp. at 1526.

332. See id. at 1527-28.

333. Id. at 1527 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986)).

334. See id. (citing Sims v. Montgomery County Comm’n, 766 F. Supp. 1052, 1068 (M.D. Ala. 1990)).

335. See id.
court specified that in order to successfully argue that Shanks was an agent of the school, Saville needed only to establish that Shanks was aided in the harassment by the existence of an agency relationship with the institution. The court concluded that whether Shanks was an agent of the institution was a question to be resolved by the factfinder.

In addition to the possibility that institutional liability might flow from agency principles, the Saville court noted another possible avenue of institutional liability: the institution may be indirectly liable for Shanks's actions. That is, once the institution had notice of the harassment, the school could be liable for failing to take prompt, remedial, effective action to remedy the situation. The court noted that whether the institution could be found liable under an indirect liability standard should be determined by the factfinder. With these determinations, the court denied the defendant's motion for summary judgment.

(3) Agency Principles Only

The first federal court to limit its discussion of institutional liability under Title IX for hostile environment sexual harassment to agency principles was the district court in Hastings v. Hancock. In addition to the quid pro quo claim discussed in the previous section, Hastings brought a claim for hostile environment sexual harassment. First, the Hastings court determined that Title VII ought to guide the court in considering the school's potential liability, and concluded that agency principles ought to be utilized

336. See id.
337. See id.
338. See id. at 1528.
339. See id. According to the court, if the institutional defendants failed to redress effectively the harassment situation of which they had knowledge, they could be found to be "indirectly" liable for Shanks's action. See id.
340. See id.
341. See id.
343. See supra notes 97-106 and accompanying text.
345. See id. at 1318. The court noted that the Tenth Circuit had held in another case that the law from Title VII ought to apply by analogy to the consideration of sex discrimination claims brought under Title IX. See id. at 1318 (citing Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 317 (10th Cir. 1987)). However, the Hastings court did not find the Tenth Circuit ruling on Mabry definitive on the issue because Mabry could be distinguished because it involved employment-related
to analyze the institution's liability for an employee's actions that created the hostile environment. The primary issue addressed by the Hastings court was whether the harasser had been aided by an agency relationship with the school. The court noted that according to the law of the Tenth Circuit, the mere existence of employment is not a sufficient reason to impute liability for the employee's conduct to the institution. In the present case, however, the court concluded that it was likely that Hancock's relationship with the school would satisfy one of the agency theories of liability.

The Hastings court also recognized, under the applicable agency law, an additional theory of institutional liability through which the plaintiff might pursue the school. Specifically, the court noted that in many Title VII cases courts have held the employer directly liable for the harassing actions of a supervisor who has direct authority over the victim of the harassment. According to the Hastings court, the theory of direct liability is "an alternative interpretation of the agency rules set forth in Restatement (Second) of Agency § 219(2)(d)." When a theory of direct liability is applicable, that is,

346. See id. at 1318. After reviewing cases from two other federal district courts that had considered the issue, the Hastings court concluded that Title VII should apply to the case at bar. See id. (citing Floyd v. Waiters, 831 F. Supp. 867, 876 (M.D. Ga. 1993); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1291 (N.D. Cal. 1993)).

347. See Hastings, 842 F. Supp. at 1319. The court summarized the relevant provisions of the RESTATEMENT (SECOND) OF AGENCY § 219 (1958), which provided three different bases for employer liability under the Title VII law in the Tenth Circuit. See Hastings, 842 F. Supp at 1318-19 (citing Hirschfeld v. New Mexico Corrections Dept't., 916 F.2d 572, 576 (10th Cir. 1990); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417-18 (10th Cir. 1987)). According to the Hastings court, the three potential bases of employer liability were: "(1) Section 219(1) Acting within the scope of employment; (2) Section 219(2)(b) Employer Negligence or Recklessness; and (3) § 219(2)(d) Authority or Agency Relationship Aiding Harasser." Id. at 1319.

348. See id. at 1319-20. The court stated that "it would be too broad a reading of section 219(2)(d) for a court to hold that an employee was aided in accomplishing the tort in that he would not have been there but for his job." Id.

349. See id. at 1320. According to the court, "[t]he cosmetology licenses in the Morrisons' name enabled Hancock to operate the school. At the very least, there is a genuine issue of material fact as to the extent Hancock was aided in accomplishing the harassment of plaintiff by his relationship with the school and the Morrisons." Id.

350. See id.

351. See id. (citing Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1558 (11th Cir. 1987)).

352. Id.
when the perpetrator of the harassment is in a "supervisor" position at the institution, the institution cannot defend itself from liability with the claim that it lacked notice of the harassment. The court concluded that a theory of direct liability also provided the plaintiff with a viable argument for institutional liability.

The Sixth Circuit adopted a similar standard of liability for teacher-student sexual abuse in *Doe v. Claiborne County, Tennessee*. Jane Doe, a fourteen-year-old high school student, entered into a sexual relationship with Jeffrey Davis, a physical education teacher and baseball coach at a middle school. Doe subsequently sued the county and the school board, alleging that the school had violated Title IX "on the grounds that Davis was an agent of the School Board and his conduct created a hostile environment for Doe."

The Sixth Circuit preceded its discussion of the proper standard for institutional liability under Title IX with the observation that many courts have used Title VII standards in resolving sexual harassment claims brought under Title IX. In addition, according to the *Claiborne County* court, the practice of applying Title VII principles to Title IX sexual harassment claims was implicitly approved by the United States Supreme Court in *Franklin*. Finally, according to the Sixth Circuit, both Title IX's legislative history and statements by the OCR supported the use of agency

353. See id.

354. See id. According to the court, "Hancock had complete authority over the school and its students, presumably including authority over graduation, student financial aid, and grades. Therefore, this alternative 'delegation of authority' interpretation of section 219(d)(2) could also provide a basis for liability on the part of the school, and the Morrisons as its owners." Id.

355. 103 F.3d 495 (6th Cir. 1996).

356. See id. at 500. As scorekeeper for the boys' baseball team during the spring of 1991, Doe traveled with the team for games. See id. at 501. It was during the bus trips that Davis began "systematically abusing and harassing Doe." Id. In the fall of 1992, Davis invited Doe to be the scorekeeper for the boys' basketball team. See id. Davis also began to call Doe repeatedly at home, and continued to sexually abuse her on the bus on the way to basketball games. See id. In the spring of 1992, Davis took Doe to a friend's trailer and had sex with her. See id. Davis's sexual abuse of Doe ended "when two of her aunts discovered her in Davis's home while his wife was away at the hospital giving birth to their child." Id.

357. Id. at 503.

358. See id. at 514 (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996); Murray v. New York Univ. College of Dentistry, 57 F.3d 243 (2d Cir. 1995); Preston v. Virginia ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988)).

principles for the determination of institutional liability under Title IX. The court concluded that "[t]here is ample authority to support our conclusion that Title VII agency principles apply to resolve discrimination claims brought under Title IX." 6

(4) Negligence

In Deborah O. v. Lake Central School Corp., the Court of Appeals for the Seventh Circuit became the first federal court to adopt a negligence standard to impute liability to a school for a student’s experience of hostile environment sexual harassment perpetrated by an employee of the school. Deborah O. was a seventeen-year-old student and band member at her high school when she had a sexual encounter with the band director, Matthew Barmore. The parties offered different interpretations as to their sexual relationship. As a result of the relationship, Deborah O. filed suit against the school for sexual harassment under Title IX.

As a preliminary matter, the court noted that in order to maintain her claim under Title IX, Deborah O. had to show that the educational institution intentionally discriminated against her on the basis of her sex. Without offering its reasoning, the Deborah O. court seemed to apply a negligence standard to the issue of institutional liability under Title IX. Further, the court reasoned that such a standard could be met only if Deborah O. could show that the school "knew or should have known about the harassment and yet failed to take appropriate remedial action." After reviewing the facts of the case, the court found that no basis existed for concluding that the school knew or should have known of the

360. See id.
361. Id.
362. 648 F.3d 905 (Table) (text of opinion available in No. 94-3804, 1995 WL 431414 (7th Cir. July 21, 1995)).
363. See id. at *2.
364. See id. at *1.
365. See id. Barmore contended that the relationship was consensual. Deborah O. claimed that Barmore “stalked, sexually harassed, and raped” her. Id.
366. See id.
367. See id. at *3 (citing Cannon v. University of Chicago, 648 F.2d 1104, 1109 (7th Cir. 1981)).
368. See id. (discussing and relying on Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986), for the proposition that “employers are not automatically liable for the sexual harassment of their employees”).
369. Id. (citing Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 535 (7th Cir. 1993)).
harassment in time to take appropriate remedial action.\textsuperscript{370}

In Kadiki v. Virginia Commonwealth University,\textsuperscript{371} the district court effectively adopted a negligence standard for institutional liability for situations in which a hostile environment resulted from sexual harassment perpetrated by a professor.\textsuperscript{372} After determining that Title VII principles should apply to Kadiki’s Title IX sexual harassment claims,\textsuperscript{373} the court noted that, in the Fourth Circuit, the consideration of a hostile environment required a two-step analysis.\textsuperscript{374} The first step concerned the establishment of the hostile environment itself.\textsuperscript{375} In order to satisfy the second prong of the analysis, the plaintiff must show that the employer knew or should have known of the hostile environment and failed to take appropriate action to remedy it.\textsuperscript{376}

The Kadiki court applied the analysis to the facts and expressed its doubt that Kadiki had satisfied the first prong of the analysis—the establishment of the hostile environment claim.\textsuperscript{377} The court ultimately concluded that summary judgment for the defendant was more appropriately granted because of the application of the second prong of the analysis—the standard for institutional liability.\textsuperscript{378} According to the court, the action taken by the school in response to Kadiki’s complaint protected the school from liability: 379 “Because Defendant took ‘prompt and remedial action’ with respect [to] any conduct that involved Plaintiff, Plaintiff cannot prevail on her theory

\textsuperscript{370} See id. at *3-*4 (“The School Corporation did not have notice that Barmore was sexually harassing [Deborah] O. (supposing, of course, that she could show that the facts demonstrate actionable harassment) in time to have done anything about it.”).

\textsuperscript{371} 892 F. Supp. 746 (E.D. Va. 1995). For a discussion of the facts of Kadiki, see supra notes 124-32 and accompanying text. The student in Kadiki also alleged quid pro quo sexual harassment. See Kadiki, 892 F. Supp. at 750-52. For a discussion of Kadiki’s quid pro quo claim, see supra notes 133-39 and accompanying text.

\textsuperscript{372} See Kadiki, 892 F. Supp. at 753.

\textsuperscript{373} See id. at 750. For a description of the court’s reasoning, see supra note 133 and accompanying text.

\textsuperscript{374} See Kadiki, 892 F. Supp. at 753.

\textsuperscript{375} See id. According to the court, a plaintiff must allege that discriminatory behavior severe enough to alter the conditions of the educational environment existed and created an abusive atmosphere. See id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

\textsuperscript{376} See id. (citing Swentek v. USAIR, Inc., 830 F.2d 552, 558 (4th Cir. 1987)).

\textsuperscript{377} See id. The court expressed doubt that the one incident that was the subject of Kadiki’s complaint constituted “pervasive” behavior creating a hostile environment. See id.

\textsuperscript{378} See id.

\textsuperscript{379} See id. The court noted that the situation was investigated immediately by the school and a variety of sanctions were imposed on the professor. See id.
of hostile environment harassment.

Still another court adopted a negligence standard for the purpose of imputing liability for a hostile environment created by a professor in Slaughter v. Waubonsee Community College. Sarah Slaughter was a student at the Waubonsee Community College when she was sexually harassed by her English teacher, Michael O'Gorman. During a meeting with O'Gorman, he offered to increase Slaughter's final grade in exchange for sexual favors. The Slaughter court began its analysis with the observation that the Supreme Court had not addressed the issue of institutional liability in Franklin, the only case the Court had decided that involved a sexual harassment claim brought under Title IX. After making that observation, the court turned to the findings of two other district courts for guidance. However, the court's reliance on those cases was misguided because each case could be distinguished from the present facts in a fundamental way.

The court initially noted that Title VII standards should apply to
the analysis of Slaughter's sexual harassment claim under Title IX and then summarized the standard for the analysis of a hostile environment claim in accordance with the Supreme Court's decision in *Harris*. After applying the standard to Slaughter's case, the court concluded that the facts of the plaintiff's case failed the objective prong of the test. The court noted that a single isolated act "rarely supports a hostile environment claim."

Notwithstanding its conclusion that Slaughter failed to establish a prima facie case of hostile environment sexual harassment, the court addressed the potential application of agency principles to the consideration of institutional liability for a hostile environment claim under Title IX. The court concluded that the only way Slaughter could succeed in arguing that the school should be liable for the harassment would be to show that the school had some knowledge of the hostile environment and failed to act appropriately in response to the situation. Slaughter failed to allege that the school had any knowledge of O'Gorman's actions. Also, the court noted that the plaintiff did not demonstrate that the school failed to take proper action upon receiving notice of the harassment. The court ultimately granted summary judgment to the defendant.

The Eastern District of Michigan also effectively adopted a negligence standard for the purpose of determining a school's liability for a sexual relationship between a teacher and a student in *Nelson v. Almont Community Schools*. Tad Nelson had a sexual

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389. See *id.* at *3* (citing *Harris v. Forklift Sys.*, Inc., 510 U.S. 17, 23 (1993)). For a description of the *Harris* standard, see *supra* notes 35-38 and accompanying text.
390. See *Slaughter*, 1995 WL 579296, at *3*. The court noted that while it was clear that the plaintiff subjectively perceived the environment as hostile, the factors did not objectively create a hostile environment. See *id.* The court reasoned that "the conduct happened once, and only once, there was no physical threat or humiliation, it happened at the end of the school year, and plaintiff had no reason to see or work with O'Gorman again... Such conduct does not rise to the level of pervasive harassment..." *Id.*
391. *Id.* at *4*.
392. See *id.* at *3*.
393. See *id.* at *2*.
394. See *id.* at *2*, *4*.
395. See *id.* at *3*. The premise of Slaughter's argument for the school's liability was that the school "should have been aware of O'Gorman's propensity to commit the alleged acts because of its knowledge of O'Gorman's prior actions." *Id.* at *3*. The court rejected her argument, reasoning that no facts alleged supported the conclusion that the school knew of or participated in the discriminatory acts. See *id.*
396. See *id.* at *4*.
397. See *id.* at *5*.
relationship with his English teacher, Jean Schohl, for approximately
six months.\textsuperscript{399} The only information the high school principal, Steven
Zott, received regarding the relationship between Nelson and Schohl
was several nominations of the two for Snowcoming King and
Queen, which the principal assumed were a practical joke, and a
report by a chaperon at the Snowcoming dance that Nelson and
Schohl danced together.\textsuperscript{400} Zott discovered the relationship when he
was informed of it by Nelson's parents, who found journals, notes,
and cards detailing the relationship in Nelson's room.\textsuperscript{401} Zott
subsequently suspended Schohl and commenced an investigation.\textsuperscript{402}
Schohl resigned from the school district before her tenure charges
were heard by the school board.\textsuperscript{403} Nelson subsequently brought an
action against the school alleging a violation of Title IX.\textsuperscript{404}

The Nelson court noted that the substantive law from Title VII
should apply to the analysis of the establishment of the prima facie
elements of Nelson's sexual harassment claim under Title IX.\textsuperscript{405} It
then categorized Nelson's claim as one of hostile environment sexual
harassment\textsuperscript{406} and summarized the elements of a prima facie case.\textsuperscript{407}

\begin{itemize}
\item 399. See id. at 1347.
\item 400. See id. at 1349.
\item 401. See id. at 1350.
\item 402. See id. Through the investigation, Zott learned that several faculty members had
observed questionable behavior between Schohl and Nelson. See id. In addition, Zott
discovered that five years before Zott came to the school district, Schohl had been
involved in a sexual relationship with another student. See id. at 1351.
\item 403. See id.
\item 404. See id.
\item 405. See id. at 1356. According to the court, "Franklin v. Gwinnett teaches that to
establish a prima facie case of sexual harassment under Title IX, the substantive law of
Title VII is applicable." Id.
\item 406. See id. The court noted that Nelson's claim was not for quid pro quo sexual
harassment because it did not involve a demand for sexual consideration in return for an
educational benefit. See id. Additionally, Nelson stipulated that the case did not involve
quid pro quo harassment and instead premised his claim on the only other cognizable
cause of action under Title VII—a hostile environment theory. See id.
\item 407. See id. According to the court, a plaintiff in Nelson's situation had to prove that:
(1) he or she was a member of a protected class; (2) he or she was subjected to
unwelcome sexual harassment in the form of sexual advances, requests for sexual
favors, or other verbal or physical conduct of a sexual nature; (3) the harassment
complained of was based on sex; (4) the charged sexual harassment had the effect
of unreasonably interfering with the plaintiff's education and creating an
intimidating, hostile, or offensive educational environment that affected seriously
the psychological well-being of the plaintiff; and (5) some basis for institutional
liability.
\end{itemize}

\textit{Id.} at 1357 (footnote omitted) (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186,
1194 (11th Cir. 1996); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619-621 (6th Cir. 1986)).
In addressing the issue of the school's liability, the Nelson court noted that other courts had adopted various standards since 1992.\footnote{See id. at 1355.} After categorizing those standards,\footnote{The Nelson court summarized the standards adopted by other courts as including standards derived from agency principles, Title VII (a "'knew or should have known'" standard for hostile environment claims and strict liability for quid pro quo claims), Title VI (requiring a showing of intentional discrimination by the school), and strict liability. See id.} the court held that a "Title VI" standard of intentional discrimination was the proper standard under which a school may be found liable for the intentional harassment of one of its students by a teacher.\footnote{See id. at 1355.} The court clarified its adopted standard by stating that in order for a school to be liable for sexual harassment resulting from the actions of a teacher, a plaintiff must establish:

(A) a showing of direct involvement of the school district in the discrimination, or (B) a showing of (1) actual or constructive knowledge on the part of the district of the sexual harassment of a student and (2) that the school failed to take immediate appropriate action reasonably calculated to prevent or stop the harassment.\footnote{See id.}

The Nelson court applied the standard to the present case and determined that because no evidence existed that the school participated in Nelson's harassment, the school could be liable only if the evidence suggested that the school had actual or constructive knowledge of the harassment and failed to react appropriately.\footnote{Id. at 1356.} The court ultimately held that there were several issues of fact with respect to both the establishment of a prima facie case of hostile environment sexual harassment and the issue of liability that needed to be resolved by a jury.\footnote{Id. at 1357.} As a result, the defendant's motion for summary judgment was denied.\footnote{94 F.3d 463 (8th Cir. 1996).}

The Eighth Circuit most recently adopted a negligence standard in Kinman v. Omaha Public School District, a case involving a sexual relationship between Janet Kinman and her female teacher,
Sheryl McDougall.\textsuperscript{416} McDougall was Kinman’s English teacher during Kinman’s sophomore year, which encompassed the fall of 1987 and the spring of 1988.\textsuperscript{417} Although questionable behavior took place between McDougall and Kinman during Kinman’s junior year,\textsuperscript{418} their sexual relationship did not actually begin until the summer between Kinman’s junior and senior years, and it continued until the November of Kinman’s senior year.\textsuperscript{419}

The issue of the school’s notice of the relationship between Kinman and McDougall was sharply disputed in the case.\textsuperscript{420} During Kinman’s sophomore year, McDougall received an evaluation in which she was criticized for planning to attend a concert with Kinman.\textsuperscript{421} Robert Whitehouse, a school official, and Susan Paar, the school’s guidance counselor, received reports from students during the fall of 1989 that Kinman and McDougall were involved in a sexual relationship.\textsuperscript{422} Other employees of the school also expressed concern about the relationship between Kinman and McDougall during that time period.\textsuperscript{423} Finally, during that fall, after she ended the relationship with McDougall, Kinman told her mother of the relationship.\textsuperscript{424} After Kinman’s mother reported Kinman’s allegations to the school, school officials began an investigation but took no official action against McDougall at that time.\textsuperscript{425} Two years after Kinman graduated, Kinman’s mother claimed that the relationship had been ongoing and that she had proof of the

\textsuperscript{416} See id. at 465. A full discussion of the viability of a claim involving same-sex sexual harassment under Title IX is outside the scope of this Comment. The Eighth Circuit, however, did emphasize that the appropriate question for determining whether a sexual harassment violation had occurred was whether a plaintiff was subjected to behavior because of her sex. See id. at 468. The court pointed out that McDougall sought out Kinman because Kinman was a woman, and males in Kinman’s class were not subjected to similar behavior. See id. The court concluded that Kinman had been harassed on the basis of her sex. See id.

\textsuperscript{417} See id. at 465.

\textsuperscript{418} During her sophomore year, while still a student in McDougall’s English class, Kinman wrote McDougall a note “stating that she liked her but that she (Kinman) was not gay.” Id. at 465. During Kinman’s junior year, McDougall questioned Kinman about the childhood abuse she had suffered and invited Kinman to attend an Alcoholics Anonymous (AA) meeting. See id. Kinman did not find out that it was a gay AA meeting until she was there. See id.

\textsuperscript{419} See id.

\textsuperscript{420} See id. at 465-66.

\textsuperscript{421} See id. at 466.

\textsuperscript{422} See id.

\textsuperscript{423} See id.

\textsuperscript{424} See id. at 465.

\textsuperscript{425} See id. at 465-66.
relationship in McDougall’s journal—incriminating pictures of Kinman and McDougall and a series of cards written to Kinman from McDougall.\textsuperscript{426} McDougall’s employment was ultimately terminated and her teaching certificate revoked.\textsuperscript{427}

The court began its consideration of Kinman’s hostile environment sexual harassment claim under Title IX by listing the prima facie elements of such a claim.\textsuperscript{428} Noting that one area of contention between the parties was whether the sexual contact between Kinman and McDougall was “unwelcome,” the court concluded that the question presented a material issue of fact for the purpose of the summary judgment motion.\textsuperscript{429}

The \textit{Kinman} court then turned to the question of the appropriate standard for institutional liability for situations such as the one at bar.\textsuperscript{430} Emphasizing the broad “divergence of views” in the courts as to the proper standard for institutional liability for sexual harassment under Title IX,\textsuperscript{431} and noting that many courts had turned to Title VII principles of liability in considering similar issues under Title IX, the court concluded that those principles should also guide its determination of an institution’s liability under Title IX.\textsuperscript{432} After considering the Supreme Court’s dicta in \textit{Meritor Savings Bank v. Vinson}, the \textit{Kinman} court held that a school may be liable for a hostile environment if the school knew or should have known of the harassment and failed to take appropriate remedial action.\textsuperscript{433}

\textsuperscript{426} See \textit{id.} at 466.

\textsuperscript{427} See \textit{id.}

\textsuperscript{428} See \textit{id.} at 467-68. According to the court, in order to succeed on her claim, Kinman had to show:

1) that she belongs to a protected group; 2) that she was subject to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and 5) that some basis for institutional liability has been established. \textit{Id.} at 467-68 (citing \textit{Seamons v. Snow}, 84 F.3d 1226, 1232 (10th Cir. 1996)).

\textsuperscript{429} \textit{Id.} at 468. The court did briefly acknowledge the troubling aspect of the “power disparity” between the parties for the purposes of determining the “welcomeness” of the relationship. \textit{See id.} (“To distinguish between an actual desire for a relationship on one hand, and a mere acquiescence to tendered sexual advances on the other, it is necessary to consider the power disparity between the individuals involved.”). The court sidestepped the potentially controversial issue by concluding that the question concerned “‘difficult problems of proof and turn[ed] largely on credibility determinations committed to the trier of fact.’” \textit{Id.} (quoting \textit{Meritor Sav. Bank v. Vinson}, 477 U.S. 57, 68 (1986)).

\textsuperscript{430} \textit{See Kinman}, 94 F.3d at 468-69.

\textsuperscript{431} \textit{See id.} at 468.

\textsuperscript{432} \textit{See id.} at 469.

\textsuperscript{433} \textit{See id.}
(5) Intentional Discrimination

The only case in which a federal court adopted a standard of institutional liability requiring a showing of intentional discrimination in the context of hostile environment sexual harassment perpetrated by a teacher was *R.L.R. v. Prague Public School District I-103.* Fourteen-year-old R.L.M.R. was an eighth-grade student when she had a sexual relationship with Albert Thorpe, her basketball coach. As a result of the relationship, R.L.M.R. and her parents brought a Title IX action against the school district.

The court’s reasoning with respect to the plaintiffs’ Title IX claim took a disturbing twist. The court stated that the plaintiffs could not prevail under Title IX without showing that the school acted with intent to discriminate against R.L.M.R., and held that the question of intent was “moot” because the plaintiffs “failed to come forward with any facts showing the custom or policy, acquiescence in, conscious disregard of, or failure to investigate or discipline on the part of the School District.” According to the court, without such a preliminary showing, the “question of intent is really moot as the proof fails before that question is reached.”

In another troubling portion of the opinion, the court addressed the defendant’s argument that the plaintiffs’ claims should be dismissed because they failed to establish that R.L.M.R.’s relationship with Thorpe was unwelcome. The court dismissed the relevancy of the fact that the plaintiff was fourteen years old at the time of the incident for purposes of gauging the “welcomeness” of the teacher’s advances. Reasoning that the plaintiff could not

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435. *See id.* at 1527.
436. *See id.*
437. *See id.* at 1534. In support of its conclusion, the court cited *Guardians Association v. Civil Service,* 463 U.S. 562, 607 n.27 (1983), a Title VI case. *See R.L.R.,* 838 F. Supp. at 1534. The court failed, however, to distinguish *Guardians* as being in the Title VI context. *See id.* In addition, the *R.L.R.* court did not explain how *Guardians* was relevant to the determination of a school’s potential Title IX liability for hostile environment sexual harassment perpetrated by one of its employees. *See id.*
439. *Id.*
440. *See id.*
441. *See id.* ("Despite plaintiffs’ argument that Oklahoma’s statutory rape law precludes her consent to Thorpe’s advances, the Court finds that the criminality of Thorpe’s actions, standing alone, have no bearing on the School Board’s liability."). At least one commentator has criticized the requirement that a student plaintiff show that a teacher’s sexual advances were unwelcome in order to maintain a Title IX sexual
maintain her Title IX action, the court ultimately granted the defendant's motion for summary judgment.

(6) Actual Knowledge of Harassment Required

In a series of three cases, the Fifth Circuit explicitly rejected several of the standards of institutional liability described in the above sections and adopted a far more stringent requirement for institutional liability under Title IX for sexual harassment resulting from a student's sexual abuse by a teacher. In the first case, the Fifth Circuit began by rejecting the adoption of a strict liability standard for such cases but failed to endorse a specific alternative standard. In its next case, the Fifth Circuit adopted a particular standard of liability and detailed its rationale for the stated standard. In the final case considered by the Fifth Circuit for the purpose of determining a school's liability for the sexual abuse of a student by a teacher, the court rejected another proposed standard and applied its adopted standard. For the purpose of exploring the court's rationale for its treatment of institutional liability under Title IX, a discussion of each case follows.

The first case in which the Fifth Circuit considered the proper standard of institutional liability for a situation involving teacher-student sexual abuse was Canutillo Independent School District v.

The burden of proving unwelcomeness can be an extremely onerous requirement for adult women; for young girls, it is substantially worse. They may know that what they experienced made them feel uncomfortable. They may know that they wanted it to stop. However, they almost certainly won't know that what they experienced was "sexual harassment." And they would be truly extraordinary to know that the law requires them to expressly reject the harassment in order to invoke its protection. Finally, in addition to knowledge, it would take considerable courage for girls to challenge their harassers and the institutions that protect them.

Bodnar, supra note 8, at 583-84.

442. See R.L.R., 838 F. Supp. at 1534. Even where the experience of sexual harassment provides the plaintiff with a private right of action, the court still requires that the plaintiff prove discriminatory intent. See id.

443. See id.


445. See Leija, 101 F.3d at 401-02; see also infra notes 448-60 and accompanying text (discussing Leija).

446. See Rosa H., 106 F.3d at 658-61; see also infra notes 461-82 and accompanying text (discussing Rosa H.).

447. See Lago Vista, 106 F.3d at 1225-26; see also infra notes 483-88 and accompanying text (discussing Lago Vista).
Rosemarie Leija was a second-grade student when she was sexually abused by her gym teacher, Tony Perales. According to Leija, another student also was being sexually abused by Perales. Leija and the other student informed Pam Mendoza, their homeroom teacher, of the abuse. Mendoza spoke with each child and advised them to avoid Perales. She also spoke to Perales about the girls' accusations but never informed any school official about the allegations. After Leija informed her mother of Perales's actions, Mrs. Leija spoke with Mendoza at a parent-teacher conference about the abuse. After the conference, Mendoza allegedly threatened Leija that she would be in "trouble" if she had fabricated her complaint. Not only did no school employee respond to the complaints made, but Perales was not removed from his teaching duties until the abuse was reported to law enforcement officials. Leija subsequently filed suit against the school under Title IX.

The Fifth Circuit articulated the specific issue as "whether the liability standard under Title IX for teacher-student sexual abuse is strict liability; and, if it is not, whether the notice to Mendoza, a teacher, is sufficient to hold the school district liable." The Leija court began by summarizing and describing the various standards that had been applied by other courts, and criticized the district

448. 101 F.3d 393 (5th Cir. 1996).
449. See id. at 395. The district court summarized the abuse suffered by Leija as follows:

For the most part, the abuse occurred while [Perales] was showing movies to Miss Leija's class in a darkened classroom. Coach Perales would instruct her to come to the back of his room and sit on his lap. He would then place his hands beneath her undergarments and rub her chest, her buttocks, and between her legs. There was no testimony suggesting penetration. At the minimum, this happened eight times; at the maximum, twenty times.

450. See Leija, 101 F.3d at 395.
451. See id.
452. See id.
453. See id.
454. See id.
456. See Leija, 101 F.3d at 395.
457. Id. at 396.
458. See id. at 397-98. In summarizing the standards, the Fifth Circuit utilized a shorthand, describing one standard as a "Title VI" standard, the second standard as a
The court for deviating from the categories and holding that a school district should be strictly liable for the sexual abuse of students by teachers. Declining to endorse a particular standard for institutional liability under Title IX, the court stated that "it is not necessary now to move beyond our rejection of strict liability and adopt a liability standard for Title IX cases of the type at hand. Leija's Title IX claim fails under each of the three types commonly applied." However, the Fifth Circuit did adopt a standard of liability for teacher-student sexual abuse cases in *Rosa H. v. San Elizario Independent School District*. Deborah H. was a high school freshman when she entered a sexual relationship with John Contreras, a twenty-nine-year-old karate instructor employed by the school. The *Rosa H.* court noted that the record was unclear with the "Title VII" standard, and the third as a standard pursuant to the *Restatement (Second) of Agency* § 219 (1958). See Leija, 101 F.3d at 397-98. The court went on to describe each standard. Under the first standard, a school could be liable only if the plaintiff could prove discriminatory intent. See id. at 397. Under the second standard, a school could be liable for hostile environment sexual harassment only upon a showing that the school knew or should have known of the harassment and failed to take appropriate remedial action. See id. Under the third standard, the court reasoned that because sexual abuse was always outside the scope of an employee's teaching duties, a school could be liable only upon a showing that the school was somehow negligent or reckless in its handling of the abuse. See id. at 398.

459. See Leija, 101 F.3d at 398-99.

460. Id. at 400. The court applied each standard to the facts of the case. See id. at 400-02. The court concluded that under the "Title VI" standard, the school could not be liable even if Leija could prove the school had knowledge of the harassment, unless the school was directly involved in the harassing actions. See id. at 400. With respect to the "Title VII" and agency standards of liability, the court concluded that both theories would allow liability to lie upon a showing that the school had actual or constructive knowledge of the harassment and failed to take appropriate action. See id. In the most disturbing portion of the court's opinion, the court considered whether Leija's report to her homeroom teacher was sufficient to put the school on "notice" of the harassment for liability purposes. See id. at 400-402. The court reasoned that, in the Title VII context, for an employer to have actual notice, a person in "high management" must be informed of the harassment. See id. at 400. Similarly, in the Title IX context, the court stated that a student must report her sexual abuse to a school employee in a "supervisory" position. See id. at 401. The court concluded that in the Title IX context, a school does not have actual knowledge of the harassment "until someone with authority to take remedial action is notified." Id. at 402. The court further noted that the proper authority might be found only in a member of the school board. See id. Thus, the court concluded that Leija's complaint to her homeroom teacher was insufficient to put the school on notice of the sexual abuse. See id. With respect to the constructive knowledge possibility, the court stated that "there was no evidence that [Perales's] conduct was then so pervasive that a reasonable juror could conclude that [the school district] 'should have known' of the abuse." Id.

461. 106 F.3d 648 (5th Cir. 1997).

462. See id. at 650. The relationship began when Deborah H. was enrolled in Contreras's karate class:
respect to the type of notice the school had of the relationship between Contreras and Deborah H.\textsuperscript{463} Deborah H. claimed she informed a high school guidance counselor that she had been having sex with Contreras, a fact the guidance counselor disputed.\textsuperscript{464} Rosa H., Deborah's mother, realized that Contreras was having a sexual relationship with her daughter when she overheard a sexually explicit telephone conversation between the two.\textsuperscript{465} After school officials were informed of the relationship,\textsuperscript{466} they decided to closely monitor Contreras's karate classes.\textsuperscript{467} The officials did not, however, conduct a full investigation into the sexual threat posed by Contreras, notify the school's Title IX coordinator that sexual abuse had occurred, or report the behavior to the appropriate law enforcement authorities.\textsuperscript{468} Rosa H. subsequently filed suit against the school district on behalf of Deborah H., alleging a violation of Title IX.\textsuperscript{469}

The Rosa H. court began its consideration of the claim by noting that the Fifth Circuit had rejected a standard of strict liability for situations involving teacher-student sexual abuse without endorsing a particular theory of liability.\textsuperscript{470} Recognizing that the present case required the court to adopt a specific standard of liability for such cases,\textsuperscript{471} the court held:

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After several weeks, Contreras took a special interest in Deborah.... He often drove her home after class. He complimented her appearance, including not only her hair, but also her breasts.... Most of the physical contact occurred in Contreras's car or at his home. Within weeks of Deborah's enrollment in the karate class, Contreras initiated sexual intercourse. Contreras had sex with Deborah at his house on a regular basis in December, January, and February, often during the school day. When Deborah insisted that she would get in trouble for missing school, Contreras assured her that the school did not require her to attend so long as she was with him.

\textit{Id.}

\textsuperscript{463} See id. at 651.

\textsuperscript{464} See id.

\textsuperscript{465} See id.

\textsuperscript{466} See id. Specifically, the school superintendent, the school principal, the high school guidance counselor, and a high school social worker were informed of the situation. See id.

\textsuperscript{467} See id.

\textsuperscript{468} See id. Contreras continued to work at the school for another year until he was terminated for a failure to produce photo identification for the school's personnel office. See id.

\textsuperscript{469} See id.

\textsuperscript{470} See id. at 652 (citing Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 398-400 (5th Cir. 1996)).

\textsuperscript{471} See id. The court noted that "[t]his case... compels us to decide which of the three liability theories outlined in\textit{ Leija}—the agency theory, the Title VII theory, or the
[A] school district can be liable for teacher-student sexual harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so.\textsuperscript{72}

The Fifth Circuit attempted to justify its adopted standard by offering its rationale for rejecting other standards of liability and detailing the meaning of the one it adopted.\textsuperscript{73} The Rosa H. court first offered its reasoning for rejecting the applicability of agency principles to the determination of institutional liability for teacher-student sexual abuse cases.\textsuperscript{74} In addition, the court rejected the use of constructive knowledge as the standard for institutional liability.\textsuperscript{75} Finally, the Fifth Circuit dismissed the relevance of the standard recently proposed by the OCR to the present case.\textsuperscript{76}

The Rosa H. court concluded by offering further detail as to the application of its adopted standard. In order to succeed, the plaintiff would not have to show that the school had actual knowledge that Contreras would sexually abuse a particular student, but would have to show that the school district failed to act when it knew that Contreras "posed a substantial risk of harassing students in

restrictive theory that requires actual, intentional discrimination—applies when a student suffers sexual abuse at the hands of a public school teacher." \textit{Id.}

\textsuperscript{72} \textit{Id.} at 660.

\textsuperscript{73} \textit{See id.} at 652-59.

\textsuperscript{74} \textit{See id.} at 654-55. The court emphasized that liability premised on agency principles was inherently inconsistent with a Spending Clause statute. \textit{See id.} at 654. The court also noted that nothing in either the text of Title IX or its implementing regulations supported the use of agency principles for the purposes of determining institutional liability. \textit{See id.} (discussing Title IX, 20 U.S.C. § 1681(a) (1994), and 34 C.F.R. § 106.2(h) (1995)). The court then summarized the decisions of other federal courts that rejected the notion of a school's vicarious liability for sexual abuse perpetrated by a teacher, and reasoned that nothing in the Supreme Court's decision in \textit{Franklin v. Gwinnett County Public Schools}, 503 U.S. 60 (1992), compelled the use of agency principles for such situations. \textit{See Rosa H.}, 106 F.3d at 654-55.

\textsuperscript{75} \textit{See Rosa H.}, 106 F.3d at 655-58. According to the court, "importing this aspect of Title VII law stretches Title IX beyond its language and purpose. Congress did not enact Title IX in order to burden federally funded educational institutions with open-ended negligence liability." \textit{Id.} at 656.

\textsuperscript{76} \textit{See id.} at 658. For a discussion of the standard recommended by the OCR, see \textit{infra} notes 734-38 and accompanying text. The Fifth Circuit stated that the guidelines promulgated by the OCR would not be given retroactive effect, emphasizing the contractual nature of Spending Clause legislation. \textit{See Rosa H.}, 106 F.3d. at 658. Further, the Rosa H. court specifically refused to offer any guidance as to the effect the OCR guidance document will have on the standard adopted in Rosa H. \textit{See id.} ("We make no comment on how these guidelines might affect cases in which a school district accepts Title IX funds after the guidelines' promulgation date.").
Liability would not lie if a student failed to show that the school district had actual knowledge of a substantial threat of sexual harassment to the student. The *Rosa H.* court specified that a school district can escape liability for situations involving teacher-student sexual abuse if the school district can show "that [it] did not know of the underlying facts indicating a sufficiently substantial danger and that [it was] therefore unaware of a danger, or that [it] knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent."

Finally, in determining whether the school district was liable under Title IX, the Fifth Circuit stated that only knowledge by key individuals of specific instances of teacher-student sexual abuse constituted the requisite notice for finding liability under Title IX. Liability would lie only if a school official with supervisory power over the employee perpetrator had actual knowledge of the harassment and failed to take action to end the abuse. The court recognized that its standard specifically omitted "the bulk of employees, such as fellow teachers, coaches, and janitors, unless the district has assigned them both the duty to supervise the employee who has sexually abused a student and also the power to halt the abuse."

The Fifth Circuit rejected another proposed standard of liability and confirmed the standard of liability adopted above in *Doe v. Lago Vista Independent School District.* Jane Doe was thirteen years old when Frank Waldrop, a teacher at Lago Vista High School, sexually abused her. There was no evidence that any school

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478. See id.
479. *Id.* (alteration in original) (quoting Farmer v. Brennan, 511 U.S. 825, 844 (1994) (using the concept of "deliberate indifference" to determine whether a prisoner's Eighth Amendment rights were violated by prison officials)). The Fifth Circuit reasoned that the concept of deliberate indifference provided an appropriate analogy for the discussion of school liability because the concept was premised on the difference between a harm caused by intentional behavior and one resulting from negligence. See id.
480. See id. at 659-61.
481. See id. at 660.
482. *Id.*
483. 106 F.3d 1223, 1226 (5th Cir. 1997).
484. See id. at 1224. The court summarized the abuse suffered by Doe:
Waldrop initiated sexual contact with [Doe] at her home in the spring of 1992. Knowing she would be alone, he visited her under the pretext of returning a book and proceeded to fondle her breasts and unzip her pants. During the summer, Waldrop had sex on a regular basis with Doe, who was by then fifteen years old. None of the encounters took place on school property. The relationship ended in
official was aware of the abuse until after it had stopped. The court reiterated that both strict liability and agency liability premised on constructive knowledge had been rejected in previous decisions. However, the Lago Vista court considered Doe's contention that the school could be liable for teacher-student sexual abuse if the teacher was aided in the commission of the abuse by virtue of the existence of an agency relationship with the school, even though the abuse was outside the scope of the teacher's employment. The court rejected the proposed standard of liability, noting that, pursuant to its decision in Rosa H., "school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."

(7) Reasonable Avenue of Complaint Available

The district court in Pallett v. Palma adopted a unique standard for institutional liability under Title IX for teacher-student sexual harassment. The claims at issue in Pallett were filed by Darleen Pallett, an undergraduate student at Iona College, and Christine Kracunas, a graduate student at Iona College, who was also employed by the college as Acting Director for Public Relations. Both students claimed that they were sexually harassed by Professor Palma during private meetings in his office. Both Pallett and

January of 1993, when a Lago Vista police officer happened to discover Waldrop and Doe having sex.

Id.

485. See id. at 1225.
486. See id. at 1225, 1226.
487. See id. at 1225-26. The plaintiff's theory was premised on the RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). See Lago Vista, 106 F.3d at 1225.
488. Lago Vista, 106 F.3d at 1226.
490. See id. at 1019. Pallett's and Kracunas's claims had been consolidated. See id.
491. See id. at 1020-21. Pallett met privately with Professor Palma in his office to protest a poor grade on a paper. See id. at 1020. Pallett alleged that, during the conversation:

[Professor Palma], in lewd and vulgar language, discussed in detail his own prior sexual experiences, ordered her to read pornographic poetry which contained extensive sexually explicit references and recitals regarding sexual intercourse, inquired as to her own sexual experiences, and made vivid expressions of his own imagination of her reactions to sexual intercourse with him and of having sexual relations with her, recited the content of sexually oriented dreams he had regarding another student named Laurie, and said that he could imagine her naked and that in his opinion most men liked to fuck women.
Kracunus reported the harassment to the dean. According to the court, after learning of the incidents, the university made reasonable efforts to gain the participation and cooperation of both plaintiffs in investigating the incidents and terminating Professor Palma through the necessary due process procedures.

The key issue in the case was whether the university should be liable for the harassment perpetrated by Palma. According to the court, that question was answered by determining whether the university responded properly once it learned of the harassment. It seemed as though the court was going to adopt a Title VII standard when it noted that under the relevant law of the Second Circuit an educational institution may be liable for the sexual harassment of a student "under standards similar to those applied in cases under Title VII." The court pointed out, however, that the Second Circuit had not addressed whether constructive notice should be included in the Title IX standard.

The Pallett court began its discussion of the university's potential liability by rejecting the possibility that agency principles could be used to hold the university liable. The court reasoned that Palma lacked actual authority to act as he had and stated that the alleged harassment was not furthered by apparent authority.

\[ Id. \text{ Kracunus alleged that when she met with Professor Palma to pick up textual materials required for class, "he made comments to her which amounted to sexual harassment." Id. at 1021.} \]

492. See id. at 1022. Pallett reported the May 1994 incident to the Dean in approximately late September 1994 and filed a formal complaint with the university on December 1, 1994. See id. Kracunus first reported the incident to the dean two days after the harassment occurred but never formally filed a complaint with the university. See id. at 1022-23.

493. See id. at 1023. The court noted that a university must be especially careful in addressing sexual harassment situations when a tenured professor is involved. See id. at 1022.

494. See id. at 1021.

495. See id.

496. Id. at 1024 (quoting Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995)).

497. See id. The court stated that under Title VII, an employee's conduct can be imputed to her employer when

1. the employee is in a supervisory role and uses actual or apparent authority to further the harassment or if the supervisor was otherwise aided in accomplishing the harassment by the existence of an agency relationship; (2) the employer provided no reasonable avenue of complaint; or (3) that the employer knew of the complaint but did nothing about it.

\[ Id. \]

498. See id.

499. See id. The court did not consider whether Palma was aided in the harassment
The court then stated that a university may escape liability for situations involving sexual harassment if the school provides reasonable procedures through which students may complain, or the school, with knowledge of the harassment, appropriately handles those complaints. The court concluded that Iona College was not liable for Palma's actions because Iona College had a policy against sexual harassment and had implemented a complaint procedure of which all students and faculty were informed; in addition, the school reacted appropriately as soon as they learned of Palma's actions. Thus, the court granted the defendant's motion for summary judgment with respect to the plaintiffs' Title IX claims.

c. Trends in Employee Perpetrator/Student Victim Case Law

Many federal courts have addressed hostile environment sexual harassment claims in the Title IX context since the Supreme Court's opinion in Franklin. One consistent holding that has emerged from the large number of opinions regarding this form of sexual harassment is that hostile environment sexual harassment is actionable under Title IX when it involves harassment between a teacher and a student. The only court to state that such a claim was not actionable under Title IX in this context was the district court in Bougher v. University of Pittsburgh. The Third Circuit, however, declined to adopt that portion of the district court's opinion and instead agreed only that the plaintiff failed to state a cause of action under Title IX. In addition, the remaining courts that have addressed the viability of hostile environment claims under Title IX overwhelmingly have supported the proposition that such claims are viable when the perpetrator is an employee of the school and the victim is a student. Finally, all the above cases that have been through his position with the university. But cf. Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1527 (M.D. Ala. 1994) (reasoning that institutional liability may be premised on a finding that the harasser was aided by his agency relationship with the school); Hastings v. Hancock, 842 F. Supp. 1315, 1319 (D. Kan. 1993) (addressing the possibility that an institution could be liable for harassment perpetrated by a teacher if the teacher was aided in the harassment because of his position with the school).

500. See Pallett, 914 F. Supp. at 1024.
501. See id. at 1025.
502. See id.
503. See id.
507. See S.B.L. v. Evans, 80 F.3d 307, 310 (8th Cir. 1996); Brown v. Hot, Sexy & Safer
Sexual harassment in education categorized according to the standard of liability adopted by the court also have implicitly endorsed the viability of hostile environment sexual harassment claims in the Title IX context. Therefore, the clear weight of the authority shows that hostile environment sexual harassment is actionable under Title IX when it is perpetrated by an employee of the school and suffered by a student.

As the above summary demonstrates, standards for institutional liability have varied widely. As the cases have been categorized within this Comment, there are at least seven different standards of liability which have been applied to hostile environment sexual harassment claims under Title IX. The first standard of liability, adopted by one district court, stated that when a student experiences hostile environment sexual harassment as a result of sexual abuse suffered at the hands of his or her teacher, Title IX liability for the teacher’s actions will be imputed to the school through a strict liability standard under Title IX. That case involved a sexual relationship between a teacher and a student at the secondary level, and may be so limited. Moreover, because of the language in the opinion, it is not clear that the strict liability standard for institutional liability should apply to hostile environment sexual harassment resulting from a sexual relationship between a student and professor at the university level.


509. See supra notes 315-503 and accompanying text; see also S.B.L., 80 F.3d at 310-12 (addressing a certified question with regard to the proper standard of institutional liability because the standards adopted by various courts have varied).

510. See Bolon, 917 F. Supp. at 1429.

511. See id. at 1427.

512. See id. at 1428-29 (emphasizing fact that students are required to attend school as supporting the school’s duty to protect the children).
The second standard of liability was adopted by one district court that considered a school's liability for hostile environment sexual harassment perpetrated by one of its employees through the application of a Title VII standard of institutional liability. Specifically, the court held that the school would be liable for hostile environment sexual harassment perpetrated by one of its employees if the plaintiff could show that the school knew or should have known of the harassment and failed to take appropriate remedial action. Additionally, according to the court, the school may be liable if the plaintiff could satisfy the relevant agency rules. Aside from the strict liability standard described above, this standard would seem to offer a Title IX plaintiff the best opportunity to hold the school liable for the harassment he or she suffered.

The third standard of liability, adopted by one district court and one court of appeals, stated that the appropriate standard for institutional liability under Title IX would allow a student plaintiff to hold a school liable for the hostile environment sexual harassment he or she suffered through the application of agency principles. Under this standard, a plaintiff would be successful if he or she could show that the harasser was acting in a supervisory capacity or if the harasser was aided in any way by his or her agency relationship with the school.

The fourth standard of liability, adopted by three district courts and two courts of appeals, essentially provided that a school will be liable for a hostile environment created by one of its employees if the school's actions in response to the situation were negligent. Specifically, these courts held that in order for a school to be liable, the plaintiff must establish that the school knew or should have known of the actions that created the hostile environment and failed to take appropriate action to remedy the situation. This standard has been adopted in cases involving sexual relationships between

514. See id. at 1528.
515. See id.
517. See Restatement (Second) of Agency § 219(1), (2)(d) (1958).
The fifth standard, adopted by one district court addressing hostile environment sexual harassment under Title IX in the teacher-student context, required a showing of intentional discrimination for the school to be liable for the harassment perpetrated by one of its employees. Under this standard, a school will be liable for the hostile environment sexual harassment caused by one of its employees only if the plaintiff can show that the harassment was exacerbated by a school policy or custom, or that the school acquiesced in, consciously disregarded, or failed to investigate or discipline the behavior that gave rise to the harassment.

A sixth standard of institutional liability has been adopted by the Fifth Circuit. Under this standard, a school will be liable for sexual abuse perpetrated by one of its employees only if the school failed to act when it had actual knowledge that an employee posed a substantial threat of sexually abusing students in general. In addition, in order for a school to be deemed to have actual knowledge of the threat posed by a teacher, a school official with the power to remedy the harassment must have actual knowledge of the abuse. This standard is a very difficult one for a plaintiff to meet. For example, in one Fifth Circuit case, the fact that a second-grader informed her homeroom teacher of the sexual abuse she suffered at the hands of her gym teacher was deemed insufficient in satisfying the requisite standard of knowledge for purposes of institutional liability. Given the psychological damage done to a student who experiences sexual abuse at the hands of her teacher, it seems

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519. See Kinman, 94 F.3d at 465; Nelson, 931 F. Supp. at 1347; Deborah O., 1995 WL 431414, at *1.
520. See Slaughter, 1995 WL 519296, at *1; Kadiki, 892 F. Supp. at 748.
522. See id.
524. See Rosa H., 106 F.3d at 659.
525. See id. at 660.
527. One commentator described the damage done to a student when he or she is sexually abused by a teacher:

Teachers are fiduciaries who hold the trust, intellectual development, and academic advancement of their students in their hands. ... The educational process itself is founded upon the development of dependent, trusting relations between students and teachers. ... Like incest, sexual harassment is an abuse of
especially onerous to require that the traumatized student report the behavior to a school employee at the top of the supervisory hierarchy.

The final standard of institutional liability under Title IX for hostile environment sexual harassment is arguably the most difficult for a plaintiff to meet. Under this standard, a school can escape liability for hostile environment sexual harassment perpetrated by one of its employees by showing that the school had in place a reasonable avenue through which students could complain of sexual harassment and that the school appropriately handled the complaints.528 This standard is difficult for a plaintiff to meet because it essentially requires that the plaintiff take affirmative action in reporting the behavior for the school to be liable. Unless the plaintiff actually reports the harassment, the school has no liability for the harassment, even if the school has actual knowledge of it.

A review of the literature pertaining to the appropriate standard of liability for hostile environment sexual harassment perpetrated by employees of an educational institution reveals the endorsement of three different standards: one theory premised on strict liability, another on agency principles, and a third on negligence.530 Significantly, no commentator has advocated the standards adopted by the Fifth Circuit or that adopted by the court in Pallett v. Palma.532 Considering the disturbing prevalence of sexual harassment in education533 and the harmful impact of such harassment,534 it is

power, and its damage is compounded by the resulting feelings of confusion and humiliation which encourage a victim to keep it a secret.

Students of all ages are exceptionally vulnerable to the advances and sexual conduct of teachers, and are often incapable of either recognizing or objecting to the impropriety of their teachers' behavior. Elementary school-age children are taught to comply with the requests of parental authority figures, especially when they have been conditioned to believe that such figures would not do anything to harm them. These students will often not be cognitively capable of discerning the impropriety of a teacher's conduct nor capable of objecting to such conduct.

Roth, supra note 11, at 509-10 (footnotes omitted).


529. See Baker, supra note 18, at 305-06 (discussing the use of a strict liability standard for sexual harassment perpetrated by school employees).

530. See Stacy, supra note 18, at 1365-70 (advocating the use of agency principles for the determination of institutional liability for sexual harassment perpetrated by employees of an educational institution).

531. See Roth, supra note 11, at 516-19 (discussing the use of a negligence standard for the determination of liability for hostile environment sexual harassment).

532. See 914 F. Supp. 1018, 1024 (S.D.N.Y. 1996); see also supra notes 489-503 and accompanying text (discussing the standard in Pallett).

533. See supra notes 8-11 and accompanying text.
unlikely that the trend in American courts will be toward a standard that will decrease the possibility of redressing such a widespread, socially significant problem. Additionally, after the promulgation of the regulations recently proposed by the OCR, it is likely that federal courts hearing cases involving hostile environment sexual harassment perpetrated by school employees will apply agency principles to the determination of institutional liability.\footnote{See infra notes 734-38 and accompanying text (describing the standard of liability recently proposed by the OCR).}

3. Student Perpetrator/Student Victim

a. Viability of the Claim

The only federal court to hold that a hostile environment sexual harassment claim resulting from peer sexual harassment is not actionable under Title IX was the Federal Court for the Southern District of Texas in \textit{Garza v. Galena Park Independent School District}.\footnote{914 F. Supp. 1437, 1438 (S.D. Tex. 1994).} Rosa Garza alleged that the school district knew that her daughter, Stacy Marie Ruiz, was being sexually harassed by a fellow student and failed to react appropriately to the situation.\footnote{See \textit{id.} at 1437-38.} The \textit{Garza} court held a hostile environment sexual harassment claim cannot be maintained under Title IX.\footnote{See \textit{id.} at 1438 (citing \textit{Doe v. Petaluma City Sch. Dist.}, 830 F. Supp. 1560, 1575 (N.D. Cal. 1993))).} In addition, the court noted that the viability of a hostile environment claim under Title IX for peer sexual harassment was recognized by only one court, which held that a school's liability must be premised on a finding of intentional discrimination.\footnote{See supra notes 12-15 and accompanying text.} Thus, the \textit{Garza} court reasoned, even if hostile environment sexual harassment was actionable in the present case, the plaintiff's allegations that the district knew or should have known of the harassment and failed to respond adequately were insufficient to support an award of damages.\footnote{See \textit{id.}} The court dismissed the
plaintiff's Title IX claim. The United States Court of Appeals for the Tenth Circuit addressed a situation involving hostile environment sexual harassment resulting from peer sexual harassment in Seamons v. Snow. The district court that initially considered the case described the incident that led to the Title IX claim as follows: In the fall of his junior year, Brian Seamons was the backup quarterback on his high school football team. During a locker-room incident, Brian was taped naked to a towel rack and exposed to the girl he had taken to the homecoming dance a few weeks earlier. Brian reported the incident to the principal. Shortly after Brian reported the incident, the head football coach, Douglas Snow, dismissed Brian from the football team. The day after Brian was dismissed from the team, the superintendent of the school district canceled the rest of the football team's season as a direct result of the locker-room incident. Brian subsequently moved from his parents' house to reside with an uncle who lived in another county because he could not tolerate the treatment he received at school. Brian's parents filed suit under Title IX, alleging that the school district was liable for the creation and maintenance of a hostile educational environment. The district court disposed of Brian's claim by holding that a claim of hostile environment sexual harassment was not a viable cause of action under Title IX.

The Tenth Circuit did not adopt the reasoning of the district court.

541. See id.
542. 84 F.3d 1226 (10th Cir. 1996).
544. See id. at 1115.
545. See id.
546. See id.
547. See id.
548. See id.
549. See id.
550. See id.
551. See id. at 1118. The district court declined to apply relevant Title VII law. See id. In support of its position, the court noted that both Title IX and Title VI were enacted pursuant to Congress's Spending Clause power. See id. And, the court reasoned, legislation enacted pursuant to the Spending Clause was like a contract that requires Congress to be unambiguous when conditioning the grant of federal money. See id. (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). Therefore, the court concluded, because there was no cause of action for a hostile environment perpetuated through a school district's negligence included in Title IX, such a cause of action could not be properly imported from Title VII. See id.
court and explicitly noted that Title IX protected a student from hostile environment sexual harassment. The court pointed out, however, that a difference existed between a "hostile environment" and a "sexually charged hostile environment." Only the latter is actionable under Title IX. The court described the prima facie elements Brian needed to establish to succeed on his claim of hostile environment sexual harassment. After applying the standard to the facts alleged by Brian, the court held that Brian failed to establish that the harassment was based on sex. In addition, the court stated that it was unclear what liability the school would have for a hostile educational environment created by a student's peers. However, since Brian failed to establish a prima facie case of sexual harassment, the Tenth Circuit did not have to address the appropriate standard of institutional liability pertaining to such situations.

The United States District Court for the Eastern District of Pennsylvania addressed the viability of a hostile environment claim resulting from peer sexual harassment in Linson v. Trustees of the University of Pennsylvania. Brian Linson was a graduate student in Linguistics at the University of Pennsylvania when he allegedly was subjected to peer sexual harassment by another male graduate student. Linson informed the chairperson of the Graduate Group in Linguistics, Donald Ringe, of the other graduate student's actions. Linson filed suit alleging that the school had violated Title IX.


553. Id. at 1232.

554. See id.

555. The court noted that Brian had to establish:
   (1) that he is a member of a protected group; (2) that he was subject to unwelcome harassment; (3) that the harassment was based on sex; (4) that the sexual harassment was severe or pervasive so as unreasonably to alter the conditions of his education and create an abusive educational environment; and (5) that some basis for institutional liability had been established.

556. See id. The court noted that Brian failed to show that the subject of his lawsuit, the school's response to the locker room incident, was sexual in nature. See id. at 1232-33.

557. See id. at 1232 n.7.

558. See id.


560. See id. at *1. Linson alleged that Kenjiro Matsuda, another graduate student, "engaged in repeated unwanted conduct toward Plaintiff, which included verbal solicitations for sexual contact, unwanted touching of the private areas of Plaintiff's body, strangling, and other nonconsensual touching." Id.

561. See id. Matsuda complained to Ringe because Linson tampered with Matsuda's
IX in its handling of his sexual harassment complaint.\(^{562}\)

In considering Linson's claim, the court initially considered whether a complaint involving peer sexual harassment was actionable under Title IX.\(^{563}\) The court noted that many other courts had recognized the viability of claims for damages resulting from a "sexually hostile educational environment,"\(^{564}\) and concluded that a school may be liable for damages resulting from a situation involving peer sexual harassment "where intentional discrimination is shown."\(^{565}\) After recognizing the viability of Linson's claim, the court concluded that the plaintiff had failed to allege sufficient facts to support a finding of institutional liability because Linson "failed to point to anything in the record indicating that the University's alleged discriminatory actions were gender-motivated."\(^{566}\)

b. Standards of Liability

(1) Actual or Constructive Knowledge and the Failure to Take Appropriate Remedial Action

In Murray v. New York University College of Dentistry,\(^{567}\) the personal computer files. See id. When Ringe contacted Linson for a response to Matsuda's allegations, Linson informed Ringe of the sexual harassment to which he had been subjected. See id. \(^{562}\) See id. at *2. \(^{563}\) See id.

562. See id. at *2.

563. See id.

564. Id. (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74-75 (1992); Seamons v. Snow, 84 F.3d 1226, 1232 n.7 (10th Cir. 1996); Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995); Bolon v. Rolla Pub. Schs., 917 F. Supp. 1423, 1429 (E.D. Mo. 1996); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571 (N.D. Cal. 1993); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993)). Only three of the above cases specifically involve student-to-student sexual harassment claims. See Seamons, 84 F.3d at 1232 n.7 (recognizing a student's Title IX cause of action against a school district for damages suffered from a hostile educational environment created by other students); Davis, 74 F.3d at 1193 ("Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." (footnote omitted)); Petaluma, 830 F. Supp. at 1573 (deferring to OCR Letters of Finding, recognizing a cause of action for student-to-student sexual harassment).


566. Id. at *4. The court did not offer much reasoning with respect to its adoption of a particular standard of institutional liability, but it did note that the intent to discriminate could be inferred from the school's failure to respond appropriately to plaintiff's complaints. See id. at *3 ("[A] plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex.").

567. 57 F.3d 243 (2d Cir. 1995).
Court of Appeals for the Second Circuit addressed a hostile environment claim brought under Title IX. While Patricia Murray was a second-year student in the New York University College of Dentistry ("NYU"), she was subjected to sexual harassment by Mitchell Davidson, a patient at the school's clinic. Over the course of several months, Davidson stared at Murray, commented repeatedly on her appearance, asked her out for dates and made professions of love to her. Although Murray informed Ira Gulker, a doctor at the school, of the harassment, she was told that she should "grow up" and deal with the problem herself. Murray performed poorly during her second year and alleged that her performance had been adversely affected by the harassment she had suffered. After unsuccessfully appealing the school's determination that she should repeat her second year, Murray filed suit against the school under Title IX, alleging that the school had violated Title IX by failing to remedy the hostile environment created by the harassment once the school had notice of it.

The Murray court noted that courts addressing Title IX sex discrimination claims brought by employees generally have applied Title VII standards to the issue. However, no court had directly addressed the extent to which Title VII standards should apply to a claim brought by a student. The Murray court noted that the Supreme Court endorsed the invocation of Title VII principles when considering Title IX sexual harassment cases, and the court concluded that an educational institution may be liable for the sexual harassment of a student through application of standards similar to those utilized under Title VII.

568. See id. at 245. Although the patient was not a "student" in the same sense as the other perpetrators of sexual harassment in other cases in this section, discussion of this case is relevant because it pertains to the standard of liability for a hostile environment created by a non-employee of the institution. See id. at 248-50. In this sense, it is analogous to and indicative of how the Second Circuit is likely to treat peer sexual harassment cases.

569. See id. at 245.
570. Id.
571. See id. at 245-46.
572. See id. at 247.
573. See id. at 248 (citations omitted).
574. See id.
575. See id. at 249. The court reasoned:
The Court's citation of Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a Title VII case, in support of Franklin's central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those
The Murray court described the appropriate standard under Title VII and noted that with respect to harassment perpetrated by a person other than a supervisor, such as a co-worker, the proper standard of liability under Title VII is whether the employer knew or should have known of the harassment and failed to take appropriate action to remedy it. It was not clear to the court whether the school could be liable under Title IX through the constructive notice aspect of the standard. Without explicitly concluding whether the constructive knowledge standard was applicable to the liability determination under Title IX, the court held that the plaintiff's claim should be dismissed because she had failed to allege facts that would support the conclusion that the university had notice of the harassment even under the more liberal standard of constructive knowledge. The court held that the district court properly dismissed Murray's complaint for failure to state a claim.

(2) Actual Knowledge or No Reasonable Avenue of Complaint Available

The District Court for the Northern District of New York addressed the appropriate standard for institutional liability resulting from peer sexual harassment in Bruneau v. South Kortright Central School District. Eva Bruneau was a sixth-grade student at Kortright Central School District when she allegedly was subjected to peer sexual harassment. Bruneau alleged that she informed

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applied in cases under Title VII.

Id.

576. The court noted in order to establish a prima facie case of hostile environment sexual harassment, a plaintiff must allege "(1) that her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer." Id. (citations omitted).

577. See id.

578. See id. at 250.

579. See id. The court concluded:

We think it unnecessary to decide here to what extent we would apply a constructive-notice standard in cases under either Title VII or Title IX, however; for we conclude that, even assuming a broad application of that standard, and drawing all reasonable inferences in Murray's favor, the complaint fails to allege that even NYU's agents knew or should have known of the continued harassment in the present case.

Id.

580. See id. at 251.


582. See id. at 166. According to Bruneau, male students often called her and other
both her sixth-grade teacher, William Parker, and an assistant superintendent of the school, Lynda Race, of the harassment. In addition, Bruneau’s mother alleged that she also specifically told Parker and Race of the sexual harassment.

The Bruneau court began by considering the plaintiff’s contention that the substantive law from Title VII ought to govern the plaintiff’s hostile environment claim under Title IX and held that the substantive law from Title VII should apply to the case at bar. The court, however, qualified its holding by noting that there was a limit to the extent to which Title VII law ought to guide Title IX jurisprudence. After considering the manner in which other courts had utilized Title VII as a guide, the court concluded that one area in which Title VII principles should be modified in the Title IX context was in the area of institutional liability. The Bruneau court noted that Title VII permits a finding of institutional liability for hostile environment sexual harassment when the employer has actual or constructive notice of the harassment and fails to take appropriate remedial action. The court reasoned that the constructive notice standard was not appropriate in the Title IX context because “although an employee is an agent of an employer, a student, of an educational institution is not, per se, an agent of that institution.”

The Bruneau court ultimately concluded that a school would not be liable for peer sexual harassment unless the school had actual notice of the harassment but refrained from action, or provided no girls vulgar names such as “lesbian,” “prostitute,” “retard,” “scum,” “bitch,” “whore,” and “ugly dog faced bitch.” In addition, Bruneau alleged that the boys subjected her and female classmates to physical harassment, such as “snapping [their] bras, running their fingers down the girls’ backs, stuffing paper down the girls’ blouses, cutting the girls’ hair, grabbing the girls’ breasts, spitting, shoving, hitting and kicking.”

583. See id. at 166-67.
584. See id. at 167.
585. See id. at 168-69.
586. See id. at 169-70.
587. See id. at 170-71.
588. See id. at 174.
589. See id. at 172 (citing Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 715 (2d Cir. 1996); EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 34 (W.D.N.Y. 1994)).
590. Id. at 173. The court emphasized the lack of an agency relationship between the school and one of its students and noted:

In order for agency principles to attach between a student and their school there must be some manifestation of consent by the student to the school that the student shall act on the school’s behalf and subject to the school’s control, as well as, consent from the school to the student’s actions.

Id.
reasonable avenue of complaint. After acknowledging that there were genuine issues of material fact with regard to whether the school had actual knowledge of the harassment, the court concluded that it could not find as a matter of law that the school lacked the requisite notice for liability. Consequently, the Bruneau court denied the defendant's motion for summary judgment.

(3) Direct Proof of "Intentional" Discrimination

The first court to consider the issue of a school's liability for a hostile environment created through peer sexual harassment was the United States District Court for the Northern District of California in Doe v. Petaluma City School District. Jane Doe alleged that she was sexually harassed by her peers throughout the seventh and eighth grades. Doe also alleged that the school failed to take appropriate action after being informed of the harassment. Doe eventually transferred schools and completed her education at a private girls' school. As a result of the above facts, Doe filed suit against the school for allegedly violating Title IX.

The Petaluma court noted that no federal court had addressed whether peer sexual harassment was actionable under Title IX. However, the court observed that the OCR clearly held the opinion that an action for student-to-student sexual harassment may be maintained under Title IX, and reasoned that the findings of the OCR should be persuasive in interpreting the causes of action under

591. See id. at 177.
592. See id.
593. See id.
594. 830 F. Supp. 1560 (N.D. Cal. 1993), rev'd on other grounds, 54 F.3d 1447 (9th. Cir. 1995). The Ninth Circuit addressed one issue from the district court's decision in Doe v. Petaluma City School District, 54 F.3d 1447 (9th Cir. 1995). The Court of Appeals decision, however, pertained only to the district court's handling of the plaintiff's claim under 42 U.S.C. § 1983. A discussion of that issue is outside the scope of this Comment.
595. See Petaluma, 830 F. Supp. at 1564. Some of Doe's specific allegations included that students repeatedly made comments to her regarding sex with hot dogs. See id. at 1564-66. She stated that she was called a "hot dog bitch," "slut," and "hoe" by other girls. Id. at 1565. In addition, after Doe reported the harassment to school officials, she was threatened repeatedly by other students. See id. at 1564-65.
596. See id. at 1563, 1564.
597. See id. at 1566.
598. See id.
600. See Petaluma, 830 F. Supp. at 1573.
Title IX. The court began its analysis by acknowledging that the Supreme Court recognized an action for hostile environment sexual harassment in the Title VII context and that the Court indicated that Title IX is to be interpreted broadly. The court also pointed out that the First Circuit had recognized the viability of hostile environment sexual harassment under Title IX, although not in the context of peer sexual harassment. In addition, the court considered that both the First and the Tenth Circuits applied the substantive law from Title VII in order to analyze sex discrimination claims under Title IX. The court also noted that at least one court recognized the viability of hostile environment sexual harassment when the claim was caused by a school employee's behavior. With these considerations, the Petaluma court ultimately held that hostile environment sexual harassment resulting from peer sexual harassment is actionable under Title IX.

The Petaluma court also addressed the standard for institutional liability for such claims. The court stated, as a preliminary matter, that there was no authority for the extent of the private judicial remedies that are available under Title IX. As a result, the court began its analysis with the observation that Title IX was based on Title VI and "is to be interpreted in a similar manner." The court noted that in order to obtain compensatory relief under Title VI, a plaintiff must show discriminatory intent; a showing of discriminatory effect is insufficient. After briefly addressing the applicability of a "knew or should have known" standard for liability, the court concluded that it did not properly apply to

601. See id. According to the court, "[w]hile Letters of Finding are not due the deference of formal regulations, some deference is due to them as they express the opinion of an agency charged with implementing Title IX and its regulations." Id.
602. See id. at 1571 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).
603. See id. (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).
604. See id. (citing Lipsett v. University of Puerto Rico, 864 F.2d 881, 901 (1st Cir. 1988)).
605. See id. (citing Lipsett, 864 F.2d at 897; Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987)).
606. See id. at 1572 (citing Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297-98 (N.D. Cal. 1993)).
607. See id. at 1575.
608. See id.
609. See id. at 1573.
610. Id. (citing Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979)).
611. See id. (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 n. 27 (1983)).
student-to-student hostile environment harassment under Title IX.\textsuperscript{612} In order to receive monetary damages, a plaintiff must show that a school intentionally discriminated against the victim of the harassment on the basis of sex.\textsuperscript{613} Such a standard required the plaintiff to show that the school's action or inaction in response to the complaint of peer sexual harassment resulted from "actual intent to discriminate against the student on the basis of sex."\textsuperscript{614} The court dismissed the plaintiff's claim with leave to amend to reflect the theory of liability adopted by the court.\textsuperscript{615}

In \textit{Rowinsky v. Bryan Independent School District},\textsuperscript{616} the Court of Appeals for the Fifth Circuit followed the lead of the \textit{Petaluma} court with respect to its adoption of a standard for institutional liability for peer sexual harassment under Title IX.\textsuperscript{617} Janet Doe was an eighth-grade student at Sam Rayburn Middle School when she was subjected to sexual harassment by male students while riding the school bus.\textsuperscript{618} Although Janet consistently complained to the bus driver about the harassment, after he failed to stop the action, she stopped reporting the incidents.\textsuperscript{619} School officials also were informed of some of the physical assaults.\textsuperscript{620} In response to the reports, the school suspended one of the offenders from riding the bus for three days,\textsuperscript{621} but Janet was sexually harassed by another boy

\begin{itemize}
\item \textsuperscript{612} \textit{Id.} at 1575-76. According to the court, the implication of the Supreme Court's decision in \textit{Franklin v. Gwinnett County Public Schools}, 503 U.S. 60 (1992), was that the remedies under Title IX are not coextensive with the remedies under Title VII. \textit{See Petaluma}, 830 F. Supp. at 1575 (citing \textit{Franklin}, 503 U.S. at 60, 65 n.4). In \textit{Franklin}, the Court recognized that damages under Title IX may be awarded only upon a showing of intentional discrimination by the school. \textit{See Franklin}, 503 U.S. at 74-75. The \textit{Petaluma} court reasoned that a finding that the school is liable because it "knew or should have known" of the harassment would not be the same as finding that the school "intentionally discriminated" against the student. \textit{Petaluma}, 830 F. Supp. at 1576. Therefore, in order to comply with the Supreme Court's holdings in \textit{Franklin} and \textit{Guardians}, the "knew or should have known" standard had to be rejected. \textit{Id.}
\item \textsuperscript{613} \textit{See Petaluma}, 830 F. Supp. at 1576.
\item \textsuperscript{614} \textit{Id.}
\item \textsuperscript{615} \textit{See id.}
\item \textsuperscript{616} 80 F.3d 1006 (5th Cir. 1996), \textit{cert. denied}, 117 S. Ct. 165 (1996).
\item \textsuperscript{617} \textit{See id.} at 1008 ("[T]itle IX does not impose such liability, absent allegations that the school district itself directly discriminated based on sex.").
\item \textsuperscript{618} \textit{See id.} at 1008-09. G.S., a male student, grabbed Janet's genital area and her breasts. \textit{See id.} at 1008. In addition, G.S. verbally harassed Janet by saying such things to her as "'When are you going to let me fuck you?', 'What bra size are you wearing?', and 'What size panties are you wearing?'" \textit{Id.} L.H., another male student, placed his hand up Janet's skirt. \textit{See id.} at 1009.
\item \textsuperscript{619} \textit{See id.} at 1008.
\item \textsuperscript{620} \textit{See id.}
\item \textsuperscript{621} \textit{See id.}
\end{itemize}
in one of her classes.\textsuperscript{622} When Janet's mother, Debra Rowinsky, met with the superintendent of the school to discuss the harassment, Ms. Rowinsky was informed that it was the school's position that the situations had been handled appropriately and that no further action would be taken by the school.\textsuperscript{623} As a result, Ms. Rowinsky filed suit under Title IX alleging that the school was liable for the hostile environment sexual harassment her daughter experienced.\textsuperscript{624}

The Fifth Circuit stated that the issue in the case was whether the school could be liable for a hostile environment created by "a party other than the grant recipient or its agents."\textsuperscript{625} The court considered the text of Title IX and, concluding that the statute offered no definitive answer to the issue,\textsuperscript{626} turned to the scope and structure of the Act itself, its legislative history, and the interpretations of the agency charged with executing the statute.\textsuperscript{627} With respect to the scope of Title IX, the court emphasized that Title IX was enacted pursuant to the Spending Clause.\textsuperscript{628} With that observation as its premise, the court reasoned that "[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX."\textsuperscript{629} In addition, according to the Rowinsky court, the legislative history of Title IX supported the conclusion that schools should not be liable for the acts of its

\textsuperscript{622} See id. at 1009. F.F., another male student, reached up Janet's shirt and unfastened her bra. See id. When the vice-principal was informed of the action, he suspended F.F. from school for the rest of the day, and the day thereafter. See id.

\textsuperscript{623} See id. Mrs. Rowinsky was not advised of Title IX or of the school's sexual harassment policy. See id.

\textsuperscript{624} See id. at 1010.

\textsuperscript{625} Id.

\textsuperscript{626} See id. at 1012.

\textsuperscript{627} See id.

\textsuperscript{628} See id. at 1012-13. The court acknowledged that the Supreme Court had never explicitly recognized that Title IX was enacted pursuant to the Spending Clause. See id. at 1012 n.14. The court noted that it was possible that Title IX was enacted pursuant to Section Five of the Fourteenth Amendment. See id. Only case law suggested that because Title IX was modeled after Title VI, which was passed pursuant to the Spending Clause, Title IX also must have been passed pursuant to the Spending Clause. See id.

\textsuperscript{629} Id. at 1013 (footnote omitted). It is important to note that most of the court's reasoning in this section stemmed from a basic misunderstanding of the action for which damages were being sought under Title IX in situations such as the one in Rowinsky. Damages were not being sought simply because the plaintiff was harassed by a fellow student. Rather, the damages were being sought because of the school's failure to adequately respond to the situation. It was the school that failed to adequately remedy the harassment once it had knowledge of it. See id. at 1023-24 (Dennis, J., dissenting).
students in creating a hostile sexual environment for other students.630

Finally, the court discussed the Office of Civil Rights's interpretations of the statute631 and quoted from a Policy Memorandum issued by the OCR: "'Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX.'"632 The Rowinsky court noted that the implementing regulations of Title IX discuss only the acts of the grant recipients.633 The court dismissed the OCR Letters of Finding that addressed peer sexual harassment by stating that the letters should be "accorded little weight," particularly because the Policy Memorandum was more consistent with prior OCR determinations,634 but also because Letters of Finding do not warrant the same amount of deference due a statute interpreted by its implementing agency.635

Ultimately, the Rowinsky court held that in order for a school to be liable for a hostile environment resulting from peer sexual harassment, a plaintiff must show "that the school district responded to sexual harassment differently based on sex."636 Such a standard may be met by showing that the school treated the sexual harassment of one sex less seriously than it treated the sexual harassment of the other sex or ignored the sexual harassment of one sex while addressing the sexual harassment of the other sex.637 The court concluded that Rowinsky failed to demonstrate facts that supported such a finding and consequently affirmed the district court's dismissal

630. See id. at 1013 ("Throughout the legislative history, both supporters and opponents of the amendment focused exclusively on acts by the grant recipients.").

631. See id. at 1014-16.

632. Id. at 1015 (quoting OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981 (emphasis added)).

633. See id. (citing 34 C.F.R. § 106.31 (1995)).

634. See id. ("The Policy Memorandum deserves more deference because it represents a deliberate policy statement by the agency and is consistent with past agency interpretations.").

635. See id. The court emphasized the context in which the Letters of Finding are written. According to the court, the purpose of the letters is to compel voluntary compliance with the Act, and as a result, "pressures to settle" have a significant effect on their content. Id.

636. Id. at 1016.

637. See id.
of her claim.\footnote{See id.}

(4) Intentional Discrimination as Inferred from Totality of the Circumstances

The Federal Court for the Western District of Missouri adopted a slightly different standard in \textit{Bosley v. Kearney R-1 School District}.\footnote{904 F. Supp. 1006 (W.D. Mo. 1995).} Jennifer Bosley was a minor student in the Kearney R-1 School District when she allegedly was sexually harassed by fellow students.\footnote{See id. at 1015.} Jennifer's mother reported the harassment to the OCR, which investigated the incidents and determined that each one had been handled properly by the school.\footnote{See id.} As a result of the harassment, Mrs. Bosley eventually withdrew her children from the school and home schooled them.\footnote{See id. at 1015-16.} She also filed suit on behalf of her daughter, alleging that the school was liable for violating Title IX.\footnote{See id. at 1012-13.}

As a preliminary matter, the \textit{Bosley} court noted that in order to succeed in her Title IX action, Jennifer would have to show "that defendant's failure to take adequate remedial action in response to her complaints of sexual harassment by her peers was the result of intentional discrimination based on her sex."\footnote{Id. at 1020.} The court acknowledged that the identification of discriminatory conduct is difficult and specified that "in the context of the claims in this case, plaintiff must show that the school district selected a particular course of action in responding to her complaints of sexual harassment at least in part 'because of' plaintiff's sex."\footnote{Id. at 1021.}

The court then discussed in greater detail the appropriate standard for institutional liability for peer sexual harassment under Title IX.\footnote{See id. at 1021-22.} The court pointed out that under the relevant Title VII law, discriminatory intent can be inferred from the totality of the circumstances surrounding the harassment.\footnote{See id. at 1021.} Specifically, under Title VII, discriminatory intent could be derived from "the cumulative evidence of action and inaction which objectively
manifests discriminatory intent.' Next, the court discussed why the relevant law from Title VII regarding the establishment of discriminatory intent should apply to sexual harassment claims under Title IX. The Bosley court concluded that "[t]he standards developed under Title VII to protect employees from sex discrimination by employers are adaptable to protect persons participating in federally supported educational programs from sex discrimination by the educational institution receiving federal financial aid." Thus, the court held that "[o]nce a school district becomes aware of sexual harassment, it must promptly take remedial action which is reasonably calculated to end the harassment." In Davis v. Monroe County Board of Education, the Eleventh Circuit addressed both the viability of a hostile environment sexual harassment claim resulting from peer sexual harassment and the proper standard for institutional liability. LaShonda D. was a fifth-grade student when she was sexually harassed by G.F., a male classmate. G.F.'s actions were so severe that he pled guilty to sexual battery. In spite of the fact that LaShonda reported all the incidents to her teachers and her mother, the school took no action to remedy G.F.'s behavior. As a result of G.F.'s harassment and the school's failure to respond to LaShonda's complaints,

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648. Id. at 1020 (quoting Dowdell v. City of Apoka, Fla., 698 F.2d 1181, 1185 (11th Cir. 1983)).
649. See id. at 1021-23.
650. Id. at 1023.
651. Id.
652. 74 F.3d 1186 (11th Cir. 1996).
653. See id. at 1193.
654. See id. at 1194.
655. See id. at 1188. G.F. attempted to fondle LaShonda and directly used offensive language against her. See id. at 1188-89. The court described specific instances of G.F.'s conduct:
In December . . . G.F. attempted to touch LaShonda's breasts and vaginal area, telling her, "I want to get in bed with you," and "I want to feel your boobs." Two similar incidents occurred in January 1993. In February, G.F. placed a doorstop in his pants and behaved in a sexually suggestive manner toward LaShonda. Other incidents occurred later in February and in March. In April, G.F. rubbed against LaShonda in a sexually suggestive manner.
Id. at 1189.
656. See id.
657. See id. Some of the school's responses to LaShonda's and her mother's complaints included her classroom teacher's refusal to allow LaShonda to report G.F.'s behavior to the principal; her teacher's refusal to change LaShonda's seating assignment, which was located next to G.F.'s assigned seat; the principal's questioning of LaShonda—why "[s]he the only one complaining?"; and the failure of school officials to remove or discipline G.F. in any way for his behavior. See id.
LaShonda's mother, Aurelia Davis, filed a lawsuit against the school alleging that their actions in handling the situation violated Title IX. The district court dismissed the Title IX claim, reasoning that the school had not played a part in LaShonda's harassment because peer sexual harassment cannot properly be considered a "school program or activity" within the meaning of Title IX. The Court of Appeals for the Eleventh Circuit, however, reached a different conclusion.

The Eleventh Circuit categorized the issue before it as "whether the Board's alleged failure to take action to stop G.F.'s sexual harassment of LaShonda 'excluded [her] from participation in, . . . denied [her] the benefits of, or . . . subjected [her] to discrimination under' the Monroe County educational system because of her sex." In addressing whether the substantive law from Title VII ought to apply to sexual harassment claims brought under Title IX, the court considered Supreme Court precedent involving the interpretation of Title IX and lower court cases involving sex discrimination claims brought under Title IX. The court concluded that Title VII principles ought to apply to the case, and held that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate

658. See id. at 1188.
660. See Davis, 74 F.3d at 1188, 1195.
661. Id. at 1189 (quoting 20 U.S.C. § 1681(a) (1988)).
662. See id. at 1189-92.
663. See id. at 1190. The Davis court noted that Title IX is to be construed broadly, see id. (citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)), that a private right of action is available under Title IX, see id. (citing Cannon v. University of Chicago, 441 U.S. 677, 717 (1979)), and that monetary damages are allowed for violation of Title IX, see id. (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992)).
664. See id. at 1190-92. The court noted that "courts have regularly applied Title VII principles" to the review of sex discrimination claims brought by both teachers and students under Title IX. Id. at 1190-91. The court also pointed out that several lower courts have interpreted the Franklin decision as authorizing the application of substantive Title VII law to Title IX claims for sexual harassment. See id. at 1191-92 (discussing Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571-75 (N.D. Cal. 1993)).
665. See id. at 1192 ("[S]uch application is supported by Franklin, Title IX's legislative history and the Supreme Court's mandate that we read Title IX broadly, as well as by findings of the OCR.").
the harassment."

The court emphasized that Davis was suing the school not because of G.F.'s conduct, but rather because of the school's legally actionable lack of reaction to his conduct. As in the applicable Title VII law, an educational institution is responsible for maintaining a harassment-free environment for its students, which includes taking responsibility for harassment stemming from other students as well as from school employees. The court summarized the elements required for the establishment of a prima facie case of hostile environment sexual harassment and clarified the standard of proof required with respect to the severity of the environment by summarizing the standard set forth by the Supreme Court in Harris. With respect to the facts of the case, the court concluded that the first four elements of the cause of action (which deal with the harassment itself) had been sufficiently alleged to survive the defendant's motion for summary judgment.

The court then considered the appropriate standard for the school's institutional liability and reasoned that the school could be liable for G.F.'s actions if the evidence revealed that the school knowingly failed to remedy the hostile environment. Further, LaShonda could show that the school had knowledge of the hostile environment by producing evidence that she complained to a "higher level manager" about G.F.'s conduct, or that the conduct was pervasive, in which case it would support an inference that "higher level management" knew of the harassment. The court noted that

666. Id. at 1193.
667. See id.
668. See id. at 1193-94. The court emphasized that a sexually hostile environment caused by students has the same effect as one caused by employees: it denies the student the full benefit of her education, which violates the guarantee of Title IX. See id. at 1194.
669. See id. According to the Davis court, in order to establish a prima facie case of hostile environment sexual harassment stemming from peer sexual harassment, a plaintiff must establish:

(1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.

Id.
670. See id. For a description of the standard adopted by the Harris Court, see supra notes 35-38 and accompanying text.
671. See Davis, 74 F.3d at 1194-95.
672. See id. at 1194.
673. See id. at 1195. The court implicitly adopted the "knew or should have known"
LaShonda reported incidents of harassment to the school authorities on at least three different occasions. In addition, Davis alleged that in spite of the knowledge of the situation, the school failed to take any action to redress the problem. The court held that Davis's allegations were sufficient to raise genuine issues of material fact with respect to institutional liability and reversed the district court's dismissal of the case.

Still another federal court addressed a hostile environment claim resulting from peer sexual harassment in *Burrow v. Postville Community School District*. Lisa Burrow was a sophomore at Postville Community High School when she was allegedly subjected to a hostile environment because of sexual harassment by her peers. Lisa's parents repeatedly reported the incidents to the superintendent of the school and the principal. Mr. and Mrs. Burrow obtained an attorney who spoke to the superintendent and the principal about Lisa's situation. Lisa also discussed the situation with a teacher and a guidance counselor at the school. While several school employees made promises that the situation would be handled, nothing was ever done to change the students' behavior. Officials from the school admitted that, at the time of Lisa's harassment, the school did not have a sexual harassment policy in place and that several of the incidents reported by Lisa were never investigated by the school. Eventually, a lawsuit was filed alleging that the school's failure to remedy Lisa's situation

standard of notice for the purpose of institutional liability. See id.  
674. See id.  
675. See id.  
676. See id.  
678. See id. at 1196-97. The court summarized the behavior to which Lisa was allegedly subjected:  
[S]tudents repeatedly called Lisa vulgar names of a sexual nature and yelled sexual obscenities at her, such as “slut,” “whore,” “bitch,” “skank,” and “fuckin' tramp;” students repeatedly threw food and spit wads at Lisa, pushed her into her locker, elbowed her and intentionally ran into her in the hallway; a male student repeatedly kicked her between her legs in a sexually offensive manner; students stole her book bag and wrote sexual obscenities and threats on her books, her folders, her locker and school bathroom walls; and students repeatedly threatened her life.  
Id. at 1197.  
679. See id.  
680. See id.  
681. See id.  
682. See id.  
683. See id. at 1197-98.
violated Title IX. The Burrow court recognized that there was a split in the circuit courts regarding the appropriate standard for institutional liability for situations involving peer sexual harassment. The court noted that in the Eleventh Circuit, a school could be liable for failing to take prompt remedial action in response to a hostile environment created by students if the school knew or should have known of the harassment. In contrast, in the Fifth Circuit, a school could be found liable for peer sexual harassment only if a plaintiff could show a disparity in the way the school handled sexual harassment complaints based on the victim’s sex. The Burrow court also considered the standards adopted by the district courts that had addressed the issue of institutional liability, noting that most district courts seemed to require a showing of intentional discrimination. Moreover, the Bosley court added that under the standard adopted by the district courts, intentional discrimination can be inferred from the pervasiveness of the behavior or from evidence that the school failed to stop the harassment even when it had actual knowledge of such harassment.

The Burrow court concluded that in order to support a finding of institutional liability, Lisa must establish an “intent to discriminate” on the part of the school district. The requisite intent

684. See id. at 1196.
685. See id. at 1200.
686. See id. at 1201 (discussing Davis v. Monroe County Board of Education, 74 F.3d 1186, 1195 (11th Cir. 1996)). The court also noted that the Davis standard of school liability for peer sexual harassment was endorsed, in dicta, by the Tenth Circuit in Seamons v. Snow, 84 F.3d 1226, 1232-33 (10th Cir. 1996), but the Seamons court never reached the issue of the school’s liability, dismissing the plaintiff’s claim because the harassment suffered by the plaintiff was not sexual in nature. See Burrow, 929 F. Supp. at 1202 (discussing Seamons). In addition, the court noted that the Ninth Circuit also discussed the issue of institutional liability without explicitly adopting a standard in Doe v. Petaluma City School District, 54 F.3d 1447, 1452 (9th Cir. 1994). See Burrow, 929 F. Supp. at 1203 n.7. The Burrow court noted that the Ninth Circuit stated, in dicta, that a school official might not be entitled to immunity if the official failed to remedy a hostile environment that he or she knew or should have known about. See id. However, because the district court’s disposition of the claim against the school had not been appealed, the Ninth Circuit escaped having to adopt a standard for institutional liability. See id.
689. See id. at 1204 (citing Bosley, 904 F. Supp. at 1021; Oona R.-S., 890 F. Supp. at 1466; Petaluma, 830 F. Supp. at 1575).
690. Id. at 1205.
could be established through either direct or indirect evidence, and ... that in the absence of direct evidence, an intent to discriminate on the part of the school district may be inferred by the finder of fact from the totality of relevant evidence, including the school's failure to prevent or stop the sexual harassment despite actual knowledge of the sexually harassing behavior of students over whom the school exercised some degree of control. 691

The court held that Lisa alleged facts sufficient to allow a trier of fact to infer that the school district intentionally discriminated against her. 692

The United States District Court for the Northern District of Iowa adopted the Burrow standard in Wright v. Mason City Community School District. 693 Heather Wright was raped by a former boyfriend in junior high school and pressed charges. 694 As a result, she was "unmercifully tormented" by other students at her high school. 695 Heather filed suit against the school district, alleging that the school was liable for failing to adequately respond to the hostile environment to which she was subjected. 696

691. Id. In applying the standard to the facts of the case, the court summarized the evidence in Lisa's case which supported the inference that the school intentionally discriminated against her, including evidence that the school district knowingly failed to respond appropriately to peer sexual harassment of Lisa despite numerous reports by Lisa, her Parents, her attorney, various teachers and the OCR; evidence that the school district knowingly failed to implement appropriate sexual harassment policies and grievance procedures; evidence that the school district tolerated the harassment of Lisa by failing to promptly investigate and/or punish students for peer sexual harassment; evidence that school officials characterized the sexually harassing conduct as students "picking on each other;" evidence that the school district failed to remove obscenities and threats scratched onto Lisa's school locker and the school bathroom walls for several months despite numerous requests from Lisa and her Parents; evidence that a member of the school board is the father of one of the students who allegedly participated in the harassment of Lisa; evidence that the school district failed to inquire into Lisa's increasing tardiness and absences from school; and evidence that the school district chose to remove Lisa from the hostile sexual environment and granted her request to graduate early, rather than attempting to eliminate the hostile environment.

Id.

692. See id.


694. See id. at 1414.

695. Id. According to the court, Heather was called vulgar names, was the subject of humiliating graffiti, and was harassed physically. See id.

696. See id.
In considering the issue of institutional liability, the Wright court noted that the subject had been the cause of conflicting opinions in the appellate courts. The court then analyzed the standards adopted by the Eleventh Circuit in *Davis v. Monroe County Board of Education* and the Fifth Circuit in *Rowinsky v. Bryan Independent School District*. Ultimately, the holdings of both *Davis* and *Rowinsky* were rejected in favor of the standard adopted by the court in *Burrow v. Postville Community School District*.

The Wright court reasoned that the Burrow standard was a modified version of the *Davis* standard. More specifically, while the *Davis* standard permitted a finding of institutional liability to be premised on a showing that the school had been negligent in its handling of a student's complaint of peer sexual harassment, the Burrow standard required a showing that the school's failure to respond appropriately to the complaint was intentional.

According to the Wright court, for a school to be liable for peer sexual harassment, a plaintiff must show "that the educational institution knew of the harassment and intentionally failed to take the proper remedial measures because of the plaintiff's sex." The Wright

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697. See id. at 1416. The court recognized the "enormous social implications" of the issue before it and implied that the decision was one best left to Congress. Id. at 1414 ("[T]his court wishes that Congress would step in and simply tell us whether it intended to make school districts responsible for the payment of damages to students under these circumstances."). Because no legislative action was forthcoming, the court attempted to determine Congress's intent and to identify the correct standard for evaluating institutional liability under Title IX. See id.

698. 74 F.3d 1186 (11th Cir. 1996). For a discussion of the *Davis* standard and the Eleventh Circuit opinion, see supra notes 652-76 and accompanying text. The Wright court summarized the *Davis* standard as one that "imposes liability on a school board for a hostile educational environment created by a student's peers when the school board knows or should know of the harassment and fails to take prompt action to remedy the situation." Wright, 940 F. Supp. at 1417. The court described the *Davis* standard as one that was premised on negligence. See id. at 1417.

699. 80 F.3d 1006 (5th Cir. 1996), cert. denied, 117 S. Ct. 165 (1996). For a discussion of the standard adopted by the *Rowinsky* court and a description of the court's opinion, see supra notes 616-38 and accompanying text. The Wright court summarized the *Rowinsky* standard of liability as one where "a plaintiff 'must demonstrate that the school district responded to sexual harassment claims differently based on sex.'" Wright, 940 F. Supp. at 1418 (quoting *Rowinsky*, 80 F.3d at 1016).

700. See Wright, 940 F. Supp. at 1419 (requiring intentional failure by the institution to appropriately redress the sexually discriminating behavior, and discussing *Burrow v. Postville Community School District*, 929 F. Supp. 1193, 1205-06 (N.D. Iowa 1996)); see also supra notes 677-92 and accompanying text (discussing *Burrow*).

701. See Wright, 940 F. Supp. at 1419-20.

702. Id. at 1420.
c. Trends in Student Perpetrator/Student Victim Case Law

A review of the above decisions reveals that hostile environment sexual harassment stemming from peer sexual harassment has been considered a viable cause of action by the majority of courts that have addressed the issue. The courts, however, have split in regard to the proper standard of institutional liability for situations involving peer sexual harassment. The various standards that have been adopted can be described as follows.

The Fifth Circuit and one district court adopted a standard of liability under which a school is liable for a hostile educational environment resulting from peer sexual harassment only if a plaintiff can demonstrate that the school reacted to the plaintiff's complaint with the intention to discriminate against that particular plaintiff because of the plaintiff's sex. This standard causes some concern. First, because of the prevalence of sexual harassment perpetrated against girls, it is possible that a school may have to address sexual harassment complaints brought only by girls. For a female plaintiff who attends that school, a standard requiring her to show how the school handles similar complaints brought by boys seems to pose an insurmountable burden. Second, under the theory adopted by the

703. See id.
704. See id.
705. See id.
707. See Rowinsky, 80 F.3d at 1016; Petaluma, 830 F. Supp. at 1576.
708. One commentator has noted that a recent study conducted by the American Association of University Women ("AAUW") for the purpose of determining the extent of sexual harassment in United States school systems revealed that "[a]lthough both girls and boys experience sexual harassment in school, more girls reported such harassment than did boys. In addition, girls report being harassed more often than boys." See Davis, Reading, Writing, supra note 22 at 1125; see also Sherer, supra note 17, at 2128 ("[Y]oung women are much more likely to be the victim of sexual harassment than young men.").
Fifth Circuit, it also would be possible for a school to escape liability for peer sexual harassment by refusing to respond to complaints of sexual harassment made by both boys and girls, because as long as a school refuses to address complaints of either sex, the school will succeed in treating all peer sexual harassment allegations equally, regardless of the sex of the complainant, and thus will escape liability.

The Second Circuit adopted a second standard of institutional liability, holding that a Title VII standard should apply to peer sexual harassment under Title IX. Specifically, when a hostile environment is created by a third party—a person not affiliated with the educational institution—the school will be liable for the hostile environment if the plaintiff can prove that the school knew or should have known of the harassment and failed to take appropriate remedial action. It is important to note, however, that the Second Circuit declined to hold that a school will be liable for its failure to remedy a hostile environment if the school had only constructive knowledge of the harassment.

One district court within the Second Circuit took advantage of the Second Circuit's reluctance to endorse a constructive knowledge standard and instead adopted a more stringent standard requiring a plaintiff to show that the school had actual notice of the peer sexual harassment and failed to react appropriately to the situation. This standard, however, also allows institutional liability when the school "provided no reasonable avenue of complaint."

The Eleventh Circuit, along with two district courts, adopted the final standard of liability, which holds a school liable for the hostile environment caused by peer sexual harassment when a plaintiff can show that the school intentionally discriminated against her in its

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710. See id. at 249-50. As previously mentioned, the Second Circuit's analysis in Murray is applicable to peer harassment because it states that a school may be liable for a hostile environment created by someone other than an employee; thus, it is indicative of the kind of analysis the Second Circuit would follow in student-to-student sexual harassment cases. See supra note 568.

711. See Murray, 57 F.3d at 250. The court disposed of the case by determining that the plaintiff had failed to meet even a constructive knowledge standard. See id. The court reasoned that if the plaintiff could not meet a constructive knowledge standard, she would also be unable to meet a standard requiring that the school have actual knowledge of the harassment. See id.


713. Id.
treatment of her complaint. The school's intention to discriminate can be inferred from the way it handles the complaint. Under this standard, a plaintiff may recover damages resulting from peer sexual harassment if the plaintiff can demonstrate successfully that the school knew or should have known of the harassment and failed to take appropriate remedial action.

Many commentators have addressed the issue of peer sexual harassment for the specific purpose of advocating or criticizing various standards of institutional liability. A review of the articles reveals that authors consistently advocate that an educational institution should be liable for peer sexual harassment if it knew or should have known of the harassment and failed to take appropriate remedial action. A common theme in these articles is that the damage resulting from hostile environment sexual harassment in educational contexts is at least as harmful to its victims as is hostile environment sexual harassment in the employment context. The standard adopted by these commentators and by the majority of the above courts does not hold educational institutions strictly liable for peer sexual harassment; rather, the standard requires that the school have some kind of notice of the harassment before liability may be found. At the same time, the standard prevents a school from

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715. See Davis, 74 F.3d at 1193; Burrow, 929 F. Supp. at 1205; Bosley, 904 F. Supp. at 1023.

716. See Davis, 74 F.3d at 1193; Burrow, 929 F. Supp. at 1205; Bosley, 904 F. Supp. at 1023. This standard seems to be slightly different than that adopted by the Murray court in that a school's liability may be premised on its constructive notice of the harassment.

717. See, e.g., Davis, supra note 18, at 220-21 (discussing differences in the standards of liability adopted by the Fifth and Eleventh Circuits); Nixon, supra note 17, at 251-257 (discussing the Davis standard of liability adopted by the Eleventh Circuit); Recent Case, 110 HARV. L REV. 787, 790-92 (1997) (criticizing the standard of liability adopted by the Fifth Circuit).

718. See, e.g., Bodnar, supra note 8, at 585; Eriksson, supra note 8, at 1815; Elizabeth J. Gant, Comment, Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972—An Avenue of Relief for Victims of Student-to-Student Sexual Harassment in the Schools, 98 DICK. L REV. 489, 506 (1994); Miller, supra note 10, at 718; Sherer, supra note 17, at 2157, 2164-65.

719. See Gant, supra note 718, at 512 (explaining how sexual harassment in schools yields results similar to sexual harassment in employment); Miller, supra note 10, at 721 ("[A] hostile environment may be more detrimental in the academic setting under Title IX than in the workplace."); Sherer, supra note 17, at 2123 (analogizing the damage suffered by sexual harassment victims in the educational context to that suffered by victims in the employment context).

720. See Eriksson, supra note 8, at 1815 ("This standard satisfies the notice
escaping liability by closing its eyes to pervasive peer sexual harassment.\textsuperscript{721}

Peer sexual harassment can have a significant effect on a student’s access to educational opportunity.\textsuperscript{722} If Title IX is to be effective in guaranteeing equal educational opportunity to students regardless of their sex, the law must offer a viable remedy to students who are deprived of that equal educational opportunity when they are victimized by peer sexual harassment.\textsuperscript{723} A "knew or should have known" standard offers a plaintiff an opportunity to hold a school liable for the damage suffered as a result of sexual harassment.\textsuperscript{724} Despite the contrary holding by the Fifth Circuit, it is likely that federal courts will begin to adopt the standard described in the above paragraph. It is this standard that was adopted by the OCR in the recently proposed regulations pertaining to sexual harassment in education.\textsuperscript{725}

\section*{III. CONCLUSION}

This Comment has summarized the different standards for institutional liability under Title IX for sexual harassment in education. The cases were analyzed within a framework depicting the types of people involved in the harassment. While that requirement because schools would be liable only if they intended to discriminate or if, despite their awareness that sexual harassment was a pervasive problem, they did nothing to remedy the situation."; Sherer, \textit{supra} note 17, at 2165 ("The school's knowledge may be shown through complaints that were lodged with the school or by demonstrating that the harassment was so pervasive that the school's awareness may be inferred." (footnotes omitted)).

\textsuperscript{721} See Eriksson, \textit{supra} note 8, at 1816 ("Courts could infer intent from the school's blatant and reckless disregard for the well-being of victims of harassment."); Sherer, \textit{supra} note 17, at 2164 ("Although it is unrealistic to hold a school accountable for every isolated incident of sexual harassment, it is not an unfair burden on a school to take measures to prevent a sexually hostile atmosphere from pervading a school that both males and females attend.").

\textsuperscript{722} See Sherer, \textit{supra} note 17, at 2153 ("Peer sexual harassment can impair academic progress and inhibit the attainment of goals so that a young woman is effectively limited in her educational and career opportunities and, consequently, economic potential.").

\textsuperscript{723} See Eriksson, \textit{supra} note 8, at 1816 (pointing out that without a viable mechanism by which they could hold schools liable, victims of peer sexual harassment would not be compensated and schools would have no incentive to prohibit harassing conduct); Gant, \textit{supra} note 718, at 514 ("Holding schools accountable for the conduct of students will promote the equal opportunities for women that Title IX was enacted to protect.").

\textsuperscript{724} See Sherer, \textit{supra} note 17, at 2164 ("Under this proposal, the burden is placed on the school to discourage and eliminate sexual harassment. This responsibility is consonant with a school's duty under Title IX to provide equal educational opportunities.").

\textsuperscript{725} See \textit{infra} notes 739-41 and accompanying text (describing the standard recently proposed by the OCR for institutional liability for peer sexual harassment).
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categorization was intended to provide some clarity to the discussion of institutional liability, it actually served to illuminate the division in the federal court system with regard to the proper standard for institutional liability under Title IX within each category. The description of the law in the section describing sexual harassment under Title IX in the employment context remains an accurate description of the status of the law today. However, the description of the law in the other sections, including the quid pro quo section, may be fundamentally affected by action taken by the Office for Civil Rights at the end of 1996.

On October 4, 1996, the Office of Civil Rights issued a Request for Comments regarding the "clarity and completeness" of a guidance notice entitled "Appendix One—Sexual Harassment Guidance: Harassment of Students by School Employees" ("Appendix One"). Also included was a second appendix entitled "Appendix Two—Sexual Harassment Guidance: Peer Sexual Harassment" ("Appendix Two"). Both appendices summarized the standards used by the OCR in evaluating claims of sexual harassment under Title IX in their respective contexts. The OCR issued Appendix One for the purpose of soliciting comments on the standards contained within it. According to the OCR, "[o]nce the comments are assessed, OCR plans to publish a single document in the Federal Register combining the guidance found in Appendix One and Appendix Two."

The effect the standards will have on the status of the law with respect to the standards of liability under Title IX is not clear. A number of courts have noted the relevance of the OCR's interpretation of the issue of sexual harassment of Title IX. A

726. See supra notes 155-244 and accompanying text.
727. See Office for Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52,172 (proposed Oct. 4, 1996). The purpose of Appendix One is "to inform educational institutions that receive Federal financial assistance regarding the standards that OCR follows, and that institutions should follow, when investigating allegations that Title IX has been violated because of sexual harassment by employees." Id.

728. See id. at 52,175.
729. See id. at 52,172, 52,175.
730. See id. at 52,172 ("The Assistant Secretary solicits from all interested parties written comments on the clarity and completeness of this Guidance, which is appended to the notice as Appendix One.").
731. Id.
policy statement by the OCR, however, will not have the effect of overturning the relevant case law. Instead, it is likely that future courts will give weight to the OCR's interpretation of the issue of institutional liability while still considering other relevant interpretations of the law. Therefore, a brief summary of the standard proposed by the OCR is warranted.

With respect to sexual harassment of students by school employees, the OCR noted in Appendix One that "[s]exual harassment of students by a school employee is a form of prohibited sex discrimination." The OCR also stated that both quid pro quo and hostile environment sexual harassment are actionable under Title IX. Finally, the OCR reasoned that an educational institution's liability for any type of sexual harassment by its employees should be analyzed using agency principles. In cases of quid pro quo harassment, the application of agency principles will almost always lead to institutional liability. With respect to hostile environment sexual harassment caused by a school's employees, the situation should be analyzed to determine whether the employee acted with apparent authority or was aided in the harassment by his or her position within the school.

With respect to peer sexual harassment, the OCR stated in Appendix Two that "[p]eer sexual harassment is a form of prohibited sex discrimination where the harassing conduct creates a hostile environment." Consequently, a school will be liable for the existence of a hostile environment if "the school knows ('has notice') of the harassment, and ... the school fails to take immediate and appropriate steps to remedy it." The OCR emphasized that the

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33. Even formal regulations passed by the agency charged with implementing the law are not binding on the courts. Several courts have, however, noted that such regulations are to be accorded weight when interpreting the statute to which they pertain. See, e.g., id. at 1015.


35. See id.

36. See id. at 52,172-73.

37. See id. at 52,172.

38. See id.

39. Id. at 52,175.

40. Id. at 52,176. In another section of the guidance draft, the OCR specified that "a school will have notice when it actually 'knew, or in the exercise of reasonable care, should have known' about the harassment." Id. at 52,177.
school is not liable for the actions of its students in creating the hostile environment but is liable for the school's own failure to remedy the harassment once the school has notice of it. 741

As previously noted, when a school is faced with a sexual harassment situation, the appropriate response to avoid a potential lawsuit is not clear. A review of the case law in the area demonstrates the difficulty of ascertaining the appropriate response. In recent years, numerous publications have been aimed toward assisting schools in determining the best manner in which to react to the problem of sexual harassment in our schools. 742 A school interested in avoiding liability for such situations should review some of the literature and adopt one of the recommended policies.

It is through education that the future of our society is determined. As at least one commentator has noted, "[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." 743 Protecting those in our educational systems from sexual harassment should be of primary concern to every educational institution.

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741. See id. at 52,177-78.
742. See generally AUDREY COHAN ET AL., SEXUAL HARASSMENT AND SEXUAL ABUSE: A HANDBOOK FOR TEACHERS AND ADMINISTRATORS 21-75 (1996) (providing guidelines for the prevention and adequate response to sexual harassment in education); SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS (Bernice R. Sandler & Robert J. Shoop eds., 1997) (consisting of several articles discussing various aspects of sexual harassment on campus); SHOOP & EDWARDS, supra note 9 (describing the problem of sexual harassment in education and several programs and curricula designed to respond to the problem).