

LIMITING LIABILITY THROUGH EDUCATION: DO SCHOOL DISTRICTS HAVE A RESPONSIBILITY TO TEACH STUDENTS ABOUT PEER SEXUAL HARASSMENT?

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Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹

I. INTRODUCTION

In light of recent lawsuits, court decisions, and media attention recognizing peer to peer sexual harassment in school systems, many school boards are examining their policies regarding sexual harassment.² In this Comment, I will discuss whether a school district should be compelled to implement educational programs designed to prevent peer to peer sexual harassment by students.

I will discuss the current state of the law to determine whether the Department of Education, Office for Civil Rights (OCR) regulations or recent court decisions require school districts to educate students about sexual harassment. I will also examine compelling nonlegal reasons why school districts may want to implement such a program.

1. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

2. See Tamar Lewin, *Inside America: Hard Lessons on Harassment*, THE GUARDIAN, Oct. 8, 1996, at 12 (discussing the emergence of sexual harassment in schools); see also DeWayne Wickham, *Harassment Lacks Clarification*, THE MONTGOMERY ADVERTISER, Mar. 19, 1997, at A9 (addressing the challenges schools face in dealing with peer sexual harassment).

I conclude that the implementation of an effective educational program on sexual harassment is a factor that OCR and the courts will consider when determining whether school districts are in violation of Title IX of the Education Amendments of 1972 (Title IX). Therefore, the existence of such a program will reduce a school district's liability for peer sexual harassment. I will then suggest policies, programs, and techniques that school administrators may use to combat the prevalence of sexual harassment.

II. SEXUAL HARASSMENT AS SEXUAL DISCRIMINATION

Sexual harassment as a form of sex-based discrimination has its legal roots in Title VII of the 1964 Civil Rights Act³ (Title VII). Title VII is the primary federal law prohibiting sex-based discrimination in employment, providing, in relevant part:

It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.⁴

The Supreme Court first recognized sexual harassment as a form of sexual discrimination that violates Title VII in the 1986 case *Meritor Savings Bank v. Vinson*.⁵ In *Meritor*, Mechelle Vinson, a former bank employee, brought a Title VII action against her former supervisor and the bank.⁶ Ms. Vinson alleged that her supervisor repeatedly demanded sexual favors, fondled her in front of her co-workers, exposed himself to her, and forcibly raped her several times.⁷ She stated that on numerous occasions she had intercourse with him out of fear of losing her job.⁸

The Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.⁹ To prove that sexual harassment has created a hostile environment, the behavior must be "sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and

3. 42 U.S.C. § 2000e-17 (1994).

4. *Id.* § 2000e-2(a)(1).

5. 477 U.S. 57 (1986).

6. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

7. *See id.* at 60.

8. *See id.* at 61.

9. *See id.*

create an abusive working environment."¹⁰ The Court found that Vinson's allegations were sufficient to state such a claim.¹¹

The Court reaffirmed the *Meritor* standard in *Harris v. Forklift Systems, Inc.*¹² In *Harris*, Charles Hardy, the company president, insulted employee Teresa Harris because she was a woman and often made her the target of unwanted sexual innuendoes.¹³ He called her a "dumb-ass woman"¹⁴ in front of co-workers and suggested that they "go to the Holiday Inn to negotiate [Harris's] raise."¹⁵ Although Harris complained, Hardy continued his offensive behavior.¹⁶

The U.S. District Court for the Middle District of Tennessee found that although Hardy's remarks would offend a "reasonable woman,"¹⁷ they did not "seriously affect [Harris's] psychological well-being,"¹⁸ and therefore did not create an abusive work environment.¹⁹ The Supreme Court reversed, declaring a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."²⁰ The Court held that as long as the environment would reasonably be perceived as hostile or abusive, there is no need for the plaintiff to show actual psychological injury.²¹ Further, the plaintiff need not prove that his or her "tangible productivity"²² has declined as a result of the harassment.²³

Congress has charged the Equal Employment Opportunity Commission (EEOC) with primary responsibility for administering Title VII.²⁴ The EEOC guidelines prohibit both quid pro quo harassment, where submission to conduct of a sexual nature is implicitly or explic-

10. *Id.* at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

11. *See id.*

12. 510 U.S. 17 (1993).

13. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993).

14. *Id.*

15. *Id.*

16. *See id.*

17. *Id.* at 20.

18. *Id.*

19. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (quoting the district court opinion which cited *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986)).

20. *Id.* at 21.

21. *See id.* at 22.

22. *Id.* at 25 (Ginsburg, J., concurring).

23. *See id.* (Ginsburg, J., concurring) (citing *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).

24. *See* 42 U.S.C. ch. 21 § 2000e-4 (1996).

itly a term or condition of employment;²⁵ and hostile environment harassment, where the conduct has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."²⁶ EEOC guidelines hold employers responsible for the sexually harassing conduct of fellow employees and non-employees in the workplace "where the employer (or its agents or supervisory employees) knew or should have known"²⁷ of the conduct and failed to take "immediate and appropriate corrective action."²⁸

Although the case law on sexual harassment has primarily developed through employment cases, the Supreme Court applied Title VII sexual harassment principles in deciding *Franklin v. Gwinnett County Public Schools*,²⁹ a Title IX case. This suggests that the Court is prepared to afford students in a school setting the same level of protection from sexual harassment as it affords employees in the workplace.³⁰

III. PEER SEXUAL HARASSMENT IN SCHOOLS

A. Definition of Peer Sexual Harassment

The term "peer sexual harassment" is used to describe sexual harassment by peers — students harassing students — as opposed to teachers harassing students.³¹ Schools define sexual harassment in a variety of ways. One is "unwelcome sexual behavior that makes a student feel uncomfortable or unsafe,"³² another is "deliberate or repeated unsolicited verbal comments, gestures or physical contact of a sexual nature which is unwelcome."³³ The key elements of the defi-

25. See 29 C.F.R. § 1604.11(a) (1986).

26. *Id.*

27. *Id.* § 1604.11(e).

28. *Id.* § 1604.11(d).

29. 503 U.S. 60 (1992).

30. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992) (explaining that legal and equitable remedies are available to students under Title VII); see also *Lipsett v. University of P.R.*, 864 F.2d 881, 896-97 (1st Cir. 1988) (explaining that borrowing the Title VII standard in Title IX employment actions is justified because Title VII and Title IX both prohibit sex discrimination, and the legislative history of Title IX demonstrates Congressional intent to remove Title VII's exemption of educational institutions to bring employees of educational institutions within the scope of equal employment protection).

31. See 62 Fed. Reg. 12,033, 12,038 (1997).

32. *Angry Kids: Many of Today's Youth Are Releasing Their Anger Through Violence*, CHATTANOOGA FREE PRESS, Apr. 30, 1995 [hereinafter *Angry Kids*] (citing the Chattanooga Public Schools' definition of sexual harassment from a booklet entitled *About Sexual Harassment At School*).

33. Sandy Heuckroth, *Soudertown Students Take Look At How Sex Bias Affects School*, THE

nitions are that the contact is both unwelcome and is either sexual in nature or based on the sex or gender³⁴ of the victim.

Students, thirty-nine percent of whom must deal with harassing behavior on a daily basis,³⁵ have defined sexual harassment as "the derogatory comments toward males or females about sex, the body, or what one can or cannot do because of the way they are;"³⁶ "any action of one sex where the other sex feels inferior, uncomfortable, or threatened;"³⁷ or "something that makes you feel uncomfortable about who you are . . . because of the sex you are."³⁸ Although students can generally distinguish certain behavior as sexual harassment, which "feels bad," from flirting, which "feels good," there is significant confusion about some actions.³⁹

The behaviors which may constitute sexual harassment form a continuum ranging from teasing to forcible rape. The list of inappropriate, harassing behaviors displayed by elementary, junior high, and high school students is lengthy, and includes: pulling down someone's pants; flipping up girls' skirts; comments about body parts; bra-snapping; profanity; sexual name calling; crude gestures; lining

MORNING CALL, Apr. 27, 1995, at B3 (quoting Louisa Abney-Babcock, a social studies teacher, addressing the Soudertown Area High School's Annual Gender Issues Forum).

34. Most feminist theorists use the term "sex" to refer to the anatomical and physiological distinctions between men and women and the term "gender" to refer to the cultural overlay of those distinctions, i.e., masculine and feminine. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10-16 (1995) (discussing the analytical differences between the terms "sex" and "gender").

35. See Helena K. Dolan, Note, *The Fourth R— Respect: Combating Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 218 (1994) (citing Judy Mann, *What's Harassment? Ask a Girl*, WASH. POST, June 23, 1993, at D26) (revealing that 39% of 4,200 girls surveyed by the National Organization for Women Legal Defense and Education Fund reported suffering sexual harassment every school day). It is important to note that all behavior of a sexual nature, or which is sexually harassing, is not "sexual harassment" under the legal definition. To establish a legal claim for peer sexual harassment, the conduct must be "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an educational program or activity, or to create a hostile or abusive environment." 62 Fed. Reg. 12,033, 12,038 (1997); see *infra* Section IV.

36. Rhonda Stansberry, *Sexual Harassment: Still Seen in Schools*, OMAHA WORLD HERALD, Jan. 30, 1996, at 31 (quoting Jessica Phares, a Bellevue East High School senior).

37. *Id.* (quoting Sarah Roth, a Bellevue East High School senior).

38. JUNE LARKIN, *HIGH SCHOOL GIRLS SPEAK OUT* 21 (1994) (quoting a young woman who participated in a sexual harassment program designed for high school girls). Any definition of sexual harassment is necessarily ambiguous due to the numerous factors that need to be taken into consideration, including: tone of voice, body language, context in which the behavior occurred, the impact on the target, and the power dynamics. See *id.* at 20.

39. See NAN STEIN & LISA SJOSTROM, *FLIRTING OR HURTING? A TEACHER'S GUIDE ON STUDENT-TO-STUDENT SEXUAL HARASSMENT IN SCHOOLS* 13-16 (1994). As an activity to increase students' awareness of sexual harassment, the authors suggest that classes create lists of behaviors that constitute "flirting" and behaviors that constitute "harassment." See *id.* Often, a behavior will appear on both lists, with a recognition that it depends on the tone of voice, whether the person is a friend or stranger, and where it occurs. See *id.*

up to rate girls as they pass; explicit graffiti; exposing genitals; inappropriate touching of breasts, buttocks, and genitalia; sexual assault; displaying pornography; repeated requests or demands for sexual acts; and forcible rape.⁴⁰

B. Prevalence of Peer Sexual Harassment in K-12 Schools

In the early 1990's, media attention on two surveys increased school administrators' awareness of the prevalence of sexual harassment in schools.⁴¹ In a scientific survey of more than 1,600 high school boys and girls, roughly eighty percent responded that they had experienced some form of sexual harassment while in school.⁴² Eighty-five percent of the girls surveyed had been targets of harassment in school; classmates committed the vast majority of the harassment.⁴³

Although both boys and girls reported being targets of sexual harassment, girls were targeted at a much higher frequency.⁴⁴ Boys were much more frequently the perpetrators, regardless of whether the harassment was directed at girls or boys.⁴⁵

C. Effects and Impacts of Peer Sexual Harassment

Sexual harassment has a detrimental effect on the targeted student, the school community, and society as a whole.⁴⁶ Sexual harassment

40. See MINNESOTA DEPARTMENT OF EDUCATION, GIRLS AND BOYS GETTING ALONG: TEACHING SEXUAL HARASSMENT PREVENTION 2-3, 137 (1995) [hereinafter GIRLS & BOYS]; Dolan, *supra* note 35, at 215; STEIN & SJOSTROM, *supra* note 39, at 2, 24.

41. The American Association of University Women Educational Foundation commissioned a study by the Harris Poll, which surveyed a scientific random sample of 1,600 boys and girls in eighth to twelfth grade in 79 public schools. See AMERICAN ASS'N OF UNIV. WOMEN, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993) [hereinafter AAUW SURVEY]. *Seventeen* magazine published another survey, conducted by Wellesley College Center for Research on Women and funded by the NOW Legal Defense and Education Fund; 4,200 girls, aged nine to nineteen years old, responded. See NAN STEIN, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS (1992).

42. See generally STEIN, *supra* note 41. The majority of respondents reported experiencing both verbal and physical sexual harassment; 89% reported receiving sexual comments, looks, or gestures; 83% reported that they had been touched, pinched, or grabbed. See *id.*

43. See generally STEIN, *supra* note 41. These statistics illustrate that sexually harassing behavior is prevalent in the nation's schools in epidemic proportions. See *id.*

44. See Dolan, *supra* note 35, at 221-22 (explaining that the gap between instances of male and female harassment widened when frequency was considered). Sixty-six percent of girls and forty-nine percent of boys reported occasional harassment; however, thirty-one percent of girls and eighteen percent of boys reported being harassed often. See *id.* (citing AAUW SURVEY, *supra* note 41). Because girls are more frequently the targets of harassment by boys, this Comment will generally use the female pronoun to refer to the victim of the harassment and the male pronoun to refer to the harasser.

45. See Dolan, *supra* note 35, at 222 (revealing that boys, acting alone or in a group, were more likely to harass than girls).

46. See Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sex-*

prevents the victim from obtaining an equal educational opportunity and causes psychological, physical, and academic harm.⁴⁷ Verbal and physical assaults make a girl feel insecure and ill-prepared to learn.⁴⁸ Moreover, harassment may have a devastating impact on a girl's sense of self-worth, conveying to her that she is a second-class citizen who is valued only for her physical appearance.⁴⁹

Furthermore, sexual harassment may have a real impact on a girl's academic progress.⁵⁰ A girl who has witnessed or has been the target of harassment may be afraid to speak in class for fear of drawing attention to herself and being teased.⁵¹ A student has difficulty paying attention when she is being poked, propositioned, or mocked during class.⁵² A girl who is distracted by harassing behavior may earn lower grades, lose interest in school, skip or drop classes, switch schools, or withdraw from school.⁵³

Schools, the Department of Education, and national organizations have recommended and implemented numerous gender equity initiatives to encourage girls' academic success and specifically to urge girls to study science or math.⁵⁴ Most programs, however, fail to ac-

ual Harassment of Students in Primary and Secondary School, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 559-60 (1996) (discussing the effects of sexual harassment on victims).

47. See *id.* (suggesting that girls lose self-esteem to a greater extent than boys because girls suffer much more sexual harassment than boys). Researchers have suggested that general depression; dissatisfaction with classes; a sense of powerlessness, helplessness or vulnerability; loss of academic self-confidence and decline in school performance; feelings of isolation; irritability; fear; anxiety; inability to concentrate; and alcohol and drug dependency may result from sexual harassment. See *id.* at 560-61; see also 62 Fed. Reg. 12,033, 12,034 (1997) (asserting that "sexual harassment can interfere with a student's academic performance and emotional and physical well-being").

48. See Dolan, *supra* note 35, at 222 (citing Patricia Edmonds, "H" Is for Harassment: Schools Forming Policies, USA TODAY, Oct. 11, 1993, at 3A).

49. See Dolan, *supra* note 35, at 223 (explaining that girls are "twice victimized" by sexual harassment — once at the original encounter and then afterwards when the girl understands the message that physical appearance is her only important attribute).

50. See 62 Fed. Reg. 12,033, 12,034 (1997) (addressing the impact of sexual harassment on girls' academic progress).

51. See LARKIN, *supra* note 38, at 110-13 (explaining the negative impact of harassment on academic performance). Larkin cites examples showing that girls limit their participation in class discussion early in the year to determine how males will respond to girls' comments, and that girls will speak less after boys have chanted "airhead" during presentations or mocked girls during a speech. See *id.* at 110-11. Some girls skip class to avoid being subjected to "anti-female" remarks or taunting, while others drop courses. See *id.* at 111.

52. See LARKIN, *supra* note 38, at 112-13 (providing examples of actual experiences and citing the AAUW Survey to validate these experiences).

53. See AAUW SURVEY, *supra* note 41. The AAUW Survey found that common consequences of sexual harassment included "not wanting to go to school," "not wanting to talk as much in class," "finding it hard to pay attention in school," "staying home from school or cutting class," "making a lower grade in class," and "thinking about changing schools." *Id.*

54. Special efforts have been made to encourage girls to pursue careers in math and science because of the disproportionate lack of women in these fields. See MYRA SADKER & DAVID

knowledge the existence of sexual harassment.⁵⁵ June Larkin, noted educator and author, believes these programs will not be fully effective unless the issue of sexual harassment is addressed.⁵⁶ She states: "We can't continue to push female students forward without acknowledging all the ways they get set back. Unless we confront the problem of sexual harassment in schools, our lofty statements about providing gender equitable education are meaningless. Harassment is a major barrier to girls' education."⁵⁷

Schools' unwillingness to deal with sexual harassment or their inappropriate handling of sexual harassment complaints reinforces the acceptability of the behavior.⁵⁸ The victim learns that trusted adults will not take action, which makes her feel that reporting harassment is meaningless and destroys her sense of worth.⁵⁹

What is equally, if not more disturbing, is that the harasser does not learn that his behavior is inappropriate and potentially illegal.⁶⁰ "If sexual harassment is not prevented today," reports children's advocate Toby Carpenter, "tomorrow it may be some form of sexual abuse or sexual victimization."⁶¹ The harasser is likely to carry his attitudes about women and his inappropriate behavior into

SADKER, FAILING AT FAIRNESS 36-37 (1994).

55. See LARKIN, *supra* note 38, at 16.

56. See LARKIN, *supra* note 38, at 16. Larkin explains that educational equality means more than giving girls access to an education that is geared to boys. Teachers and staff members must make schools "comfortable, supportive and safe places for female students." *Id.* at 42. Poet Dale Spender makes the point in her poem *Gender and Marketable Skills: Who Underachieves at Math and Science*

... We can chase our own tails
and spend years
testing girls for their own inadequacies
We will not find them,
For we are looking in the wrong place.
The underachievement lies not in the girls,
But in those who do not wish to accept them
As equal.

Id. at 42-43 (quoting LEARNING TO LOSE: SEXISM IN EDUCATION, 130 (D. Spender and E. Sarah eds., The Women's Press 1988)).

57. LARKIN, *supra* note 38, at 16.

58. See Dolan, *supra* note 35, at 223.

59. See Dolan, *supra* note 35, at 224. The "boys will be boys" excuse sends the message that boys are privileged and girls are inferior. See *id.* Girls who learn to silence their complaints about boys' mistreatment may continue this behavior into adulthood and adult relationships. This societal conditioning to unquestioningly accept harassment or abuse from males may train girls who become battered women not to leave their abusive partners. See *id.* (citing Nan Stein, *Sexual Harassment: It Breaks Your Soul and Brings You Down*, N.Y. TEACHER, Oct. 18, 1993, at 23).

60. See *Angry Kids*, *supra* note 32 (quoting Toby Carpenter, Children's Advocacy Center) (referring to the potential for sexual harassment and sexual abuse charges as harassers get older).

61. *Angry Kids*, *supra* note 32 (quoting Toby Carpenter, Children's Advocacy Center).

relationships, which may lead to dating violence, rape, and spousal abuse.⁶² The harasser is also likely to continue the harassing behavior when he enters the workplace.⁶³ Peer sexual harassment perpetuates sexism, gender discrimination, and violence against women throughout society.⁶⁴

IV. LEGAL RESPONSIBILITY OF SCHOOL DISTRICTS TO PREVENT PEER SEXUAL HARASSMENT

A. Federal Regulations — Title IX

Title IX and its implementing regulations prohibit discrimination against an individual on the basis of sex in any educational program receiving federal funds.⁶⁵ The Department of Education, Office for Civil Rights is the law enforcement agency charged with enforcing Title IX.⁶⁶ Title IX covers almost 15,000 school districts and approximately 51.7 million students who attend primary and secondary schools in the United States.⁶⁷

Peer sexual harassment that creates a hostile environment is a prohibited form of sex discrimination.⁶⁸ The OCR Sexual Harassment Guidance (Guidance) defines peer harassment as:

[S]exually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal or

62. See generally LARKIN, *supra* note 38 (discussing the long term effects of allowing sexual abuse to continue without repercussions). According to Marion Boyd, Ontario Women's Issues Minister, sexual assault is learned at an early age and begins when boys call girls cows, sluts, and other derogatory names, and continues, if unchecked, with inappropriate touching, mock intercourse, and actual rape. See *id.* at 14.

63. Cf. JUDITH BERMAN BRANDENBURG, CONFRONTING SEXUAL HARASSMENT: WHAT SCHOOLS AND COLLEGES CAN DO 44 (1997) (discussing the danger in ignoring sexual harassment at schools). It would be unrealistic to expect boys to change their attitudes about and behavior toward girls as soon as they leave school; the author explains:

The differential treatment of boys and girls in the classroom fosters lower self-esteem among girls and reinforces the biases that lie beneath and result in sexual harassment. The perception that boys are more valued than girls, who are second-class citizens, fosters the notion that it is acceptable to treat girls poorly. If, through giving boys most of our attention and forgiving their inappropriate behavior, we give them the message that they are more worthy and powerful than girls, is it any surprise that boys attempt to use this power?

Id.

64. See Bodnar, *supra* note 46, at 564 (explaining how a school's refusal to deal with harassment teaches children that girls are worth less than boys, and questioning why we would expect boys, who then become men, to act differently).

65. See 62 Fed. Reg. 12,033, 12,034 (1997) (citing 20 U.S.C. § 1681 (1994); 34 C.F.R. § 106.31(b) (1986)).

66. See OFFICE FOR CIVIL RIGHTS: ENSURING EQUAL ACCESS TO QUALITY EDUCATION (1996).

67. See *id.*

68. See 62 Fed. Reg. 12,033, 12,038 (1997).

physical conduct of a sexual nature) . . . by another student . . . that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an educational program or activity, or to create a hostile or abusive environment.⁶⁹

OCR will find a school in violation of Title IX if: (1) a hostile environment, including one caused by students or other third parties, exists;⁷⁰ (2) the school has actual or constructive notice of the harassment;⁷¹ and (3) the school fails to take immediate and appropriate steps to remedy the situation.⁷²

1. Existence of a Hostile Environment

Peer sexual harassment creates a hostile environment in violation of Title IX when conduct of a sexual nature or conduct based on sex is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program."⁷³ To determine whether the conduct rises to this level, OCR will consider the conduct from both a subjective and objective perspective.⁷⁴ In other words, OCR will look at how the particular victim perceived the harassment (subjective) and how a reasonable student would perceive the harassment (objective).⁷⁵ In making a determination, all relevant circumstances will be considered, including:

- 1) The degree to which the conduct affected one or more students' education.⁷⁶ To offend Title IX, the conduct must have limited the ability of a student to participate in or benefit from her education, or it must have altered the conditions of her educational experience.⁷⁷*
- 2) The type, frequency and duration of the conduct.⁷⁸*
- 3) The number of individuals involved.⁷⁹*

69. *Id.*

70. *See id.* at 12,039.

71. *See id.*

72. *See id.*

73. *Id.* at 12,038.

74. *See* 62 Fed. Reg. 12,041, 12,049 (1997) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (requiring victims to subjectively perceive an environment as abusive before courts will find that the conduct has altered the conditions of the victim's work environment and applying a "reasonable person" standard)).

75. *See id.* at 12,049 n.44 (citing *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288 (N.D. Cal. 1993), and suggesting that it may be appropriate to use a "reasonable woman" or "reasonable victim" standard).

76. *See id.* at 12,041 (stating that hostile environment cases may or may not involve tangible or obvious injuries).

77. *See id.*

78. *See id.*

79. *See id.* at 12,041-42. Harassment may be committed by an individual or a group, and

- 4) *The age and sex of the alleged harasser and victim(s).*⁸⁰
- 5) *The size of the school, location of the incidents, and context in which they appeared.*⁸¹
- 6) *Other incidents at the school. Additional incidents at the school may be compiled to show the existence of a hostile environment.*⁸²
- 7) *Incidents of gender-based but non-sexual harassment.*⁸³

2. Actual or Constructive Notice

A school will be held responsible only if it had actual or constructive notice of a sexually hostile environment.⁸⁴ A school has notice of a sexually hostile environment when "it actually knew, or in the exercise of reasonable care, should have known about the harassment."⁸⁵ As long as an agent or responsible employee of the school has notice, notice will be imputed to the school.⁸⁶ This includes individuals who witness the harassment or to whom the harassment has been reported, and therefore includes, among others, bus drivers, teachers, and custodians.⁸⁷

Title IX regulations require schools to adopt, publish, and disseminate sex discrimination grievance procedures.⁸⁸ The procedures must provide for "prompt and equitable resolution" of the complaints.⁸⁹ These procedures provide a mechanism for schools to be informed of any harassing behavior as soon as it happens the first time, thus enabling officials to deal with the harassment quickly.⁹⁰

may target an individual or a group; the effect of the harassment will vary depending on these factors. *See id.*

80. *See* 62 Fed. Reg. 12,042 (1997) (asserting that younger students may feel more intimidated when harassed by an older student).

81. *See id.* (stating that instances on school buses may be more intimidating than similar conduct on a playground because on buses, it would be harder for victims to avoid harassers).

82. *See id.*

83. *See id.* (suggesting that incidents of both sex-based and gender-based harassment will be considered to determine whether a hostile environment exists). The Guidance describes gender-based harassment as harassment based on sex, but not of a sexual nature. *See id.* at 12,039. For example, male students' repeated sabotaging of female students' laboratory assignments may constitute gender-based harassment. *See id.*

84. *See id.* at 12,042.

85. *Id.*

86. *See* 62 Fed. Reg. 12,042 (1997).

87. *See id.*

88. *See id.* at 12,044 (stating that sexual harassment is a form of sexual discrimination and therefore needs to be addressed in the school's grievance procedures).

89. *Id.*

90. *See id.*

Therefore, when a school lacks adequate procedures, OCR will find the school in violation of Title IX.⁹¹

3. *Failure of School to Take Immediate and Appropriate Action*

The Guidance stresses, and case law indicates, that when schools fail to take immediate and appropriate action, the school districts will be held responsible for their *own discrimination* for allowing sexual harassment to continue.⁹² However, school districts will not be held directly responsible for the actions of third parties or students.⁹³

The Guidance identifies possible actions that a school may take, in addition to a thorough investigation of the present allegation, in response to a report of sexual harassment.⁹⁴ The Guidance stresses that the school should take steps to prevent further harassment and suggests that the school may need to provide training to all persons in the school.⁹⁵ The Guidance also suggests that a school should develop a prevention plan, including training for administrators, teachers, and staff members, and "age-appropriate classroom information" for students.⁹⁶

Because the OCR Guidance was based on pre-existing OCR procedures and federal case law, it reflects the current state of discrimination law in most circuits.⁹⁷ The Guidance itself is notice to a school of the school's responsibility to prevent peer sexual harassment from creating a hostile environment.⁹⁸ This "notice" may strengthen a student plaintiff's civil rights action against a school fail-

91. See *id.* (concluding that if students are unaware of what kind of conduct constitutes sexual harassment because of a lack of a policy specifically addressing sexual harassment, the policy will be considered ineffective).

92. See 62 Fed. Reg. 12,039 (1997) (noting that this has been OCR's long standing practice); see, e.g., *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006 (W.D. Mo. 1995); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415 (N.D. Cal. 1996); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193 (N.D. Iowa 1996).

93. See 62 Fed. Reg. 12,039 (1997) (noting that this may change if an agency relationship can be found to exist between the perpetrator and the school, i.e., a teacher or cafeteria worker).

94. See *id.* at 12,042-44.

95. See *id.* at 12,044.

96. *Id.* The Department of Education is developing publications identifying "promising programs and practices for preventing and responding to sexual harassment." These publications will be available to all primary and secondary schools, and will include information on preventing sexual harassment. Telephone Interview with Howard Kallem, Chief Attorney D.C. Enforcement Office, OCR (Sept. 17, 1997) (notes on file with author).

97. See 62 Fed. Reg. 12,033, 12,036 (1997).

98. See Dolan, *supra* note 35, at 85.

ing to address peer sexual harassment that created a hostile environment.⁹⁹

B. Review of Case Law¹⁰⁰

The Supreme Court allowed a student to recover monetary damages from a school for the sexual harassment of a student by a teacher in *Franklin v. Gwinnett County Public Schools*.¹⁰¹ The plaintiff, high school student Christine Franklin, alleged that on at least three occasions, teacher Andrew Hill interrupted one of Franklin's classes, asked Franklin's teacher to excuse her, and took Franklin to an office where he sexually assaulted her.¹⁰² Franklin alleges that teachers and administrators took no action to halt the sexual harassment and discouraged her from pressing charges against Hill.¹⁰³ Franklin made a claim of intentional discrimination based on sex.¹⁰⁴ The Court concluded that a damages remedy is available for an action brought to enforce Title IX.¹⁰⁵ Other courts have used the Supreme Court's decision as a foundation for awards of monetary damages in hostile environment cases, including cases where the hostile environment is

99. For a plaintiff to prevail in an action based on 42 U.S.C. § 1983, she must establish either that a special relationship existed between her and the school and that the school failed to protect her, or that the school, as a governmental actor, denied the plaintiff a right guaranteed by the U.S. Constitution or federal law. See 42 U.S.C. § 1983 (1994). A governmental official performing discretionary functions generally is shielded from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Arguably, the OCR Guidance clarifies a student's right to a non-discriminatory education free from a hostile environment caused by peer sexual harassment. See generally Dolan, *supra* note 35 (arguing for recognition of a special relationship between school officials and students which imposes an affirmative duty of protection on officials).

100. For a thorough discussion and analysis of Title IX sexual harassment case law, see Melissa M. Nasrah, Casenote, *A Lost Chance in Rowinsky v. Bryan Independent School District to Use Title IX to Make Schools Stop Peer Sexual Harassment By Imposing Title VII Standards*, 5 AM. U.J. GENDER & L. 453 (1997).

101. 503 U.S. 60 (1992). Interestingly, the United States Solicitor General, Kenneth Starr, submitted a brief as amicus curiae urging affirmance in favor of defendant. The United States argued that damages should be limited to backpay (which are not applicable for a student plaintiff) and prospective relief. The Court noted that the Government's position would leave the plaintiff without any remedy. See *id.* at 61, 75-76; see also *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (holding that a claim for monetary damages is supported by the implied right of action under Title IX).

102. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63 (1992).

103. See *id.* at 63-64.

104. See *id.* The Court did not define or analyze "intentional discrimination," leaving unclear how the Court meant the "intentional discrimination" standard to relate to the standard for liability for hostile work environment sexual harassment under Title VII. See *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1419, 1422 (N.D. Cal. 1996) (holding that hostile environment harassment constitutes intentional discrimination for which a school may be held liable if it fails to provide prompt remedial action).

105. See *Franklin*, 503 U.S. at 76.

created by peer harassment and the school fails to take prompt and effective remedial action.¹⁰⁶

The Ninth Circuit, in *Oona v. McCaffrey*,¹⁰⁷ interpreted the Supreme Court's decision in *Franklin* to hold that under clearly established law, school officials have a duty to take reasonable steps to prevent peer harassment by students.¹⁰⁸ The circuit court reasoned that by citing with approval *Meritor*, a Title VII case, the Supreme Court was "analogizing the duties of school officials to prevent sexual harassment under Title IX, to those of employers under Title VII."¹⁰⁹ The court also found support for applying Title VII standards to Title IX cases in the Sixth and Eighth Circuits.¹¹⁰

The Northern District of California, in *Doe v. Petaluma City School District*,¹¹¹ held that school districts can be liable for peer sexual harassment if officials knew or should have known that the harassment was occurring, yet failed to take proper remedial action.¹¹² In *Petaluma*, the plaintiff-student alleged that her classmates made repeated lewd comments to her about having sexual intercourse with a hot dog and wrote similar remarks on the rest room walls.¹¹³ The plaintiff repeatedly complained to the school counselor, who told the plaintiff that "boys will be boys," and advised her to work out her problems.¹¹⁴ The harassing behavior, which occurred on an almost daily basis, took place from September 1990 until February 1992, when the

106. See, e.g., *Petaluma*, 949 F. Supp. at 1418-22 (holding that the district can be held financially liable for peer harassment); *Bruneau v. South Kortright Central Sch. Dist.*, 935 F. Supp. 162, 172 (N.D.N.Y. 1996) (finding that the school's failure to take corrective action to halt peer sexual harassment subjected the school to damages).

107. 122 F.3d 1207 (1997).

108. See *Oona v. McCaffrey*, 122 F.3d 1207, 1211 (1997) (affirming denial of qualified immunity for school officials who failed to prevent peer sexual harassment and sexual harassment by a student teacher).

109. *Id.* at 1210.

110. See *id.* (citing *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (considering the school's duties to prevent harassment under Title IX to be the same as that of an employer's under Title VII), and *Doe v. Claiborne County*, 103 F.3d 495, 514-15 (6th Cir. 1996) (holding that a hostile environment sexual harassment claim is cognizable under Title IX, and that Title VII principles guide resolution of such a claim)).

111. 949 F. Supp. 1415 (N.D. Cal. 1996).

112. See *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1416 (N.D. Cal. 1996).

113. See *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449 (9th Cir. 1995) (reviewing plaintiff's § 1983 claim and holding that in 1990, before the United States Supreme Court decided *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), school officials had no clearly established legal duty to prevent peer sexual harassment). The plaintiff's male and female classmates repeatedly taunted her about having sex with a hot dog and called her derogatory names. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1564 (N.D. Cal. 1993). Students tried to provoke fights with her, and one student slapped her. See *id.* at 1565. The plaintiff stopped using the rest rooms at school because they contained graffiti which referred to her as a "hot dog bitch." *Id.*

114. See *Petaluma*, 54 F.3d at 1449.

plaintiff's mother enrolled her in another school.¹¹⁵ The counselor never advised the plaintiff or her parents that a Title IX grievance procedure existed.¹¹⁶ No school official ever took action to end the harassment.¹¹⁷

The district court, noting that sexual harassment is a greater problem in schools than in the workplace,¹¹⁸ held that the appropriate standard for a Title IX action is the traditional Title VII hostile environment standard.¹¹⁹ The elements which a plaintiff must prove are: (1) that she was subjected to unwelcome harassment based on her sex,¹²⁰ (2) that the harassment was so severe or pervasive as to create a hostile educational environment,¹²¹ and (3) that the defendants, including school administrators, "knew, or should in the exercise of their duties have known, of the hostile environment and failed to take prompt and appropriate remedial action."¹²²

In *Bosley v. Kearney R-I School District*,¹²³ the court found, as had the *Petaluma* court, that intentional discrimination on the part of the

115. See *Petaluma*, 830 F. Supp. at 1564-66 (recounting that, as a result of the harassment, the plaintiff suffered both mental and physical harm, including injuries to her body as a result of other students ganging up on her).

116. See *id.* The school counselor never informed the Title IX representative about the ongoing harassment because he did not consider the harassment important. See *id.* at 1565.

117. See *id.*

118. See *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1420 (N.D. Cal. 1996).

119. See *id.* Julie Goldscheid, staff attorney for NOW Legal Defense and Education Fund and counsel for the plaintiff, praised the ruling, stating that it "rightfully concludes that the legal standard for awarding money damages in a peer sexual harassment case should mirror that used in workplace sexual harassment cases." *Schools Need to Assume That Peer Sexual Harassment Is Occurring*, YOUR SCHOOL AND THE LAW (LRP Publications, Oct. 1996). Goldscheid advises districts to take complaints of sexual harassment very seriously, stating, "[s]chools cannot ignore these types of situations or dismiss them by saying, 'boys will be boys.' These attitudes don't cut it anymore." *Id.* Conversely, however, Kim Jameson, deputy superintendent for the Petaluma City School District, asserts that the district will be forced unfairly to police student behavior. See *id.*

120. See *Petaluma*, 949 F. Supp. at 1423.

121. See *id.*

122. *Id.* Given the statistic that 85% of girls are subjected to sexual harassment in schools, the court noted that it appears that districts are on notice that student to student sexual harassment is very likely to exist in their schools:

In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment.

Id. at 1426. The court ruled that the Title VII standard for intentional discrimination, which imposes liability where the school "knows or should have known of the hostile environment and fails to take remedial action," is the appropriate standard. *Id.*

The Petaluma City School District settled the lawsuit with a payment of \$250,000 to the plaintiff. See *California District Settles Long-Running Peer Sexual Harassment Case for \$250,000*, SCHOOL VIOLENCE ALERT (LRP Publications, Feb. 1997).

123. 904 F. Supp. 1006 (W.D. Mo. 1995).

school district is a required element of a claim for damages, holding that a "plaintiff must show that the school district selected a particular course of action in response to her complaints of sexual harassment at least in part 'because of' plaintiff's sex."¹²⁴ The court stated that the required intent could be established by inference.¹²⁵ Therefore, the court could infer intentional discrimination upon a showing that the plaintiff was subjected to harassment based on sex while participating in an educational program, and that the school district knew of the harassment and failed to take appropriate remedial action.¹²⁶

The *Bosley* court held that Title VII provides the most appropriate standard for enforcing the anti-discrimination provisions of Title IX.¹²⁷ However, the court modified the standard for school liability, raising the test of "knew or should have known of the hostile environment and took no or insufficient remedial action,"¹²⁸ to "knew of the harassment and intentionally failed to take proper remedial action."¹²⁹

The Eleventh and Fifth Circuits have not held school districts liable for peer harassment under Title IX. In *Davis v. Monroe County Board of Education*,¹³⁰ a fifth-grade student named LaShonda was sexually harassed and sexually abused by a classmate for a period of six months, beginning in December 1992.¹³¹ Her classmate fondled her, attempted to touch her breasts and vaginal area, rubbed up against her, and told her that he wanted to "feel your boobs" and "get in bed with you."¹³² The offender's behavior escalated in severity until he was convicted of sexual battery in May 1993.¹³³ Despite repeated complaints by LaShonda and her mother to both the teacher and principal, school officials did not discipline the offender.¹³⁴

124. *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1021 (W.D. Mo. 1995).

125. *See id.* The court relied on language from *Washington v. Davis*, 476 U.S. 229 (1976), in which the court asserted that "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Id.* at 241.

126. *See Bosley*, 904 F. Supp. at 1025.

127. *See id.* at 1025.

128. *Id.* at 1022.

129. *Id.* at 1023.

130. 74 F.3d 1186 (11th Cir. 1996), *rev'd*, 102 F.3d 1390 (11th Cir. 1997).

131. *See Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1188-89 (11th Cir. 1996), *rev'd*, 102 F.3d 1390 (11th Cir. 1997).

132. *Id.*

133. *See id.* at 1189.

134. *See id.* LaShonda reported the classmate after every incident of harassment, and her mother called the principal or teacher after every incident except one. No protective action was taken on the part of the school; school officials did not even move LaShonda's seat away

The Eleventh Circuit, sitting en banc, ruled that the plaintiff failed to state a cause of action against the school district.¹³⁵ Because Title IX was enacted by Congress under the Spending Clause,¹³⁶ the court reasoned that Congress must provide clear notice to schools, as recipients of federal funds, of any conditions attached to the receipt of those funds.¹³⁷ The court stated that the school district could not be held liable for student to student sexual harassment because the language and legislative history of Title IX fail to give "unambiguous notice"¹³⁸ to schools that they would be liable for peer sexual harassment.¹³⁹ The majority did not consider the OCR Guidance because the offensive conduct occurred before the Guidance was published.¹⁴⁰

The dissent charged the majority with ignoring "the plain meaning of Title IX as well as its spirit and purpose,"¹⁴¹ and suggested that under appropriate statutory analysis and Supreme Court precedent, the plaintiff had stated a cause of action.¹⁴² The dissent reasoned that "[j]ust as a working woman should not be required to 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living,' a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education."¹⁴³

Over an equally terse dissent, in *Rowinsky v. Bryan Independent School District*,¹⁴⁴ the Fifth Circuit ruled that a school will be liable only if the

from the classmate until after she had complained for more than three months. *See id.* at 1189.

135. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1392 (11th Cir. 1997).

136. *See U.S. CONST.* art. 1, § 8, cl. 1 (providing in part: "Congress shall have Power To . . . provide for the general Welfare of the United States"). The dissent points out that in *Franklin v. Gwinnett County Public Schools*, the Supreme Court assumed, without deciding, that Title IX was enacted under the Spending Clause. *See Davis*, 120 F.3d at 1397-98 (Barkett, J., dissenting) (citing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)).

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

138. *Id.* The court asserted: "To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding." *Id.* at 1399 (citing *Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981)).

139. *See id.* ("A spending power provision must read like a prospectus and give funding recipients a clear signal of what they are buying").

140. *See id.* at 1404 n.23. It is unclear whether the court would find the Guidance to be adequate notice to hold schools responsible for future claims of failing to correct peer harassment. Judge Tjoflat states, albeit in a footnote in a section of the majority opinion which was joined by no other judges, "[i]n this publication, the OCR constructs a labyrinth of factors and caveats which simply reinforces our conclusion that the Board was not on notice that it could be held liable in the present situation." *Id.*

141. *Id.* at 1411 (Barkett, J., dissenting).

142. *See id.*

143. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1417 (11th Cir. 1997) (Barkett, J., dissenting) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

144. 80 F.3d 1006 (5th Cir. 1996).

plaintiff can specifically show discriminatory intent by demonstrating that "the school district responded to sexual harassment claims *differently* based on sex."¹⁴⁵ In *Rowinsky*, two eighth-grade girls were harassed on the bus and in the classroom.¹⁴⁶ At least three different boys exhibited harassing behavior toward the girls, including grabbing the girls' breasts and genital area, slapping their buttocks, reaching under one girl's shirt and unfastening her bra, using foul language, and making lewd comments, such as "When are you going to let me fuck you?"¹⁴⁷ After repeated complaints, the school disciplined the offenders, although not to the satisfaction of the plaintiffs.¹⁴⁸ The school also replaced the bus driver; however, this did not alleviate the problem because the new driver assigned one of the plaintiffs a seat next to one of the harassers.¹⁴⁹ The complaint alleged that school officials condoned and caused a sexually harassing hostile environment.¹⁵⁰ The court found the school district had no liability for allowing the harassing behavior to continue.

Consequently, under the *Rowinsky* approach, it is not enough that the school district intentionally permits a hostile environment to exist and continue; a school district may be held liable *only* if it treats girls' complaints differently than boys' complaints.¹⁵¹

Critics of the *Rowinsky* decision assert that it fails to hold the school district responsible for its own inactions or for policies and procedures which create or tolerate a hostile educational environment.¹⁵²

145. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996) (emphasis added).

146. *See id.* at 1008. The harassment began in September, 1992, and continued through March, 1993. *See id.* at 1008-09.

147. *Id.* at 1008-09.

148. *See id.* Plaintiffs were not informed by the school of the existence of Title IX or any Title IX grievance procedures. *See id.* at 1009.

149. *See id.* at 1009.

150. *See id.* at 1009-10.

151. *See Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1420-21 (N.D. Cal. 1996) (criticizing *Rowinsky*). If harassment exists only, or predominantly, against girls, such that there are not complaints by boys providing a reasonable comparison for the treatment of girls' complaints, girls are thereby deprived of a remedy. *See id.* at 1421. Therefore, a school will not be held liable even if the hostile environment is extremely severe and pervasive, the school district has actual knowledge of the hostile environment, and the school district chooses not to take any action whatever to remedy it. *See id.* Under *Rowinsky*, the school would not be liable even if the school district's inaction was directly caused by discriminatory animus. *See id.*

152. *See Rowinsky*, 80 F.3d at 1016-24 (Dennis, J., dissenting); 62 Fed. Reg. 12,033, 12,048 (1997) (declaring that "OCR believes that the *Rowinsky* decision misinterprets Title IX"). The OCR Guidance reports that in two recent Fifth Circuit cases involving sexual harassment of students by employees, the Fifth Circuit again misapplied Title IX law. *See* 62 Fed. Reg. 12,036 (1997) (citing *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393, 398-400 (5th Cir. 1996) (determining the school lacked notice and holding the school district not liable for sexual molestation of a second grade student by her teacher because the student and her mother had

In a lengthy dissent, Judge George Dennis stated that, based on the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*,¹⁵³ a school that fails to take steps within its power to protect a student from sexual harassment is liable for discrimination.¹⁵⁴ He asserted: "Unquestionably, because the school board has accepted federal financial assistance, Title IX places upon it a duty to take appropriate measures to protect students from being subjected in the school environment to sexual harassment, abuse and discrimination of which the board has knowledge."¹⁵⁵

The Supreme Court had the opportunity to clarify the law regarding school district liability in peer harassment suits when the plaintiffs in *Rowinsky* petitioned for certiorari. The Court, however, denied certiorari,¹⁵⁶ leaving in place both the faulty Fifth Circuit decision and a substantial split in the circuits.¹⁵⁷

Other courts have rejected the *Rowinsky* approach. The *Petaluma* court reasoned that such an approach "yields extreme results inconsistent with the body of discrimination law."¹⁵⁸ The Office for Civil Rights assailed the *Rowinsky* decision.¹⁵⁹ Norma Cantu, Assistant Secretary for Civil Rights, stated that the Fifth Circuit is in error, and that "the court rejected other federal opinions on the subject, misconstrued existing statements of OCR policy, and dismissed OCR's deliberate and settled practice."¹⁶⁰ OCR explains that under its policy, the school district is not being held responsible for the students' harassment, but it is being held liable for "permitting an atmosphere of

reported the incident only to the homeroom teacher, despite the school handbook instruction that complaints should be reported to homeroom teachers) and *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997) (reversing the jury finding of district liability where the school's karate instructor repeatedly initiated sexual intercourse with a fifteen year-old student, often during the school day)).

153. 503 U.S. 60 (1992).

154. See *Rowinsky*, 80 F.3d at 1016-24 (Dennis, J., dissenting). Judge Dennis also emphasized that the record clearly demonstrated that the school board knowingly failed to take appropriate action to protect the students from the harassment of which the students and their parents had complained. See *id.*

155. *Id.* at 1024 (Dennis, J., dissenting). The court failed (or refused) to understand the nature of sexual harassment and its impact on females.

156. 117 S. Ct. 165 (1996).

157. Ideally, the Court will grant certiorari in *Davis* to clarify the law.

158. *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (stating that "*Rowinsky* is manifestly based on a fundamental misunderstanding of the nature of this type of claim").

159. See 61 Fed. Reg. 52,172, 52,180 (1996) (explaining the *Rowinsky* court's misunderstanding of a school's liability under Title IX and claiming the *Rowinsky* decision "rejected the authority of other Federal courts and OCR's longstanding construction of Title IX").

160. *Sexual Harassment: Office for Civil Rights Issues Guidance on Peer Harassment*, SCHOOL VIOLENCE ALERT (LRP Publications, Sept. 1996).

sexual discrimination to permeate the educational program,"¹⁶¹ which was created by the district's own action or inaction.¹⁶²

In the Fifth Circuit, because a school district has virtually no duty to correct an environment of sexual harassment, a court is unlikely to determine that it has a legal responsibility to prevent sexual harassment from occurring. In the Eleventh Circuit, it is unclear whether the OCR Guidance has provided school districts with the necessary "unambiguous notice" that failure to halt peer sexual harassment is a violation of Title IX.¹⁶³ In all other circuits, however, given the notice provided by the OCR Guidance and the lack of precedent to the contrary, a school district may be held liable for failing to correct a hostile environment.¹⁶⁴ Because education is fundamental to prevention and elimination of sexual harassment, a school district should be less likely to be found liable for sexual discrimination if it has an effective prevention program in place.

C. State Statutes

In addition to potential liability under Title IX, school districts may face legal action in state courts for failing to provide a non-discriminatory education to students. Many states have civil rights statutes which prohibit discrimination based on sex, including sexual harassment.¹⁶⁵ Some states have adopted specific statutes which prohibit sexual harassment in the workplace, schools, or both. For instance, Minnesota, California, Illinois, and Wisconsin prohibit sexual harassment in educational institutions.¹⁶⁶ At least one state statute requires educational institutions to educate students about sexual harassment, including peer harassment.¹⁶⁷

161. 61 Fed. Reg. 51,172, 51,280 (1996) (comparing Title IX standards to Title VII standards imposed upon employers).

162. *See id.*

163. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1404 n.23 (11th Cir. 1997).

164. *But see supra* note 138 (examining the Eleventh Circuit's discussion of the Guidance).

165. *See, e.g.*, FLA. STAT. chs. 760.01-760.11 (1997) (securing for all individuals freedom from discrimination); IDAHO CODE § 67-5901 (1996) (proclaiming the intent of the statute is "[t]o secure for all individuals within the state freedom from discrimination because of . . . sex . . . in connection with . . . education").

166. *See, e.g.*, MINN. STAT. §§ 127.46, 135A.15 (1991) (requiring each school board to adopt a written sexual harassment and sexual violence policy which applies to the entire school community); CAL. EDUC. CODE § 212.6 (West 1994) (providing all individuals freedom from discrimination of any kind in California's educational institutions); 765 ILL. COMP. STAT. ANN. 5/5A-102 (West 1993) (making it a civil rights violation for any higher education representative to commit or engage in sexual harassment in higher education); WIS. STAT. § 38.12 (1994) (creating affirmative duties for school boards to educate about and report sexual harassment).

167. *See* WIS. STAT. § 38.12 (1994) (requiring schools to provide oral and written information on sexual assault and harassment to students). Some states, including Iowa and Connecticut, include prohibitions against sexual harassment at colleges and universities but not

Schools failing to comply with the educational or non-discriminatory requirements of state statutes risk losing state funding for education.¹⁶⁸ Additionally, state courts may look to such statutes to hold a school liable in a tort action brought by a victim of sexual harassment.¹⁶⁹

V. METHODS FOR REDUCING PEER SEXUAL HARASSMENT AND LIABILITY

To avoid legal liability under Title IX, a school cannot allow peer sexual harassment to rise to the level that creates a hostile environment.¹⁷⁰ School districts will not be held responsible for all of the harassing behaviors of students, but they will be held liable if they *ignore* all the harassing behavior.¹⁷¹ A school is an educational institution. Therefore, it is appropriate to use education to prevent undesirable, harassing behavior before it reaches the point where the behavior has created a hostile environment, has affected a child's ability to learn, and has created a legal liability for the school district.

To effectively reduce the incidence of peer sexual harassment, thereby reducing liability, a district should implement a comprehensive strategy that begins with clear policies and is reinforced with assessable, fair complaint procedures and widespread educational efforts for students, faculty, and staff.

A. School Districts Should Implement Comprehensive Anti-Harassment Policies

Title IX does not require a school to have a sexual harassment policy, although it is generally recommended.¹⁷² The Supreme Court in

K-12 schools. See IOWA CODE § 19b.12 (1995); CONN. GEN. STAT. §§ 46a-54, 10a-55c (1992). Arguably, by the time a student enters college, his or her attitudes are well-formed. It seems unlikely that efforts to change college-age students' attitudes or behaviors about sexual harassment will be successful, especially if the issues were never addressed in the student's first thirteen years of education.

168. See JOHN F. LEWIS & SUSAN C. HASTINGS, SEXUAL HARASSMENT IN EDUCATION 38 (2d ed. 1994) (detailing the need for sexual harassment policies in some states in order to receive education funding).

169. Such statutes may create a duty for which the district will be liable if it breaches. See NATIONAL SCHOOL BOARDS ASSOCIATION, SEXUAL HARASSMENT IN THE SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS (1993) [hereinafter NSBA] (citing *Eide v. Kelsey-Hayes Co.*, 397 N.W.2d 532 (Mich. 1986) (looking to Michigan's Civil Rights Act to award damages), and *College-Town, Div. of Interco, Inc. v. Massachusetts Comm. Against Discrimination*, 508 N.E.2d 587 (Mass. 1987) (holding a hostile environment cause of action cognizable under Massachusetts anti-discrimination law)).

170. See *supra* Part IV. (explaining liability under Title IX).

171. See *supra* Part IV. (explaining school district liability under Title IX).

172. See AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, SEXUAL HARASSMENT: THE COMPLETE GUIDE FOR ADMINISTRATORS 3 (1996) [hereinafter AASA] (describing the impor-

Meritor noted that the defendant employer's "general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination."¹⁷³ The Court opinion suggests that if "procedures were better calculated to encourage victims of harassment to come forward," the employer may have a stronger argument that it should be insulated from liability.¹⁷⁴

A policy that specifically prohibits harassment and explains to students what harassment is may help reduce the prevalence of inappropriate behavior. A school has a duty under Title VI to prevent a racially hostile environment and also has a general duty to provide education to all students.¹⁷⁵ Because it may be counterproductive to have multiple policies that discuss similar prohibited behaviors, it may be better for a school to adopt one concise yet comprehensive anti-harassment policy.

Policies provide important guidelines for directing student and staff behavior.¹⁷⁶ An effective policy can also limit a school district's liability.¹⁷⁷ A good policy is consistent with current law, is responsive to complaints, addresses all forms of sexual harassment, and emphasizes education and prevention.¹⁷⁸ "Good policies set clear goals and objectives;"¹⁷⁹ they are simply written (and therefore more easily understood), and are comprehensive.¹⁸⁰ The American Association of School Administrators outlines the elements included in a good policy:

tance of and elements of good written policies); LEWIS & HASTINGS, *supra* note 168, at 39 (discussing the need for written policies against sexual harassment and suggesting what issues should be addressed in those policies).

173. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72-73 (1986).

174. *Id.* at 73.

175. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1996); see generally *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance*, 59 Fed. Reg. 11,448 (1994) (providing OCR's position on Title VI duties).

176. See AASA, *supra* note 172, at 3 (detailing the importance of having a policy and outlining elements of a good policy). Even a school district that has a policy prohibiting disorderly or disruptive behavior or discrimination should implement a policy to address harassment because of the complex and sensitive issues associated with sexual harassment. See *id.*

177. See AASA, *supra* note 172, at 3 (describing the elements an administrator must consider when formulating a sexual harassment policy); LEWIS & HASTINGS, *supra* note 168, at 38 (stating that educational institutions cannot expect to avoid liability in the absence of a formal written policy and an effective reporting procedure). Title IX regulations provide that recipients of federal funds must establish and publish grievance procedures that provide for the prompt and equitable resolution of complaints, including sexual harassment complaints. See 62 Fed. Reg. 12,033, 12,040 (1997).

178. See LEWIS & HASTINGS, *supra* note 168, at 39.

179. AASA, *supra* note 172, at 3.

180. See AASA, *supra* note 172, at 3.

- 1) A statement of commitment to an environment free of harassment.¹⁸¹
- 2) A statement about the harasser's intent.¹⁸²
- 3) A comprehensive definition of harassment, including definitions of sexual harassment and hostile environment harassment.¹⁸³
- 4) Examples of behavior which constitute harassment, including examples of sexual harassment and peer harassment.¹⁸⁴
- 5) A prohibition of amorous relationships between district employees and students.¹⁸⁵
- 6) The possible sanctions which may be imposed.¹⁸⁶
- 7) Information on how to report.¹⁸⁷
- 8) A statement that the policy covers the entire school community¹⁸⁸
- 9) A statement prohibiting retaliation.¹⁸⁹
- 10) Legal authority for the policy.¹⁹⁰

To be effective, any policy must be supported by well-established procedures.¹⁹¹

B. School Districts Should Establish Procedures for Effective Response

Title IX regulations require that each school receiving federal support develop a grievance procedure for sex discrimination claims and designate a Title IX coordinator whose duties include investigating

181. See AASA, *supra* note 172, at 4. This statement of commitment should include a prohibition of student to student harassment. See *id.*

182. See AASA, *supra* note 172, at 4. Because the harasser's intent is generally not relevant to determining whether sexual harassment has occurred, appropriate policy language may be: "It is no defense to a claim of sexual harassment that the alleged harasser did not intend to harass." *Id.*

183. See AASA, *supra* note 172, at 4 (stating that the policy should cover all types of harassment, including peer harassment).

184. See AASA, *supra* note 172, at 4-5 (suggesting that providing a list of offending behaviors reduces the risk that students will fail to see their offensive behavior as harassment).

185. See AASA, *supra* note 172, at 5.

186. See AASA, *supra* note 172, at 5; LEWIS & HASTINGS, *supra* note 168, at 39 (stating that the failure to clearly spell out potential consequences of a violation may offend the perpetrator's right to due process).

187. See AASA, *supra* note 172, at 5-6.

188. See AASA, *supra* note 172, at 6.

189. See AASA, *supra* note 172, at 6 (suggesting that the district should discipline anyone who retaliates or reprises against, intimidates, or harasses any person who reports sexual harassment or any person who assists in a sexual harassment investigation or proceeding). Many targets of sexual harassment fail to report because they believe they will be subjected to worse harassment or retaliation by the harassers, his friends or both. See Bodnar, *supra* note 46, at 563.

190. See AASA, *supra* note 172, at 6 (suggesting that the district cite Title IX and relevant state and local statutes).

191. See *infra* Part V.B.

the claims.¹⁹² Title IX does not require a separate grievance procedure for sexual harassment claims.¹⁹³ Because of the variety of possible Title IX grievances,¹⁹⁴ a separate, clear procedure for sexual harassment cases is likely to be more effective and therefore more desirable.¹⁹⁵ The existence of an accessible, effective, and fairly applied grievance procedure informs students that the school does not tolerate sexual harassment and that they can report harassment without fear of adverse consequences.¹⁹⁶

The grievance procedures should provide an opportunity for the complaining party who is the target of harassment to report complaints to specially trained teachers or staff members designated to handle allegations of sexual harassment.¹⁹⁷ The grievance procedures should also provide the target with an advocate to accompany him or her through the process.¹⁹⁸ The advocate should provide the target with information about what actions the school takes as the case proceeds and information about the final resolution of the case.¹⁹⁹

In developing the procedures, administrators must consider the constitutional rights of the alleged harasser.²⁰⁰ The procedures should include an independent and impartial investigation con-

192. See 34 C.F.R. § 106.9 (1992). Though required, many school districts have not yet developed Title IX grievance procedures or nondiscriminatory statements. This may be grounds for loss of federal funding. See AASA, *supra* note 172, at 19 n.40.

193. See 62 Fed. Reg. 12,034, 12,044 (1997).

194. Title IX covers sports inequities, curricular issues, and other inequities. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1996).

195. See LEWIS & HASTINGS, *supra* note 168, at 38. Arguably, the easier it is for students to report sexual harassment complaints, the more likely students are to report them, thus allowing schools to take prompt and effective remedial action to eliminate the problem.

196. See 62 Fed. Reg. 12,038 (1997).

197. See AASA, *supra* note 172, at 19-20; see generally NSBA, *supra* note 169, at 61-68. A model that districts may wish to adopt for their schools is the "Surviving Sexual Assault Advocate" program at the University of Wisconsin-Parkside. Selected faculty, staff members, and students are trained to hear reports of sexual assault and to serve as advocates for complaining students as they make decisions about whether or not to report the assault to the Dean, file criminal charges, and proceed through the process. Each trained advocate places a sign on his or her office or residence hall door, notifying the general student body that he or she is an appropriate resource for reporting. Within a school district, key teachers, staff members and administrators could be trained and identified as "advocates." (Information on file with author).

198. See AASA, *supra* note 172, at 19-20. Requiring a victim to go through the process alone may discourage reporting. Based on past inaction, a student may not trust that the administration will act, or may fear retaliation or a lack of support.

199. See AASA, *supra* note 172, at 19-20. Informing the target through an advocate provides some means of confidentiality. See *id.*

200. See AASA, *supra* note 172, at 20. For a general discussion of harassment and First Amendment concerns, see Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools' Regulation of Fighting Words and the Consequences If They Do Not*, 28 AKRON L. REV. 187 (1995).

ducted by someone who is not the advocate for the victim; an articulation of the required standard of proof; an assurance of prompt and equitable resolution of the matter; a mechanism for appeal; and timely notices of what steps are being taken, what findings have been made, and what remedies are being initiated.²⁰¹

The key to effective enforcement is to take prompt and effective corrective action.²⁰² The investigation should begin immediately after a report has been made and the targeted student has been interviewed.²⁰³ Prompt, effective action will send a message to the student body that the district considers allegations of sexual harassment seriously, and this message should discourage harassing behavior.²⁰⁴

C. School Districts Should Conduct Effective Prevention Programs to Reduce Their Legal Liability and Improve the Quality of Education for All Students

*Prevention is the best tool for the elimination of sexual harassment.*²⁰⁵

Although not specifically required under Title IX guidelines, the recently released OCR Guidance suggests that a school can train administrators, teachers, and staff members and can provide "age-appropriate classroom information" to students to insure that they understand what types of conduct constitute sexual harassment and know how to respond to harassing behavior.²⁰⁶ The existence of a sexual harassment prevention program is a factor that OCR will consider when determining whether a district violated Title IX by failing to respond to a hostile environment that "permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination."²⁰⁷ Because OCR believes that educational efforts are effective in eliminating a hostile environment,²⁰⁸ such ef-

201. See AASA, *supra* note 172, at 20.

202. See NSBA, *supra* note 169, at 65. Failure to act quickly may undermine the credibility of the system, cause harassers to believe they can act without consequences, and cause victims to view the system as ineffective. See *id.*

203. See NSBA, *supra* note 169, at 65.

204. See NSBA, *supra* note 169, at 65.

205. 29 C.F.R. § 1604.11(f) (1986) (referring to Title VII, which states: "An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned").

206. 62 Fed. Reg. 12,034, 12,044 (1997).

207. AASA, *supra* note 172, at 101 (citing OCR Letter of Finding, which states: "The district's curriculum and curricular material have been reviewed and include, as appropriate, the issue of sexual harassment and gender fairness. For younger elementary school students, this includes discussions of self-respect, teasing, and tolerance for individual differences.").

208. See 62 Fed. Reg. 12,034 (1997).

forts may be included in the terms of a settlement agreement between OCR and a school which has been found in violation of Title IX.²⁰⁹

As a general rule, the more effort a district applies to educate the school community about harassment and the prohibition against it, the greater the likelihood that the institution will be absolved of liability for harassment.²¹⁰ Logically, the more proactive, well-designed educational efforts a district makes, the less likely it is that there will be violations of the district's sexual harassment policy. Because school personnel have been trained to respond to instances of sexual harassment, they should be more likely to effectively handle the complaints that they do receive. There also should be less likelihood that harassment will become "severe, persistent or pervasive" enough to constitute a hostile environment.²¹¹

1. Components of Effective Prevention Programs

a. Curriculum

At a minimum, a school district should inform students of the existence and content of school policies that prohibit discrimination and harassment. Ideally, however, the district will attempt to create an institutional climate change through the curriculum to systematically eliminate sexual harassment.²¹² Effective age-appropriate educational

209. See AASA, *supra* note 172, at 107 (citing an OCR settlement agreement: "The District will continue to provide education to students on the subject of sexual harassment through its curriculum and by other means, including classroom discussion").

210. See LEWIS & HASTINGS, *supra* note 168, at 41. Attorneys who are litigating sexual harassment cases suggest that districts should educate students about sexual harassment, gender issues or both. Merrick Rossein, the plaintiff's attorney in the sexual harassment lawsuit *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162 (N.D.N.Y. 1996), stated that schools need more than a policy, they need "training for students and teachers and sexual harassment information built into the curricula," with the aim of being proactive. *Peer Harassment: Actual Notice Is Needed*, YOUR SCHOOL AND THE LAW (LRP Publications, Oct. 1996). Julie Goldscheid, staff attorney for NOW Legal Defense and Education Fund and plaintiff's attorney in *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415 (N.D. Cal. 1996), suggested that there are actions that administrators may take to prevent peer harassment and safeguard themselves and their districts from sexual harassment lawsuits, including training teachers and other staff members and educating students about sexual harassment. See *Schools Need to Assume That Peer Sexual Harassment Is Occurring*, YOUR SCHOOL AND THE LAW (LRP Publications, Oct. 1996).

211. Dr. James Patten, a professor at the University of Arkansas, supports the use of education to combat sexual harassment, stating: "In the long run, although the legal system provides necessary guidelines and grievance procedures, the problem of sexual harassment is best dealt with through education. Once individuals have knowledge and understanding of moral and ethical behavior toward self and others, the issue of harassment will more effectively be addressed." *Peer Sexual Harassment: Protecting Your District From Liability*, YOUR SCHOOL AND THE LAW (LRP Publications, May 1996).

212. See generally LEWIS & HASTINGS, *supra* note 168 at 38-41 (discussing the need for a written policy and suggesting what issues should be addressed in the sexual harassment policy).

programs may prevent inappropriate behavior and may help mold or reshape attitudes about gender and justice.²¹³

It is essential that the curriculum be of high quality, age-appropriate, and legally accurate.²¹⁴ The program should not be a one-sided presentation on what the school policy is; students should be encouraged to discuss issues in some depth. To be more effective, related issues such as tolerance, stereotyping, and nonviolence should be taught throughout the curriculum.

(1) Kindergarten Through Fourth Grade

Educational authorities suggest that sexual acting out in the early grades may signal that a child has been a victim of sexual abuse at home.²¹⁵ Alternatively, the child may merely be imitating what he or she has seen at home, on television, or in a movie.²¹⁶ Research indicates that before reaching school age, most children have formed a stereotypical understanding of gender roles.²¹⁷ Even in the earliest elementary grades, students may exhibit sexist or inappropriate gender-based behavior.²¹⁸ According to Sara Schwed, a school psychologist, harassment at an early age, prior to puberty, is more an issue of disrespectful power-plays rather than sexual in nature.²¹⁹

213. See Nan D. Stein, *From the Margins to the Mainstream: Sexual Harassment in K-12 School*, 57 INITIATIVES 23 (1996). Stein, who has extensively researched harassment in schools, states:

By creating a common classroom vocabulary and offering non-punitive and non-litigious ways to probe controversial and troubling subjects, educators and their students can confront and reduce sexual harassment and gendered violence in the school. . . . Institutionalizing and normalizing the conversation about sexual harassment in schools might be one of the ways to reduce and eliminate sexual harassment in schools.

Id. at 24.

214. See Interview with Nan Stein, Project on Sexual Harassment in Schools at the Center for Research on Women, at Wellesley College (Oct. 23, 1996) (stating that if materials are "junk," teachers will not use them, and that if the legal information is wrong or misleading, the program will be detrimental) (notes on file with author).

215. See GIRLS & BOYS, *supra* note 40, at 136.

216. See GIRLS & BOYS, *supra* note 40, at 124; Shelley Donald Coolidge, *In the Halls of Learning, Students Get Lessons in Sexual Harassment*, CHRISTIAN SCI. MONITOR, Sept. 18, 1996, at 1 (quoting Ellen Linn at the University of Michigan, who blames the increased aggressiveness of peer sexual harassment on conflicting messages teens receive about sex from television, music, and movies).

217. See GIRLS & BOYS, *supra* note 40, at 132-136 (citing recent studies reflecting stereotypical thinking of girls and boys regarding gender based on appearances of, activities of, behaviors of, and treatment from others).

218. See GIRLS & BOYS, *supra* note 40, at 137 (listing examples of sexual harassment reported in elementary schools).

219. See Heuckroth, *supra* note 33, at B3. The behavior, whatever it is labeled, is still likely to disrupt the targeted student's learning.

At the start of each school year, it may be beneficial and appropriate for the administration to set out the ground rules for the year in an all-school assembly. The principal should discuss the purpose for and value of education, and should explain the school's expectations for student behavior. Individual teachers may follow up the program in the classroom by focusing a class discussion on "Why do we go to school?" This discussion will help prepare students for the task at hand — learning. It provides opportunities for teachers to spell out expected school conduct, discussing both academic and non-academic behavior. Teachers may review the rules, the reasons the rules exist, and the consequences for violating the rules.

For younger elementary school students, OCR recommends instruction about self-respect, teasing, and tolerance for individual differences.²²⁰ Students should learn about cooperation, listening, solving conflicts, stereotypes, and harassment.²²¹ Some authorities believe it is also important to teach children the definition of sexual harassment so children can name the behavior and identify it as wrong.²²² However, it may be just as valuable, and less controversial, to teach children what harassment is and that it is wrong without discussing sex.

Parents of young children may be uncomfortable with the idea that their young child is learning about "sex" in school. The introduction of the word "sex" to the curriculum is likely to disturb parents and limit discussion on harassment. However, parents typically support educational efforts that attempt to keep their children safe.²²³ For example, the majority of parents support the lessons on protective behaviors, or teaching children about "good touch — bad touch."²²⁴

220. See AASA, *supra* note 172, at 101.

221. Useful resources on these topics include: ELIZABETH CRARY, KIDS CAN COOPERATE, A PRACTICAL GUIDE TO TEACHING PROBLEM SOLVING (Parenting Press, 1984); NAOMI DREW, LEARNING THE SKILLS OF PEACEMAKING, AN ACTIVITY GUIDE FOR ELEMENTARY-AGE CHILDREN ON COMMUNICATING, COOPERATING, RESOLVING CONFLICT (Jalmar Press, 1987); J.I. CLARKE, SELF ESTEEM: A FAMILY AFFAIR (Harper Collins Publishers, 1978); WALTER ENLOE & KEN SIMON, LINKING THROUGH DIVERSITY, PRACTICAL CLASSROOM METHODS OF EXPERIENCING AND UNDERSTANDING OUR CULTURES (Zephyr Press, 1993); WILLIAM KREIDLER, CREATIVE CONFLICT RESOLUTION, MORE THAN 200 ACTIVITIES FOR KEEPING PEACE IN THE CLASSROOM (B.L. Winch & Associates, 1986); T. WEBSTER-DOYLE, WHY IS EVERYBODY ALWAYS PICKING ON ME: A GUIDE TO HANDLING BULLIES (Atrium Society, 1991); LISA SJOSTROM & NAN STEIN, BULLY PROOF: A TEACHER'S GUIDE ON TEASING AND BULLYING FOR USE WITH FOURTH AND FIFTH GRADE STUDENTS (1996).

222. See generally GIRLS AND BOYS, *supra* note 40, at 2, 77 (providing a definition of sexual harassment and a sexual harassment pre-test geared toward young students).

223. See Telephone Interview with Brenda WelshMcLean, social worker in Columbia County, Wis., who conducted protective behaviors workshops (Feb. 15, 1997) (notes on file with author).

224. See *id.* Most parents support the program when it is presented by qualified people. See *id.* Concerns may arise, however, if the presenter cannot teach children how to distinguish

The program should be designed to teach young children how to identify and report inappropriate touching or sexual abuse,²²⁵ and the lesson should focus on the child as the receiver of the good or bad touches.²²⁶ The presenter, however, can and should teach children that they should give only good touches and never give bad touches, which include inappropriate touching and hitting.²²⁷

(2) *Fifth Through Eighth Grade*

In junior high school, after children reach puberty and begin to date classmates, harassment is more likely to be sexual or gender-based.²²⁸ Therefore, it is appropriate to directly address behaviors that constitute gender and sexual harassment by building on the lessons of tolerance, respect, acceptance, and ending prejudice.

*Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools*²²⁹ provides a comprehensive curriculum for teaching junior and senior high school students about peer sexual harassment.²³⁰ The material examines social norms; perceptions of sexual harassment, including myths; the definition of, and possible strategies to respond to harassment; and information about legal rights.²³¹

(3) *High School*

Additional topics that may be introduced in high school harassment prevention programs include: dating violence, acquaintance rape, harassment based on sexual orientation, and sexual harassment in employment. Although dating violence, rape, and harassment in the workplace may not occur on campus, the effects are likely to affect a student-victim's ability to learn — especially if the perpetrator is a classmate or the job is connected to a school cooperative employment.²³²

good touches from bad touches. *See id.*

225. *See id.*

226. *See id.*

227. *See id.*

228. *See* STEIN, *supra* note 41, at 25 (stating that reasons for this may include hormones, dating pressures, and increased exposure to media images).

229. NAN STEIN & LISA SJOSTROM, *FLIRTING OR HURTING? A TEACHER'S GUIDE ON STUDENT-TO-STUDENT HARASSMENT IN SCHOOLS* (1994).

230. *See id.*

231. *See id.* at 11.

232. Although not legally required, teaching students that sexual harassment and any type of violence in relationships are inappropriate and illegal will help prepare them to be better employees and may help keep students out of jail.

In addition to *Flirting or Hurting*, educators should consider using a publication entitled *TUNE IN to Your Rights: A Guide for Teenagers About Turning Off Sexual Harassment*.²³³ This twenty page booklet provides a useful case study of peer harassment and explores the perceptions of both the victim and harasser.²³⁴ The booklet also presents information on a student's options and legal rights.²³⁵ *Young Men's Work, Building Skills to Stop the Violence: A Ten-Session Group Program*²³⁶ provides an interesting approach to help thirteen to eighteen year-old males unlearn violent behavior, and learn new ways to manage anger and resolve conflicts peacefully.²³⁷

2. Methods and Techniques

Districts have implemented a variety of methods to educate students about sexual harassment.²³⁸ Schools should utilize interactive, diverse, and interesting techniques and materials.²³⁹ Effective programs will challenge students to think and talk about the issues in depth. Presenters have used skits, role playing activities, a "Jeopardy" game, open discussion of issues, and videotapes to reach students.²⁴⁰

3. Evaluating Effectiveness

It may be difficult for school districts to determine quantitatively whether or not the sexual harassment programs they have implemented are effective.²⁴¹ Depending on the pervasiveness of sexual

233. *TUNE IN TO YOUR RIGHTS: A GUIDE FOR TEENAGERS ABOUT TURNING OFF SEXUAL HARASSMENT* (Univ. of Mich. Prog. for Educ. Opportunity 1985).

234. See *id.* at 2-4, 9.

235. See *id.* at 7, 10-11.

236. PAUL KIVEL & ALLAN CREIGHTON, *YOUNG MEN'S WORK, BUILDING SKILLS TO STOP THE VIOLENCE: A TEN-SESSION GROUP PROGRAM* (1995).

237. See *id.* (promoting non-violence, the book includes a section encouraging young men to become women's allies).

238. Schools may use workshops, assemblies, or incorporate the materials into an existing course. See Elaine Yaffe, *Expensive, Illegal and Wrong: Sexual Harassment in Our Schools*, PHI DELTA KAPPAN, Nov. 1995, at K1.

239. See Telephone Interview with Sylvia Cedillo, an attorney with the Texas Civil Rights Project and plaintiff's attorney in *Rowinsky*, who has developed and conducted sexual harassment workshops in Texas (Oct. 19, 1996) (notes on file with author). Ms. Cedillo states that districts need to develop good models for teaching both students and teachers. See *id.*

240. See *id.* Ms. Cedillo created a "Jeopardy" game which actively involved the students in learning about sexual harassment and the law. See *id.* Students at a high school in Stevens Point, Wisconsin, wrote and performed a play called "Alice in Sexual Assault Land," which used common fairy tales to introduce topics ranging from harassment to rape (e.g., *Tweedle Dee, Tweedle Dum & Tweedle Dummer* deals with sexual harassment). See Telephone Interview with Laura Spoeth, Contemporary Issues Advisor, Stevens Point Area High School (Jan. 7, 1997) (notes on file with author).

241. For an overview of evaluation techniques, see, e.g., N.E. GREDLER, *PROGRAM EVALUATION* (1996), BLAINE R. WORTHEN AND JAMES R. SAUNDERS, *EDUCATIONAL EVALUATION*:

harassment in the school before the program began, school officials may notice a visible difference in the number of reports as students learn their rights. Officials may conduct a climate survey to determine how students perceive the environment, or they may meet with students in focus groups to gather information about students' perceptions of the school climate.

VI. CONCLUSION

Schools are legally responsible under Title IX for creating an environment where all students can learn free from discrimination. At least eighty-five percent²⁴² of school girls report that they have been exposed to some form of sexually harassing behavior in school, signaling an epidemic that schools cannot legally ignore. If peer harassment is left unchecked, it creates a discriminatory environment, generally based on sex.

The Department of Education, Office for Civil Rights has clarified school districts' responsibilities in the Guidance.²⁴³ Districts are now on notice that they risk losing federal funding and face civil lawsuits in federal courts if they fail to take "steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."²⁴⁴ Logically, a school with an effective prevention program in place may reduce the incidence of sexually harassing behavior and minimize the possibility that a hostile environment will be created, thereby reducing the school district's potential liability.

Prevention programs can effectively decrease peer harassment, and are, in fact, the best proactive measure a school district can implement to decrease harassment. At a minimum, school districts should teach students about prohibited harassing behaviors and the existence of procedures to remedy harassment. To further reduce their exposure to liability, however, school districts should implement comprehensive peer harassment prevention programs that provide training for the school board, administrators, teachers, staff, and students. The student program should be age-appropriate, interesting, and responsive to the specific needs of the school.

A well-designed program will reduce school district liability. More importantly, however, it will help insure that the district provides

ALTERNATIVE APPROACHES AND PRACTICAL GUIDELINES (1987).

242. See *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426 (N.D. Cal. 1996); see also *supra* notes 42-43 and accompanying text.

243. See 62 Fed. Reg. 12,033 (1997).

244. *Id.* at 12,042.

educational opportunities to girls on equal terms, thereby fulfilling the goals mandated in *Brown v. Board of Education*²⁴⁵ and promoting *all* children's future success.

245. 347 U.S. 483, 493 (1954) (discussing the importance of education as a foundation for future success).

