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Kiss the Girls and Make Them Sue: Liability of Schools for Peer Sexual Harassment

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# KISS THE GIRLS AND MAKE THEM SUE:
LIABILITY OF SCHOOLS FOR PEER
SEXUAL HARASSMENT

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I. INTRODUCTION

When six-year-old Johnathan Prevette was punished for kissing a classmate on the cheek,1 the media and public portrayed the incident as a sign of politically correct thinking run amok.2 The Lexington City, North Carolina School District subsequently retreated from the “sexual harassment” label,3 but the furor over the incident continued. Had the school not used the phrase “sexual harassment,” there would probably have been no public outcry. However misguided the school’s response to the action was, the result was that the media and public began to focus more on peer sexual harassment. Indeed, the incident pointed out the fact that, for the most part, schools do not know how to deal with peer sexual harassment,4 and when they try, they are inconsistent in their approach.5

It is unfortunate that it took something so innocent-sounding as a first-grade kiss to get the media’s attention. Sexual harassment is a serious problem in our schools. Four out of five students in grades eight to eleven have reported being sexually harassed in school.6 The harassing conduct ranged from sexual jokes and...

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3 See id.

4 See Tamar Lewin, Kissing Cases Highlight Schools’ Fears of Liability for Sexual Harassment, N.Y. TIMES, Oct. 6, 1996, at A22 (“While the recent suspensions of two little boys for kissing girls were widely seen as excessive, they highlight the confusion that is sweeping schools as educators grapple with a growing fear that they may be sued for failing to intervene when one student sexually harasses another.”).

5 See THE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 25: REPORT CARD ON GENDER EQUITY 33 (1997) [hereinafter TITLE IX AT 25] (“For example, only eight percent of the respondents to a study conducted in 1993 by the NOW Legal Defense and Education Fund and Wellesley College Center for Women reported that their school had and enforced a policy on sexual harassment.”).

6 LOUIS HARRIS & ASSOCIATES, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS 7 (1993) [hereinafter HOSTILE HALLWAYS]. The American Association of University Women Educational Foundation (AAUW) commissioned “this in-depth survey of girls, boys, and sexual harassment in public schools.” Id. at 3.
comments, to being forced to do something sexual other than kissing. In most cases, the harassers were peers of the victims. The educational impact of such harassment is serious. Many students so harassed have stayed home from school or cut class because of the harassment. Many said the harassment resulted in making a lower grade in class. Some victims are forced to transfer to different schools to avoid further harassment. Others remain at the same school, but become emotionally withdrawn or afraid. In at least one case, the victim attempted suicide.

When complaints to school administrators have not helped, some victims have lodged complaints with the Department of Education’s Office of Civil Rights (OCR). If OCR determines that a school violated Title IX of the Education Amendments of 1972 (Title IX), it can seek money damages and cut off federal

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7 Id. at 8. Seventy-six percent of girls surveyed “say they have been the targets of sexual comments, jokes, gestures, or looks.” Id.

8 Id. at 10. Thirteen percent of girls who were harassed say they were “forced to do something sexual other than kissing.” Id. Other forms of sexual harassment reported in the AAUW survey included being touched, grabbed, or pinched in a sexual way, being mooned or flashed, and having clothing pulled off or down. Id. at 8-10.

9 Id. at 11. Among girls who were harassed, eighty-six percent were targeted by a current or former student at school. Id.

10 See id. at 4 (“[S]exual harassment in America’s schools affects – even disables – girls and boys alike.”).

11 HOSTILE HALLWAYS, supra note 6, at 15.

12 Id. at 16.

13 Id.

14 Id. at 17; see also Holly Coryell, Girl Says Sex Harassment in Sixth Grade Class Was Relentless, ORANGE COUNTY (CAL.) REG. Nov. 3, 1996, at A13. Eve Bruneau, a sixth grader at the time, “was depressed, cried frequently, and begged her mother to let her stay home. She didn’t feel safe.” Id.

15 Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 69 (D.N.H. 1997) (“[Jane] attempted suicide by overdosing on medication . . . . Jane was hospitalized as a result . . . ”).

16 TITLE IX AT 25, supra note 5, at 33.
funds. The number of complaints to OCR has risen to over 150 cases a year. Other victims have sought damages in the federal courts, claiming that schools discriminated against them in violation of Title IX by allowing hostile environment sexual harassment to exist in the schools.

Where lawsuits over peer sexual harassment in the schools have been heard by courts, the decisions are inconsistent. Most courts have decided that under some conditions, students subjected to hostile environment peer sexual harassment have a cause of action. The courts that have applied Title IX to peer sexual harassment cases have disagreed on what standards to apply. Unless the United States Supreme Court decides to hear one of these cases, there appears to be little hope of a definitive answer. Thus far, the Court has not granted certiorari to any peer sexual harassment case. However, due to the split in circuit court decisions, the Court may

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18 TITLE IX AT 25, supra note 5, at 33. The number of complaints filed in 1988 was 28. The number rose to 152 in 1996.


20 See, e.g., Rowinsky, 80 F. 3d at 1016; Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996). See also Doe v. Univ. of Ill., Nos. 96-3511, 96-4148, 1998 WL 88341, at *1 (7th Cir. Mar. 3, 1998). The Seventh Circuit decided Doe as this publication was going to print. The court held that the plaintiff had a cause of action under Title IX because “a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient’s responsible officials actually knew that the harassment was taking place.” Id. at *8. This decision makes the split in the circuit courts even, and may provide additional motivation for the Supreme Court to grant certiorari to a Title IX peer sexual harassment case.

21 Compare Seamons v. Snow, 84 F. 3d 1226, 1232 (stating that a plaintiff must prove “that some basis for institutional liability must be established.”), with Wright, 940 F. Supp. at 1420 (N.D. Iowa, 1996) (requiring a plaintiff to show “that the educational institution knew of the harassment and intentionally failed to take the proper remedial measures because of the plaintiff’s sex.”), and Rowinsky, 80 F.3d 1006 (5th Cir. 1996) (holding that in order to be held liable, the school must have treated boys’ claims differently from girls’).
do so in the near future. There is little chance that Congress will "address these issues squarely."\(^\text{22}\)

Meanwhile, OCR has stepped into the fray with guidance for schools to use when dealing with peer sexual harassment.\(^\text{23}\) The Sexual Harassment Guidance (Guidance) is a final policy guidance issued by the Assistant Secretary for Civil Rights to provide schools with "information regarding the standards that are used by the OCR, and that institutions should use, to investigate and resolve allegations of sexual harassment of students engaged in by school employees, other students, or third parties."\(^\text{24}\) The Guidance is a tool schools can use in order to avoid these lawsuits and to prevent sexual harassment.\(^\text{25}\)

II. BACKGROUND

Title IX makes no mention of harassment at all. Title IX simply states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."\(^\text{26}\)

The interpretation of Title IX discrimination as including sexual harassment has developed gradually through court opinions and agency letters of findings instead of legislation.

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\(^{22}\) See Doe, 970 F. Supp. at 72 n.10. See also Wright, 940 F. Supp. at 1414. The Wright court stated:

Given the enormous social implications for students, schools, and parents, this 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. Knowing that that will not occur, the court does its best to decipher Congressional intent.

Id.


\(^{24}\) See id.

\(^{25}\) TITLE IX AT 25, supra note 5, at 31-32.

III. HISTORY OF TITLE IX SEXUAL HARASSMENT LITIGATION

A. Quid Pro Quo Sexual Harassment

Sexual harassment was first recognized as a form of sexual discrimination in 1976 when a federal district court held that sexual harassment in the workplace violated Title VII of the Civil Rights Act of 1964.28 One year later, a federal court, relying on Title VII principles, found that quid pro quo sexual harassment violated Title IX.29 However, the courts did not recognize a private cause of action by a person injured by a violation, and the only remedy was a termination of federal financial support.30

Two years later, the United States Supreme Court recognized a right to pursue a private cause of action for a violation of Title IX.31 Still, lawsuits were rare until 1992, when the Supreme Court decided Franklin v. Gwinnett.32 In Franklin, the Court ruled that Title IX prohibits sexual harassment.33 Christine Franklin was a high school student who alleged that a male teacher at her school "subjected her to coercive intercourse," among other allegations.34 The teacher

27 Harassment is considered quid pro quo "where the harasser demands sexual favors from the victim in exchange for a benefit." Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1454 n.2 (9th Cir. 1995).


30 See Cannon v. Univ. of Chicago, 559 F.2d 1063 (7th Cir. 1977), rev'd by 441 U.S. 677 (1979).


33 Id. at 75 ("Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex . . . .").

34 Id. at 63.
resigned in return for the charges against him being dropped.\textsuperscript{35} Ms. Franklin claimed that although the school knew about the abuse, nothing was done to stop it. In fact, school officials discouraged her from pressing charges against the teacher.\textsuperscript{36} The Supreme Court applied Title VII standards to the Title IX case, holding that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex. We believe the same rule should apply when a teacher sexually harasses and abuses a student."\textsuperscript{37} The Court also ruled that money damages were available.\textsuperscript{38} \textit{Franklin} involved quid pro quo harassment, that is, "where the harasser demands sexual favors from the victim in exchange for a benefit."\textsuperscript{39} Yet by analogizing a Title IX case to Title VII standards, the Court opened the door for lower courts to use Title VII standards in other types of sexual harassment in schools.\textsuperscript{40}

\textbf{B. Hostile Environment Sexual Harassment}

Hostile environment sexual harassment exists where the conduct is "sufficiently severe, persistent or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive education environment."\textsuperscript{41} Hostile environment sexual harassment was first

\begin{itemize}
  \item \textsuperscript{35} \textit{Id.} at 64.
  \item \textsuperscript{36} \textit{Id.} at 63-64.
  \item \textsuperscript{37} \textit{Franklin}, 503 U.S. at 75.
  \item \textsuperscript{38} \textit{Id.} at 76.
  \item \textsuperscript{39} \textit{Doe}, 54 F.3d at 1454 n.2.
  \item \textsuperscript{40} \textit{See}, e.g., \textit{Murray v. New York Univ. College of Dentistry}, 57 F.3d 243, 249 (2d Cir. 1995) ("[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."); \textit{Mabry v. State Bd. of Community Colleges and Occupational Educ.}, 813 F.2d 311, 317 n.6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards . . ."); \textit{Lipsett v. Univ. of Puerto Rico}, 864 F.2d 881, 897 (1st Cir. 1988) ("We also rely on the legislative history of Title IX itself, which strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII.").
  \item \textsuperscript{41} \textit{Sexual Harassment Guidance}, 62 Fed. Reg. 12,038 (citing \textit{Davis v. Monroe County Bd. of Educ.}, 74 F.3d 1186 (11th Cir. 1996)).
\end{itemize}
recognized as sex discrimination in cases involving employees. In 1986, the Supreme Court defined hostile environment sexual harassment as a form of sex discrimination that is actionable under Title VII. However, the Court has not yet considered a hostile environment sexual harassment claim in violation of Title IX. In light of the fact that the Court has applied Title VII principles to Title IX cases before, it is possible that the Court would do the same in a hostile environment case.

Lower courts have already applied Title VII standards to Title IX hostile environment cases. The First Circuit used Title VII analysis in a mixed employment-educational context in 1988. In Lipsett, the victim, who was both an employee and a medical student, claimed she was harassed by both her employers and her peers. The male students posted a sexually explicit drawing of the plaintiff on a wall, and gave all the women students sexual names. Some male students offered to alleviate the harassment if the plaintiff had sex with them. The court held,

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 halt it.

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42 See, e.g., Henson v. City of Dundee, 682 F.2d 897, 902 (1982).
43 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (“[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).
44 Franklin, 503 U.S. at 75 (citing Meritor, 477 U.S. at 64).
45 See supra note 40.
46 Lipsett, 864 F.2d at 897 (“Having determined that the disparate treatment of Title VII applies as well to claims arising under . . . Title IX, we now explicate those standards.”).
47 Id. at 888.
48 Id.
49 Id.
50 Id. at 901.
The court decided *Lipsett* based on the victim's status as an employee, but she was also a student, as were many of her harassers.\(^{51}\) She brought an action against the university under Title IX, not Title VII.\(^{52}\) *Lipsett* sends the message that inaction in these types of situations is unacceptable and punishable.

In 1995, the Ninth Circuit held that Title IX prohibited hostile environment sexual harassment.\(^{53}\) Jane Doe sued her school district after repeated complaints about peer sexual harassment to her school counselor.\(^{54}\) The counselor had not himself harassed Doe, but was being sued for inaction regarding the complaints.\(^{55}\) The harassment occurred between September, 1990 and February, 1992.\(^{56}\) The court held that the counselor could not be held liable under Title IX, because he did not have a clearly established duty to prevent peer sexual harassment prior to February, 1992.\(^{57}\) In fact, the Supreme Court decided *Franklin*, which applied Title VII standards to Title IX cases, only two days before Jane Doe's parents pulled her out of school due to the continuing harassment.\(^{58}\) The court did acknowledge that had the harassment occurred after the *Franklin* decision, its decision may have been different.\(^{59}\)

### IV. RECENT CASES

Several important Title IX cases were decided in 1996. The Eleventh and Fifth Circuits both heard peer sexual harassment cases. The Eleventh Circuit, in

\(^{51}\) *Lipsett*, 864 F.2d at 886-887.

\(^{52}\) *Id.* at 884.

\(^{53}\) Doe v. Petaluma City Sch. Dist., 54 F.3d 1447 (9th Cir. 1995).

\(^{54}\) *Id.* at 1449.

\(^{55}\) *Id.*

\(^{56}\) *Id.*

\(^{57}\) *Id.* at 1451.

\(^{58}\) *See Doe*, 54 F.3d at 1455.

\(^{59}\) *Id.* at 1452 ("If Homringhouse engaged in the same conduct today, he might not be entitled to qualified immunity. We would then be required to consider the Supreme Court's recent *Franklin* decision.").
Davis v. Monroe County Board of Education,60 held that a school district could be liable if it "knew or should have known of the harassment in question and failed to take prompt remedial action."61 The Fifth Circuit, however, held that peer sexual harassment was not actionable unless the school district itself had discriminated. In other words, the school did not discriminate unless it treated girls' complaints differently than boys.62 This ruling is worrisome because it means that schools cannot be held liable for peer sexual harassment as long as they ignore all complaints from both boys and girls.63 Consequently, if no boys complain about sexual harassment in a school, the school will presumably be able to ignore girls' complaints.

In more recent decisions, most courts have followed the standard established by Davis, even after the Eleventh Circuit vacated the Davis decision pending rehearing en banc.64 Decisions in the Fifth Circuit, however, continued to defy standards adopted by other federal courts and OCR. In one case, the Fifth Circuit held that a school district was not liable for the sexual molestation of a second-grader by a teacher because the harassment was only reported to the girl's

60 74 F.3d 1186 (11th Cir. 1996). Davis concerned LaShonda D., a fifth-grader who was harassed over a six-month period by a fellow student. The student fondled LaShonda, made crude remarks toward her, and finally was charged with, and pled guilty to, sexual battery. Although both LaShonda and her mother complained to teachers and the school principal, school officials never removed or disciplined the abuser, and even refused to move LaShonda's seat away from her abuser for over three months. Id. at 1188-1189.

61 Id. at 1195 (citing Henson, 682 F.2d at 905).

62 Rowinsky, 80 F.3d at 1016. Two eighth-grade girls were physically and verbally abused on their school bus and in the school by other students. The abuse ranged from crude remarks directed toward the girls to grabbing their breasts and genitals. Although the abuse was documented in bus reports and even on videotape, the only punishment was that one student was suspended from riding the bus for three days, and another was suspended from school for three days. Id. at 1008-1009.

63 See Title IX at 25, supra note 5, at 32.

64 See, e.g., Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1376 (N.D. Cal., 1997). The court approved of the Davis analysis, stating:

Although Davis has been vacated pending rehearing, its standard has been adopted and employed by other circuit and district courts in cases of both peer and teacher-to-student sexual harassment. It is more consistent with the purposes of Title IX and the well-developed body of law under Title VII which the Franklin court implicitly found to be applicable.

Id. See also Bruneau, 962 F. Supp. 301, 305 n.3 ("Davis has been vacated pending a hearing en banc. Nevertheless the court finds that the rationale used in arriving at the five elements needed to establish a hostile environment created by peer sexual harassment is sound.")
homeroom teacher. The court determined that notice to the teacher was not notice to the school, even though the school’s own handbook instructed parents and students to report such harassment to the homeroom teacher. The Fifth Circuit also reversed a jury finding that a school district was liable for a hostile environment sexual harassment under Title IX in a case in which a male teacher repeatedly had sexual intercourse with a fifteen-year-old student, often during school. The court held that although the student was discriminated against based on sex, the school could only be held liable if a supervisor of the teacher “knew about the abuse, had the power to end the abuse, and failed to do so.” Although the Fifth Circuit appears to stand alone in its requirement of intent, it does hold that a school can be liable for peer sexual harassment in certain circumstances.

As the courts, the schools, and the public were trying to ascertain which standards to use in establishing the appropriate standard for liability, the Eleventh Circuit published its en banc decision. Despite the fact that many courts had approved and cited to the court’s earlier decision, the Eleventh Circuit held that Title IX does not apply to peer sexual harassment at all. Although the court sympathized with the plaintiff, it dismissed her case for failure to state a claim on

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66 Id. at 412 (Dennis, J., dissenting).

67 Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 652 (5th Cir. 1997) (“[W]hen a teacher sexually abuses a student, the student cannot recover from the school district under Title IX unless the school district actually knew there was a substantial risk that sexual abuse would occur.”). In Rosa H., a male teacher repeatedly initiated sexual intercourse with a fifteen-year-old student. The Fifth Circuit held that the school was not liable. Id.

68 Id. at 650.

69 See Rowinsky, 80 F.3d at 1016 (“In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls. . . .”).

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

71 See supra note 64.

72 Davis, 120 F. 3d at 1401.

73 Id. at 1406. (“We condemn the harm that has befallen La Shonda . . . .”).
which relief could be granted. After a detailed analysis of the legislative history of Title IX, the court found that Title IX was enacted by Congress under the Spending Clause. The court further stated that "[w]hen Congress enacts legislation pursuant to the Spending Clause, it in effect offers to form a contract with potential recipients of federal funding." Therefore, "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds." In other words, to be fair to schools that accept federal funding, Title IX would have had to give clear notice to the school board of this kind of liability. The majority in Davis held that the Monroe County schools did not receive such notice from Title IX, and therefore the school district was not liable for violating Title IX. The judge who authored the opinion quoted the findings of the AAUW Survey on Sexual Harassment in the Schools and decided that schools would weigh the amount of potential litigation against the "small" amount of federal funding received, and choose to forfeit the federal funding.

The majority's analysis in Davis contains several flaws. The majority opinion concludes that Congress did not intend to create a cause of action for peer sexual harassment under Title IX because Congress never discussed it. This opinion would imply that if each potential violation were not discussed, it could not be a violation. If this were true, there would have been no cause of action for the teacher-student sexual harassment in Franklin v. Gwinnett because sexual harassment was not mentioned at all in the discussion of Title IX. Yet the Supreme

74 Id. at 1392.
75 Id. at 1398-1401.
76 Id. at 1401.
77 Davis, 120 F.3d at 1399.
78 Id. (citing Canutillo, 101 F.3d at 398 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997)).
79 Id. at 1401.
80 HOSTILE HALLWAYS, supra note 6.
81 See Davis, 120 F.3d at 1406 n.26. Judge Tjoflat reasoned that "prospective recipients will decline federal funding and current recipients will withdraw from federal programs . . ." Id. The judge also stated that schools receive "only" seven percent of their funding from federal programs and would weigh this "relatively small amount of funding" against the risk of liability. Id. None of the other judges in the Eleventh Circuit joined in this section of the opinion. Id. at 1390.
82 Franklin, 503 U.S. 60.
Court held that teacher-student sexual harassment was a form of discrimination that violated Title IX. The majority in *Davis* also claims that the school would have had no notice that sexual harassment was a violation of Title IX because peer sexual harassment is not mentioned in the statute. However, the United States Supreme Court has held that under the Spending Clause, “this notice problem does not arise in a case... in which intentional discrimination is alleged.”

V. OCR GUIDELINES

A. Introduction

In 1980, the National Advisory Council on Women’s Education Programs recommended that OCR issue a federal policy on sexual harassment. Seventeen years later, and twenty-five years after Title IX was first adopted, OCR issued a Guidance on sexual harassment. The Guidance states that sexual harassment can be a form of discrimination prohibited by Title IX. Although the Guidance is not law, the Supreme Court has held that “an agency’s construction of its own regulations is entitled to substantial deference.” This would be an advantage to plaintiffs in peer sexual harassment lawsuits.

B. Prohibited Sexual Harassment Under Title IX

Although the focus of this Note is student-to-student sexual harassment, it is important to note that the Guidance also deals with sexual harassment of students by school employees and third parties. Therefore, the following discussion briefly examines the entire Guidance.

83 *Id.*

84 *Davis*, 120 F. 3d at 1401.

85 *Franklin*, 503 U.S. at 74-75.

86 *TITLE IX AT 25*, supra note 5, at 31.


88 *Id.*


90 See *Goldberg*, supra note 17, at 18.
1. Sexual Harassment by Employees

a. Quid Pro Quo Sexual Harassment

According to OCR, “a school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority...;” even if the school had no notice of the harassment.91 OCR applies agency principles to such cases, stating that the employee “stands in the shoes” of the school.92

b. Hostile Environment Sexual Harassment

A school will also be liable for hostile environment sexual harassment by its employees if the employee “(1) acted with [actual or] apparent authority...; or (2) was aided in carrying out the sexual harassment of students by his or her position of authority...”93 Whether an employee has apparent authority depends on factors such as the ages of the students involved. A younger child might believe any school employee to be in authority.94 OCR defines hostile environment sexual harassment as “sexually harassing conduct... that is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.”95 The prohibited conduct “can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal or physical conduct of a sexual nature.”96 The Guidance describes some examples of behavior that would not constitute sexual harassment, including demonstration of sports maneuvers, a consoling hug by a kindergarten teacher, or a congratulatory hug by an athletic coach.97

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92 Id.
93 See id.
94 See id.
95 Id. at 12,038.
97 See id. at 12,038-9.
2. Peer Sexual Harassment

OCR will hold a school liable for peer sexual harassment if it finds that a hostile environment exists, that the school knows or should have known of the harassment, and that the school fails to take immediate and appropriate action.\(^{98}\) In order to be actionable as sexual harassment, conduct must be unwelcome, and "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment."\(^{99}\) These elements are discussed in more depth below.

a. Unwelcomeness

According to the Guidance, "[c]onduct is unwelcome if the student [being harassed] did not request or invite it and 'regarded the conduct as undesirable or offensive.'\(^{100}\) The courts must decide on a case-by-case basis whether conduct was unwelcome. Failure to complain about the conduct does not necessarily indicate it was welcome, because the student may be silent out of embarrassment or fear of reprisal.\(^{101}\) However, active participation in the sexual conduct would be evidence that it was welcome.\(^{102}\) The age of a student must also be taken into account. A young child may not understand that he or she can object, or may not know how to object.\(^{103}\)

\(^{98}\) *Id.* at 12,039-40 ("Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.").

\(^{99}\) *Id.* at 12,038.

\(^{100}\) *Id.* at 12,040 (quoting *Henson*, 682 F.2d at 903 (Title VII case)).

\(^{101}\) *See* Sexual Harassment Guidance, 62 Fed. Reg. at 12,040 (citing *Lipsett*, 864 F.2d at 898). "In some instances, a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome." *Id.*

\(^{102}\) *See id.*

\(^{103}\) *See id.*
b. Severe, Persistent, or Pervasive

Determining whether harassment is severe, persistent or pervasive "is not, and by its nature cannot be, a mathematically precise test." The court must consider "[t]he type, frequency, and duration of the conduct." The more severe the conduct is, the less frequent it must be in order to be regarded as harassment, especially if the conduct is physical. OCR will also consider any evidence of an effect the conduct had on the student. There may be tangible injuries, such as lower grades, or mental or emotional distress. The student may be forced to withdraw from school. There may, however, be no tangible effects. A student may be able to keep up his or her grades, or stay on an athletic team despite the harassment.

c. Notice

Courts have had difficulty dealing with the problem of notice. Some courts hold that actual notice is required. Others have held that either actual notice or

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105 Sexual Harassment Guidance, 62 Fed. Reg. at 12,041 ("In most cases, a hostile environment will exist if there is a pattern or practice of harassment or if the harassment is sustained and nontrivial.").

106 See id.

107 See supra notes 10-15 and accompanying text.

108 See, e.g., Doe, 54 F.3d at 1566.

109 See Harris, 510 U.S. at 21-22.

110 See Rosa H. v. San Elizario Ind. Sch. Dist., 106 F.3d 648, 650 (5th Cir. 1997) ("[A] plaintiff must show that 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.").
constructive notice will suffice. OCR has adopted the second standard. A school will be considered to have actual notice of the harassment if a student, parent, or other individual files a grievance or complains about harassment to a teacher, principal, bus driver, or other appropriate personnel. The school will also have received notice if an employee witnesses the harassment, or if a member of the community or media reports it.

A school “should have known” about the harassment if it would have found out about it through a “reasonably diligent inquiry.” In some cases, the harassment may be pervasive enough that a school will be found to have had constructive notice. If the conduct occurs in front of school personnel, or there is graffiti in public areas of the school, a court may find that school officials had constructive notice.

C. Other Issues

1. Requests For Confidentiality

A student may request confidentiality out of fear of reprisal or embarrassment. A school should always discuss confidentiality with the harassed student or his or her parents. If the student requests confidentiality or even requests that nothing be done about the harassment, the school’s response may be limited. First, the school should inform the student that “Title IX prohibits retaliation . . .

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111 See Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1377 (N.D. Cal., 1997): [A] plaintiff may maintain a Title IX action for damages against a school district when the plaintiff alleges that the school district knew or should have known in the exercise of its duties that the plaintiff was being sexually harassed by other students and the school district failed to take steps reasonably calculated to end the harassment.

Id; See also Doe, 949 F. Supp. at 1426 (“[S]chool districts are on notice that student-to-student sexual harassment is very likely in their schools . . .”).


113 Id.

114 Id.

115 Id.

116 Id.

and that the school will take steps to try to prevent retaliation." If the student insists on confidentiality, the school can still take steps to stop the harassment. Without disclosing the student’s identity, the school can conduct student group sessions to communicate that the school will not tolerate sexual harassment and can conduct sexual harassment training for students and staff.

2. First Amendment Issues

When OCR first published the proposed Guidance, it invited comments and questions. Some comments concerned First Amendment issues. Lectures, discussions, debates, school plays, student newspapers, and some other school activities are protected by the First Amendment, even if some students find them offensive. The speech may rise to the level of sexual harassment if it is “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.” However, if the speech is protected, the school may not be able to censor it or stop it. The Guidance suggests that the school should denounce the speech and make sure competing viewpoints are heard.

3. Harassment Based on Sexual Orientation

The Guidance makes no distinction between sexual harassment of heterosexual students and sexual harassment of homosexual students. The elements of sexual harassment are the same in either case. Title IX does not prohibit discrimination on the basis of sexual orientation, although state and local laws

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118 Id. at 12,043.
119 Id. at 12,043-44.
122 Id. at 12,045.
123 Id.
124 Id.
125 Id. at 12,046.
may. However, harassing conduct of a sexual nature that is directed toward gay or lesbian students may create a sexually hostile environment, and therefore may be prohibited by Title IX.

4. Same-sex Harassment

Title IX protects both male and female students from sexual harassment. Furthermore, Title IX prohibits sexual harassment of students by other students of the same sex. Few courts have heard cases concerning same-sex harassment under Title IX. Courts were split on the issue of same-sex harassment as a cause of action under Title VII. However, the United States Supreme Court, in Oncale v. Sundowner Offshore Services, Inc. has made clear that Title VII prohibits same-sex sexual harassment in the workplace. It follows that the Court would apply Title VII analysis to a Title IX cause of action, as it did in Franklin, and hold that Title IX also prohibits same-sex harassment.


127 Id. For instance, comments such as “gay students are not welcome at this table in the cafeteria” would not be prohibited under Title IX because they were not based on sex, but on sexual orientation. However, if male students target a lesbian student for physical sexual advances, the OCR would probably consider the conduct sexual harassment.

128 See id. at 12,038.

129 Id.

130 See, e.g., Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996) (noting that same-sex harassment was actionable under Title VII, and applying the same standards under Title IX).

131 Compare McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (holding that a hostile environment claim “does not lie where both the alleged harassers and the victim are heterosexu als of the same sex”), and Garcia v. Elf Atochem N. Am., 28 F. 3d 446 (5th Cir. 1994), with Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996) (recognizing a cause of action for same-sex sexual harassment).


133 Id. at 1003.

134 503 U.S. 60.
D. Response

The OCR provides some guidance as to how schools should respond to reports of sexual harassment. First, school officials should discuss with the harassed student or his or her parents what actions the school should take. The officials should explain the school’s grievance procedure.\textsuperscript{135} The school must investigate the complaint promptly, thoroughly, and impartially.\textsuperscript{136} While the investigation is ongoing, the school should take steps to protect the accuser, including separating him or her from the alleged harassers and notifying law enforcement authorities if necessary.\textsuperscript{137} If sexual harassment has occurred, the school should take corrective action. Some examples of corrective action are counseling, warning or disciplining the harasser, and separating the harasser and the harassed student. The school should do this with minimal burden on the harassed student.\textsuperscript{138} The response must be immediate and appropriate. What is immediate and appropriate will depend on the circumstances of each case.\textsuperscript{139}

If the harassment is caused by a hostile environment, the school should take steps to eliminate it. Some steps recommended by the Guidance include clearly communicating that the school will not tolerate harassment, assisting the harassed student to change classes or schedules, and special counseling or training sessions for the harassers.\textsuperscript{140}

The school must make sure the harassed student is not further harassed or retaliated against because of his or her complaint. The school should inform the student how to report further harassment, and the school should do a follow-up investigation to ensure there is no further harassment or retaliation.\textsuperscript{141}

\textsuperscript{135} Id. at 12,042.

\textsuperscript{136} Id.

\textsuperscript{137} Id. at 12,043.

\textsuperscript{138} Sexual Harassment Guidance, 62 Fed. Reg. at 12,043.

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Id.
VI. EFFECT OF RECENT COURT DECISIONS AND THE OCR GUIDELINES

The effect of these recent court decisions and the OCR Guidance is difficult to predict. On the one hand, the Eleventh Circuit, with the full OCR Guidance to consult, held that there is no cause of action for sexual harassment under Title IX.142 However, the court correctly pointed out that even the proposed Guidance had not been issued at the time of the harassment.143 The court implied that if the Guidance had been issued before the harassment occurred, the school board might have been charged with notice of the harassment.144 In furtherance of its theory that the board was not on notice, the court stated that “the OCR constructs a labyrinth of factors and caveats”145 and “the meaning of this language may not be obvious to school officials.”146 The court seemed to imply that the Guidance, even as published, may not constitute notice because it is not simple enough for school administrators to understand.147

On the other hand, the Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of Sex148 have been cited approvingly by the United States Supreme Court.149 The EEOC guidelines included the same two types of sexual harassment as the OCR Guidance; that is, quid pro quo and hostile environment sexual harassment.150 Shortly after the EEOC issued its guidelines on sexual harassment in the workplace, the United States Supreme Court held “that a claim of ‘hostile environment’ sex discrimination is actionable under

142 Davis, 120 F.3d at 1404 n.23.

143 Id.

144 Id. (“Therefore, OCR’s regulations did not put the Board on official notice of its potential liability . . . .”).

145 Id.

146 Id.

147 Davis, 120 F.3d at 1404 n.23.

148 29 C.F.R. § 1604.11 (1997). The EEOC Guidelines define what constitutes sex discrimination in the workplace. There were no significant changes made in the Guidelines since the 1985 C.F.R. referred to by the Court.

149 See Meritor, 477 U.S. at 65-67.

150 Id.
Title VII . . ."\textsuperscript{151} It is important to note that Title VII, like Title IX, makes no mention of sexual harassment at all.\textsuperscript{152} Yet in 1986, the Court quoted with approval EEOC guidelines that defined sexual harassment as a form of sex discrimination prohibited by Title VII.\textsuperscript{153} The Court in \textit{Meritor} quoted earlier decisions holding that agency guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."\textsuperscript{154} The Court also agreed with the EEOC that Congress wanted courts to look to agency principles for guidance in sexual harassment cases.\textsuperscript{155} It would follow that if the United States Supreme Court grants \textit{certiorari} in one of the school peer sexual harassment cases, it would again defer to agency guidelines, in this case the OCR Guidance. On the other hand, the Eleventh Circuit totally disregarded OCR's Guidelines and other courts' decisions in its recent holding.\textsuperscript{156} However, it is important to note that the majority in the Eleventh Circuit explained that it had to decide the way it did because the OCR Guidance had not yet been published at the time of the harassment.\textsuperscript{157} Therefore, the court held the school board had no notice that peer sexual harassment was a violation of Title IX.\textsuperscript{158} The court's decision might have been different had the Guidance been published at the time of the harassment.\textsuperscript{159} Interestingly, the Supreme Court in \textit{Meritor} cited with approval to the EEOC guidelines in holding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work

\textsuperscript{151} \textit{Id.} at 73.

\textsuperscript{152} \textit{See} Title VII of the Civil Rights Act of 1964, 42 U.S.C.\textsuperscript{c} § 2000e-2(a)(1) (1994) ("It shall be an unlawful employment practice 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 . . . .").

\textsuperscript{153} \textit{See} \textit{Meritor,} 477 U.S. 57 at 65.


\textsuperscript{155} \textit{Id.} at 72.

\textsuperscript{156} \textit{Davis,} 120 F.3d at 1404, n. 23.

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{See generally} \textit{id.}
environment,\textsuperscript{160} despite the fact that the guidelines were issued two years \textit{after} the harassment in that case occurred.\textsuperscript{161} Because there is continuing disagreement regarding school liability, it would be wise for schools to consult the Guidance in establishing a policy on sexual harassment by both employees and peers. Even if a court finds there is no private cause of action for sexual harassment, the OCR itself can cut off a school's federal funding or seek damages.\textsuperscript{162}

\section*{VII: AVOIDING LIABILITY}

\subsection*{A. OCR's Guidance}

Under OCR standards, "a school will be liable under Title IX if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action."\textsuperscript{163} The Guidance not only provides a definition and examples of sexual harassment, but it also should provide guidance to schools on how to respond to and prevent sexual harassment.\textsuperscript{164}

First, under Title IX, all schools are required to adopt and publish grievance procedures and a policy against sex discrimination.\textsuperscript{165} "This requirement has been part of the Title IX regulations since their inception in 1975."\textsuperscript{166} Schools with policies in place to address sexual harassment take action in eighty-four percent of cases, while those without such policies do so in only fifty-two percent of cases.\textsuperscript{167} Yet only eight percent of schools had a policy in place in 1993.\textsuperscript{168} The Guidance

\begin{thebibliography}{99}

\bibitem{Meritor} Meritor, 477 US. at 66.

\bibitem{See id.} See id. at 65 ("[I]n 1980 the EEOC issued Guidelines specifying that 'sexual harassment,' as there defined, is a form of sex discrimination prohibited by Title VII."). The harassment in Meritor occurred from 1974-1978. \textit{Id.}

\bibitem{See Goldberg} See Goldberg, \textit{supra} note 17, at 18.

\bibitem{Sexual Harassment Guidance} Sexual Harassment Guidance, 62 Fed. Reg. at 12,039.

\bibitem{See TITLE IX AT 25} See \textit{TITLE IX AT 25}, \textit{supra} note 5, at 32.

\bibitem{Sexual Harassment Guidance} Sexual Harassment Guidance, 62 Fed. Reg. at 12,044.

\bibitem{Id.} Id. at 12,050 n.81.

\bibitem{TITLE IX AT 25} \textit{TITLE IX AT 25}, \textit{supra} note 5, at 33.

\bibitem{Id.} \textit{Id.}

\end{thebibliography}
is helpful in identifying what procedures are prompt and equitable.\footnote{OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the procedures provide for: (1) Notice to students, parents . . . , and employees of the procedure, including where complaints may be filed; (2) Application of the procedure to complaints . . . ; (3) Adequate, reliable and impartial investigation of complaints . . . ; (4) Designated and reasonably prompt timeframes for the major stages of the complaint process; (5) Notice to parties of the outcome of complaint; and (6) An assurance that the school will take steps to prevent recurrence of any harassment.}

Although admitting that schools may have different procedures, OCR states that the procedure should be written in language appropriate to the students' ages, and must be widely disseminated: \footnote{Id. at 12,045.} "A school must designate at least one employee . . . to carry out its Title IX responsibilities, and students should know who that employee is." \footnote{Id.} 
The Guidance further states, "[b]y having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences." \footnote{See id. at 12,040.} Because OCR considers a strong policy so important, a school without such a policy will be considered to be in violation of Title IX if a hostile environment exists, even if the school had no actual or constructive knowledge of the harassment. \footnote{Id.}

B. Other Guidance

Recognizing that school administrators, teachers, parents, and students need an accessible document to assist them in recognizing and appropriately responding to sexual harassment, OCR has also made available a pamphlet containing basic information regarding their responsibilities under Title IX. \footnote{Id. at 12,035.} The National Coalition for Women and Girls in Education has also published a list of effective policies for combating sexual harassment in schools. \footnote{TITLE IX AT 25, supra note 5, at 33.} These policies are similar
to the OCR’s Guidelines. They suggest that schools have a policy written in clear language defining sexual harassment, making clear that sexual harassment is a violation of Title IX, and demonstrating the school’s commitment to ending harassment.176

VIII. CONCLUSION

The recent court decisions involving school liability for peer sexual harassment and the OCR’s Final Policy Guidance suggest that the issue of school liability for peer sexual harassment is not going to go away quickly. However, the Guidance should help schools identify, combat, and prevent sexual harassment. The Guidance was promulgated for public comment at nearly the same time young Johnathan Prevette was being punished for his kiss on the cheek.177 Had the Guidance been widely read at that time, it would have been very clear that “a kiss on the cheek by a first grader does not constitute sexual harassment.”178

Most importantly, the Guidance warns that schools will no longer get away with inaction.179 In order to aid schools, the Guidance provides examples of effective policies schools can follow to prevent sexual harassment and avoid liability, leading one commentator to describe it as “a godsend . . . in one convenient place [it provides] the clear implications of the statutes, regulations, and case law.”180

This Note attempts to deal with the issue of peer sexual harassment in the schools in an objective way, discussing whether legislation and case law confer liability on a school system for ignoring complaints of harassment and even abuse of students by other students. It is often difficult to ascertain exactly when childish pranks or teasing become sexual harassment, abuse, or even battery. But for some reason, the courts have not had the same difficulty finding sexual harassment in

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176 Id.
177 See supra note 1.
178 Sexual Harassment Guidance, 62 Fed. Reg. at 12,034 (referring to Johnathan Prevette, see supra note 1).
179 See TITLE IX AT 25, supra note 5, at 32.
employment cases. It is difficult if not impossible to imagine an adult woman facing a workplace where every day her breasts or genitals are grabbed, her bra is unhooked, she is rubbed against in a sexually suggestive manner, she is coerced into having sexual intercourse, or she is called a “whore.” If any of these things occurred even once in the workplace and an adult employee complained, the employer would be compelled by Title VII to take action. Yet children as young as seven are being subjected to such harassment in school, and there is no clear-cut federal law prohibiting the school from simply ignoring the harassment, even if it amounts to sexual battery, and even if the school knew about it.181 Some court decisions hold that Title IX does impose liability on a school under such circumstances. “[S]chool authorities act in loco parentis, with the power and indeed the duty to ‘inculcate the habits and manners of civility . . . .’”182 Sexual harassment affects over eighty percent of our children at some time during their school years.183 On the twenty-fifth anniversary of the adoption of Title IX, it is time we follow the United States Supreme Court’s guidance: “we must accord [Title IX] ‘a sweep as broad as its language.’”

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181 See, e.g., Davis, 120 F. 3d at 1418 (Barkett, J., dissenting) (“[T]he conduct was sufficiently severe to result in criminal charges against G.F. to which he pled guilty in state court.”).


183 HOSTILE HALLWAYS, supra note 6, at 7.