

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

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I. INTRODUCTION

In 1986, the United States Supreme Court first clarified the law on sexual harassment in the workplace.¹ Prior to the *Meritor* decision, victims of hostile environment sexual harassment in the workplace, as opposed to quid pro quo sexual harassment,² were often subject to unclear guidelines on whether they had a cause of action under Title VII.³ After *Meritor*, clear guidelines established by the Court and

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** After this Casenote was written, but prior to publication, the Department of Education established guidelines supporting many of the views and proposals set forth in this paper. See 62 Fed. Reg. 12,034 (1997). The guidelines were released on March 13, 1997.

1. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (holding that the correct inquiry in sexual harassment claims is whether sexual advances were unwelcome, not whether an employee's participation in them was voluntary). *Meritor* also held that an employee does not have to suffer an economic detriment in order to state a valid sexual harassment claim, and that mere existence of an employer's grievance procedure where the employer fails to invoke that procedure does not necessarily insulate an employer from liability. *Id.* at 64-65, 72.

2. Quid pro quo sexual harassment occurs when requests for sexual favors or submission to sexual advances are an implicit or explicit condition of one's employment, or submission to or rejection of such conduct by an individual is used as the basis of employment decisions affecting such individuals. 29 C.F.R. § 1604.11(a) (1995). Hostile environment sexual harassment occurs when 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. *Id.* Additionally, U.S. courts recognize a third type of sexual harassment, which is retaliation against an employee for making a complaint or expressing opposition to harassment. Henry Blackiston, *When the Line Is Crossed: Companies Should Be Tougher On Sexual Harassment*, FIN. TIMES, July 23, 1996, at 14. This type of sexual harassment is beyond the scope of this Casenote.

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994) [hereinafter "Title VII"] (stating that Title VII prohibits discrimination in the workplace on the basis of sex). Title VII states that no employer shall "fail or refuse to hire or to discharge any individual, or

by the Equal Employment Opportunity Commission⁴ required many employers to take the problem of sexual harassment seriously, and to develop sexual harassment policies and training programs to help supervisors and co-workers know what behavior is and is not acceptable.⁵ While *Meritor* involved harassment of an employee by a supervisor, the *Meritor* Court relied on several circuit cases that had extended employer liability under Title VII for hostile environment sexual harassment created by the victim's co-workers.⁶ Under Title VII, an employer is liable for the harassment of an employee by another co-worker if the employer "knew or should have known" of the harassment.⁷

The time has come for similar, clear guidelines on the issue of peer sexual harassment in a school setting. There is a split in the circuits on whether Title IX of the Education Amendments of 1972⁸ supports a cause of action for a student who has been sexually harassed by another student. This Casenote will examine two recent, conflicting cases dealing with peer sexual harassment claims: *Rowinsky v. Bryan Independent School District*,⁹ and *Davis v. Monroe County Board of Education*.¹⁰ *Rowinsky* denied the plaintiff a cause of action by

otherwise discriminate against any individual ... because of such individual's ... sex." *Id.*

4. The Equal Employment Opportunity Commission ("EEOC") is the administrative agency that enforces Title VII. 42 U.S.C. § 2000e-4 (1994).

5. See 29 C.F.R. § 1604.11(f) (1995) (encouraging employers to prevent sexual harassment by developing programs to inform employees about sexual harassment and Title VII).

6. See *Meritor*, 477 U.S. at 66-67 (citing *Henson v. City of Dundee*, 682 F.2d 897, 902-04 (11th Cir. 1982) (holding employer liable for sexual harassment of one employee by another); *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983) (holding that the employer should have known of the harassment problem because of its pervasive character and complaints by the employee to her supervisors); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) (holding the employer liable for not taking remedial steps to halt known harassment); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (holding the employer liable for harassment by supervisory personnel)). See also 29 C.F.R. § 1604.11(d) (1995) (stating that an employer is responsible for sexual harassment where the employer knew or should have known of the condition, unless the employer took immediate and appropriate action).

7. While *Meritor* did not issue a definitive rule on co-worker harassment, Title VII does not automatically confer employer liability for harassment between co-workers. See *Meritor*, 477 U.S. at 72. The Court instead followed the EEOC guidelines which say that Congress wanted courts to look to agency law on this issue. *Id.* The EEOC guidelines make an employer liable for acts of sexual harassment between co-workers "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d) (1995).

8. 20 U.S.C. § 1681-86 (1994) [hereinafter "Title IX"].

9. 80 F.3d 1006 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996).

10. 74 F.3d 1186 (11th Cir.), vacated and reh'g en banc granted, 91 F.3d 1418 (11th Cir. 1996). Although it has been vacated, the *Davis* decision has been cited with approval by several district court cases dealing with peer sexual harassment. See, e.g., *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 170, 172-75 (N.D.N.Y. 1996); *Doe v. Petaluma Sch. Dist.*, 949 F. Supp. 1415, 1420-22 (N.D. Cal. 1996); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1204-07 (N.D. Iowa 1996); *Seamons v. Snow*, 84 F.3d 1226, 1232-33 (10th Cir. 1996).

failing to apply Title VII standards of hostile environment sexual harassment in the workplace to a Title IX claim of hostile environment sexual harassment in a school setting. *Davis*, however, found a cause of action for the plaintiff, and then went on to apply Title VII standards to find for the plaintiff. This Casenote will argue that the application of Title VII standards to a Title IX peer sexual harassment claim, where the school had actual knowledge of the harassment, would have resolved the concerns which led the *Rowinsky* court to deny the plaintiff a cause of action. This Casenote further advocates a test similar to the one used in *Davis*.¹¹

In addition, this Casenote will argue that the Supreme Court in *Franklin v. Winnett County Public Schools*¹² intended for schools to prevent a sexually hostile education environment, and that *Franklin* put schools on notice that failure to do so could make the school liable for damages to a victim of peer sexual harassment. While *Franklin* involved a teacher who sexually harassed a student and *Rowinsky* involves student-student sexual harassment, this Casenote argues that *Franklin* is relevant and that the *Rowinsky* court erred in its reasoning when it denied the plaintiff an application of Title VII standards, and that had it applied Title VII standards, the plaintiff would have had a valid cause of action.

A clear guideline must emerge because the problem of sexual harassment among peers is occurring at increasing numbers in high schools and middle schools across the country.¹³ Vulgarities and physical intimidation such as those endured by the plaintiffs in *Rowinsky* and *Davis*¹⁴ are all too familiar for young women seeking relief

11. See *Burrow*, 929 F. Supp. at 1193 (modifying only the last element of *Davis*' five-part test which is the establishment of some basis for institutional liability). The *Davis* five part test states the elements necessary to make a Title IX claim against a school board for hostile environment peer sexual harassment. The elements are (1) the plaintiff is of a protected group; (2) the plaintiff has been subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was severe and pervasive enough to alter the plaintiff's education and to create an abusive educational environment; and (5) a basis for institutional liability exists. *Davis*, 74 F.3d at 1194.

12. 503 U.S. 60 (1992) (holding damages as a remedy available for the enforcement of Title IX).

13. See Karen Schneider & John Woestendiek, *Most Teens Say They're Sexually Harassed, Schools Hit By 'Epidemic'*, MIAMI HERALD, June 2, 1993, at A1; See Monica Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2128 n.40 (1993) (citing MASSACHUSETTS BD. OF EDUC., WHO'S HURT AND WHO'S LIABLE: SEXUAL HARASSMENT IN MASSACHUSETTS SCHOOLS 2 (1986) [hereinafter WHO'S HURT AND WHO'S LIABLE] (Curriculum and Guide for School Personnel) (stating that peer sexual harassment is more common than teacher-student sexual harassment)).

14. The *Rowinsky* plaintiffs, two sisters in the eighth grade, were harassed by male students who rode with them on the same school bus. The boys repeatedly felt underneath the girls' clothing, groped their genital areas under their skirts, and asked, "When are you going to let me fuck you?" *Rowinsky*, 80 F.3d at 1008. The *Davis* plaintiff was a thirteen-year-old girl who was repeatedly fondled, molested, and verbally propositioned by another fifth-grade male student.

from peer sexual harassment.¹⁵ While there are cases of sexual harassment among peers at the university level,¹⁶ this Casenote will focus primarily on elementary, middle, and high schools. In cases where a teacher sexually harasses a student, standards similar to Title VII have been adopted in order to find a school liable under Title IX of the Education Amendments of 1972¹⁷ for both quid pro quo and hostile environment sexual harassment.¹⁸ Because this Casenote fo-

Davis, 74 F.3d at 1188-89.

15. While this Casenote focuses on females because females are more likely to be victims of sexual harassment, studies show that boys can be and are victims of sexual harassment as well. See Sherer, *supra* note 13, at 2128 n.42 (noting a 1988 study that revealed that only one of 130 males responding said he had been a victim of sexual harassment compared to 33-60 percent of the 133 females surveyed); see Helena K. Dolan, *The Fourth R—Respect: Combating Peer Sexual Harassment in the Public Schools*, 63 FORDHAM L. REV. 215, 219 n.38 (1994) (citing American Association of University Women, "Hostile Hallways," 1993 study [hereinafter AAUW Survey] (noting that 76 percent of boys experienced some type of sexual harassment at school, compared to 85 percent of girls); Mark Jennings & LaShawn Howell, *Blackboard Jungle '93: Coping With Groping, and Worse: Uh, Girls Aren't the Only Ones Getting Hassled*, WASH. POST, Jul. 25, 1993, at C3. For an example of potential sexual harassment of a male, see also *Seamons v. Snow*, 864 F. Supp. 1111 (D. Utah 1994) (involving a boy whose football teammates taped him nude to a shower stall in a locker room and then brought his girlfriend into the locker room to see him in such condition. The court held that the boy did not have a claim under Title IX because the harassment was not based on his gender, but rather on his physical stature; i.e., his small height and weight); *Zalewski v. Overlook Hosp.*, No. UNN-L-6556-94, slip op. (N.J. Sup. Ct. Mar. 11, 1996) (holding that a seventeen-year-old boy harassed at work by male co-workers and supervisors for being a virgin, and subjected to other harassment based on gender stereotyping had a cause of action under New Jersey's Law Against Discrimination). For purposes of this Casenote, the harasser will be referred to as "he," and the victim will be referred to as "she."

16. While this Casenote focuses on lower education, Title IX also applies to colleges and universities. See e.g., *Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360 (E.D. Pa. 1985) (holding that Title VII standards applied to a hostile environment claim under Title IX), *aff'd* 800 F.2d 1136 (3d Cir. 1986); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (applying Title VII standards to a peer harassment case in a medical school because medical students are not only trained but also receive a salary, and therefore, should be viewed as employees). For examples of incidents of peer sexual harassment at the early end of the age spectrum, see Jack Tinker, *Kissing a Charmless Goodbye To Sanity*, DAILY MAIL, Sept. 28, 1996 (noting the widely-publicized story of Jonathan Prevette, a six-year-old North Carolina boy who was put in detention after kissing a six-year-old classmate on the cheek. The girl had asked Jonathan to kiss her.); Sally Jesse Raphael, *"My Seven-Year Old Was Sexually Harassed at School"* (ABC television broadcast, Oct. 14, 1992); Ruth Shalit, *Romper Room: Sexual Harassment—By Tots*, NEW REPUBLIC, Mar. 29, 1993, at 13 (detailing the case of a 5-year-old who pulled down his classmate's pants, "jumped on top of her," and "began simulating sexual intercourse"); Judy Mann, *Making Schools Safe For Girls*, WASH. POST, May 7, 1993, at E3 (explaining how peer sexual harassment starts at a very early age) (quoting Bernice R. Sandler of the Center for Women Policies Studies. Ms. Sandler initiated research on peer sexual harassment).

17. 20 U.S.C. §1681(a) (1994).

18. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992). The Court stated that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* (quoting *Meritor*, 477 U.S. at 64). The court continued by saying that "the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." *Id.* While the Supreme Court cited to Title VII cases, it did not, however, squarely address the issue of whether Title VII standards and remedies are applicable to Title IX because the plaintiff, Christine Franklin, did not pursue this claim. *Franklin*, 503 U.S. at 65. Ms. Franklin's failure to pursue this claim led the *Rowinsky* court to label this section of the *Franklin* decision as dictum. *Rowinsky*, 80 F.3d 1006, 1011 (5th Cir.),

cuses on harassment by students, the term "peer sexual harassment" in this Casenote refers to hostile environment sexual harassment that is created by other students.

Part II of this Casenote discusses the facts of the *Rowinsky* decision, the significance of the decision, and provides details on the problems of peer sexual harassment. This section also explains why a clear answer is necessary to resolve the split in the circuits on whether to apply Title VII standards to school liability for peer sexual harassment claims under Title IX, and discusses whether a plaintiff even has a cause of action under Title IX when the harassers are peers and not the educational institution. Part III provides prior history and background, including the text and purposes of Title IX, relevant case law dealing with Title IX in the context of peer sexual harassment, and a definition of sexual harassment. Part IV analyzes the *Rowinsky* court's reasoning and explains why *Franklin* does not preclude the applicability of Title VII standards to peer sexual harassment claims. Part V explains the procedural steps a victim of sexual harassment must take to file a claim under Title IX, and briefly discusses other avenues of relief and other remedies available. Part VI provides recommendations, and proposes a modified *Davis*-type approach. Part VII concludes with the opinion that allowing a Title IX cause of action for peer sexual harassment will provide plaintiffs with a remedy, which comports with the Supreme Court's concerns in *Franklin*, and will provide incentives for schools to directly address and prevent peer sexual harassment.

II. THE FACTS AND THE SIGNIFICANCE OF ROWINSKY

A. *The Facts of Rowinsky*

1. *Months of Harassment and Physical Assault*

Jane and Janet Doe were enrolled in the eighth grade in the Bryan Independent School District (BISD) during the 1992-1993 school year.¹⁹ They rode a bus to and from school each day, and school policy required that boys and girls sit on opposite sides of the bus.²⁰ The bus driver, James Owens, enforced the restriction at first.²¹ Starting

cert. denied, 117 S. Ct. 165 (1996).

19. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). For their protection and privacy, the court did not use the girls' real names. To protect the identity of the male students as well, the court used only their initials.

20. *Id.*

21. *Id.*

in September 1992, "G.S.", a male student, began regularly to harass Janet.²² Such harassment continued throughout the school year. On the first incident, and during each subsequent incident, G.S. swatted Janet's buttocks whenever she walked down the aisle, and made such comments as, "When are you going to let me fuck you?"; "What bra size are you wearing?" and "What size panties are you wearing?"²³ He also called her a "whore," and once groped her genital area.²⁴ The first time the harassment occurred, Janet reported it to Owens no less than eight times during the bus ride home.²⁵ Owens took names down on paper, but did nothing else.²⁶ These incidents occurred daily on the bus. Eventually, Janet stopped reporting them, even though the harassment continued through May.²⁷

After the first incident, the seriousness of the harassment increased. G.S. continued to grope Janet's breasts and genital areas on the bus, and began to harass Jane in the same manner as well.²⁸ A visit to the school's principal by Mr. and Mrs. Rowinsky shortly after the first incident resulted in G.S.' suspension from riding the bus for three days.²⁹ Once he was allowed to ride the bus again, G.S. was undeterred, and continued to harass the girls, even after Owens made Janet and Jane sit at the front the bus.³⁰ Despite the seating change, G.S., as well as other boys continued to harass the girls.³¹ A boy named "L.H." reached up Janet's skirt, made a crude remark, and grabbed her genital area.³² Janet complained to Owens at the next stop light, but he "just stared into space."³³ L.H. then did the same to Jane a few days later, but she did not report that incident to Owens.³⁴

22. *Id.*

23. *Id.*

24. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

25. *Id.*

26. *Id.* at 1008-09.

27. *Id.* at 1008.

28. *Id.*

29. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008-09 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

30. *Id.*

31. *Id.* at 1009.

32. *Id.*

33. *Id.*

34. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1009 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

2. *Response of the Bryan Independent School District*

By March, the harassment had spread to the classroom as well as the school bus. During class, another male student, "F.F.," reached under Janet's shirt and unfastened her bra.³⁵ The school principal suspended F.F. for the incident, and told Mrs. Rowinsky that suspensions from the bus and from class were appropriate punishments because the principal did not consider F.F.'s conduct to be sexual.³⁶

Throughout the school year, Mrs. Rowinsky's consistent complaints and almost weekly phone calls and visits resulted in little change or investigation into the matter. A disciplinary report on file with the principal incorrectly listed one of the dates, contained other inaccuracies, and did not include G.S.' name.³⁷ Mrs. Rowinsky pointed this out, and Principal Caperton corrected the report.³⁸ In December, she also contacted Jay Anding, Assistant Director of Transportation, who said he would investigate the matter.³⁹ Almost one month later, she called to check on the progress of the investigation. Anding informed her that he did not conduct an investigation, but instead suspended L.H. for three days.⁴⁰ Mrs. Rowinsky then complained to Dr. Tom Purify, the BISD Director of Secondary Education, who referred her to Anding's assistant, C.W. Henry.⁴¹ Henry reviewed the videotapes from the bus, and assigned a new driver to replace Owens.⁴² The new driver, however, assigned Jane the seat next to G.S.⁴³ Mrs. Rowinsky then removed her daughters from the bus, and although there were no new assaults by G.S., asked that G.S. be removed from the bus as well.⁴⁴ While Purifoy said that G.S.'s conduct merited expulsion, Purifoy refused to take further action

35. *Id.*

36. *Id.*

37. *Id.* at 1008.

38. *Id.*

39. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008-09 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

40. *Id.* at 1009.

41. *Id.*

42. *Id.*

43. *Id.* The appellate court decision did not explain why the new bus driver did not adhere to the school's policy of separating boys and girls. This is one of many facts that the appellate court should have considered to see whether or not the plaintiff had a cause of action, because these facts may have indicated that the school did intentionally violate Title IX by not responding to the girls' claims with seriousness. *See id.* at 1016-17 (Dennis, J., dissenting opinion) (stating that these facts demonstrate that the school board knowingly failed to take appropriate measures to protect Jane and Janet from "harassment, abuse, and discrimination by male students that was sufficiently severe or pervasive to create a hostile and abusive educational environment for the plaintiffs").

44. *Id.* at 1009.

against G.S. without proof of the assaults from juvenile records.⁴⁵

Even after the bra-unfastening incident, mentioned above, the school never informed Mrs. Rowinsky of the existence of Title IX or of Title IX grievance procedures,⁴⁶ as required by Department of Education's Office of Civil Rights ("OCR") guidelines.⁴⁷ When questioned about this by Mrs. Rowinsky and her attorney, Vice-Principal Sandra Petty replied that the bra incident was not "sexual,"⁴⁸ and Sarah Ashburn, the BISD superintendent, said that the incidents on the bus were not "assaults."⁴⁹

Mrs. Rowinsky then filed a claim under Title IX through OCR.⁵⁰ She brought a suit on behalf of her minor daughters that the school condoned and caused hostile environment sexual harassment, both at school and on the bus.⁵¹ Specifically, she alleged that Janet was sexually harassed at school, and that Jane, Janet, and other girls were sexually harassed by male students while riding the BISD school bus.⁵² She sought declaratory and injunctive relief, as well as compensatory damages and attorney's fees.⁵³

B. The Basic Holding of Rowinsky and Why It Is Important

The United States District Court for the Southern District of Texas granted summary judgment in favor of the school district and held that Mrs. Rowinsky failed to state a valid Title IX claim because she did not allege that the BISD discriminated against students on the

45. *Id.* The Rowinskys filed sexual assault charges against G.S. with the Bryan city police. *Id.* at 1008 n.2. G.S. was later convicted of this charge. Dawn E. Connor, *School Isn't Liable For Harassment By Student*, LAW. WKLY USA, Apr. 22, 1996, at 1, 19.

46. *Rowinsky*, 80 F.3d at 1009.

47. 34 C.F.R. § 106.8(a) (1996). This section requires all schools which receive federal assistance to designate at least one employee to be responsible for working with OCR on any relevant claims. The school must also "notify all its students and employees of the name, office address and telephone number of the employee or employees appointed" to this capacity. *Id.*

48. *Rowinsky*, 80 F.3d at 1009.

49. *Id.*

50. *Id.*

51. *Id.* at 1009-10.

52. *Id.* at 1010.

53. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1010 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). This Casenote will not deal with the issue of damages. In *Franklin*, the Supreme Court said that the plaintiff had a cause of action, which was resolved by *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (cited in *Franklin*, 503 U.S. at 65). The *Franklin* Court then held that the plaintiff had a right to the damages sought because the school's relief was inadequate. *Franklin*, 503 U.S. at 75-76. The court emphasized that a cause of action is a wholly different issue from whether one can recover damages. *Id.* at 65-67. Because the law is unclear on whether or not plaintiffs have a cause of action for student-student peer sexual harassment, and a right of action must exist before one can recover damages, the question of damages will not be addressed in this Casenote.

basis of sex.⁵⁴ In other words, the plaintiff failed to provide evidence that the school treated sexual harassment and misconduct towards female students less seriously than it treated such behavior towards its male students.⁵⁵ The district court relied on the following facts: (1) boys who assaulted girls were punished in the same manner as boys who assaulted boys. Any disparity in punishment was due to the different levels of physical conduct involved in each incident, and not because of differences in sex;⁵⁶ and (2) that any failure to train employees would harm male and female victims of harassment equally.⁵⁷ Mrs. Rowinsky appealed to the Fifth Circuit, which affirmed the lower court's holding.

Rowinsky is important because it is the most recent of several cases that deal with the imposition of liability under Title IX of a school for failing to protect its students from sexual harassment by other students. The relevant part of Title IX provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...⁵⁸

Rowinsky interpreted "discrimination under" narrowly and held that the school is not liable for failing to stop sexual harassment by another student unless the victim alleges that the school responded to her claim less seriously than it would have responded to a claim by a male who was being bullied by another male, or a male who was being harassed by a female student.⁵⁹ Absent such an allegation, the court held, there is no "discrimination" on the basis of sex as intended by Title IX.⁶⁰

C. *The Facts of Davis and a Brief Comparison of Its Holding*

Less than two months after the *Rowinsky* case was argued,⁶¹ the

54. *Rowinsky*, 80 F.3d at 1010.

55. *Id.*

56. *Id.*

57. *Id.* The contention that males and females are equally harmed by sexual harassment is inaccurate. See Dolan, *supra* note 15, at 225 n.103 (citing AAUW Survey, *supra* note 15, at 15-17). See also *infra* notes 104-12. Further, sexual harassment damages young girls more than older women. Deborah R. Baurac, *Sexual Harassment a Painful Lesson For Teenagers*, CHI. TRIB., Nov. 8, 1992, § 6, at 1 (quoting University of Iowa psychologist Amy Reynolds, that damage is more severe for adolescent girls because they may become women who are "estranged from their own bodies").

58. 20 U.S.C. § 1681(a) (1994).

59. *Rowinsky*, 80 F.3d at 1006, 1015-16.

60. *Id.*

61. Because the *Davis* decision was decided two months after *Rowinsky* was argued, and

Eleventh Circuit accepted a broader definition of "discrimination under" and held in *Davis v. Monroe County Board of Education*⁶² that a school is liable for damages under Title IX where harassment by another student created a sexually hostile education environment, and the supervising authorities knowingly failed to act to eliminate the harassment.⁶³

1. *Months of Abuse and Assaults*

Between December 1992 and May 1993, LaShonda Davis was a fifth-grader in Monroe County.⁶⁴ During this six-month period, "G.F.," also a fifth-grader, sexually harassed and/or abused LaShonda by attempting to fondle her, fondling her, and directing sexual and abusive language towards her such as, "I want to get in bed with you," and "I want to feel your boobs."⁶⁵ These comments often accompanied the physical abuse mentioned above.⁶⁶ The incidents became more serious. Once, G.F., placing a door stop in his pants, began to behave in a sexually suggestive manner towards LaShonda. A few months later, he rubbed against her in a sexually suggestive manner.⁶⁷ The incidents continued to escalate until he was charged with and pled guilty to sexual battery in May 1993.⁶⁸

2. *The Response of the Monroe County School District*

LaShonda complained to her mother after all but one incident, and they both made repeated trips to the principal's office, which resulted in no improvement or progress in the situation.⁶⁹ After one incident in class, LaShonda's teacher denied her request to report

Rowinsky had not been decided yet, the *Davis* decision is not used by the *Rowinsky* plaintiff, and the *Rowinsky* court only refers to it in a footnote, saying that *Davis* in no way alters its analysis. *Rowinsky*, 80 F.3d at 1010 n.8.

62. 74 F.3d 1186 (11th Cir.) (applying Title VII hostile environment standards to hold the school liable), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

63. *Id.* at 1192. The *Davis* court relied on a Letter of Findings written by OCR. OCR has jurisdiction over Title IX claims. See 34 C.F.R. § 106.1 (1996). The Letter, using Title VII standards, indicated that a school fails to satisfy Title IX if it fails to "respond adequately to actual or constructive notice of the harassment." *Davis*, 74 F.3d 1186, 1192 (11th Cir. 1996) (quoting John E. Palomino, Letter of Findings, OCR Docket No. 09-92-6002, at 2 (July 24, 1992)). This Casenote advocates that a school should be liable only for failing to respond adequately to harassment of which it had actual knowledge.

64. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1188 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

65. *Id.* at 1188-89.

66. *Id.*

67. *Id.* at 1189.

68. *Id.*

69. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1189 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

G.F. to the principal.⁷⁰ When Mrs. Davis again tried to obtain protection for her daughter, the principal asked LaShonda "why she [LaShonda] was the only one complaining."⁷¹ LaShonda and Mrs. Davis also asked if LaShonda's assigned seat, which was next to G.F., could be moved.⁷² This request was denied until after LaShonda complained for over three months.⁷³ School officials never removed or disciplined G.F. in any manner for his harassment of LaShonda.⁷⁴ Mrs. Davis also alleged that the months of abuse had a detrimental effect on LaShonda's ability to benefit from her elementary education, decreasing her concentration on her school work, and causing her grades, which had been all A's and B's, to fall.⁷⁵ The harassment also seriously affected LaShonda's mental and emotional health, leading her to write a suicide note in April 1993.⁷⁶

3. *The Holding of Davis*

The court applied Title VII standards and held that the school was liable because, by failing to protect LaShonda, it denied her the benefits of and subjected her to discrimination under the Monroe County education system on the basis of her sex.⁷⁷

The court first decided that Title IX encompassed a claim for hostile environment sexual harassment because Title VII recognizes that co-workers as well as supervisors can create a hostile sexual environment.⁷⁸ Relying on Senator Bayh's statements regarding the purpose of Title IX, which was to eliminate sexual discrimination in education, and the Supreme Court's granting of a right of action for intentional violations of Title IX in *Franklin v. Gwinnett County Public Schools*,⁷⁹ the court felt that Title VII provided appropriate guidelines for determining whether a school is liable for claims of harassment of one student by other students.⁸⁰ The court also relied on *Lipsett v. University of Puerto Rico*,⁸¹ which held that Title VII applied to the

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1189 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

75. *Id.*

76. *Id.*

77. *Id.* at 1193-94.

78. *Id.*

79. 503 U.S. 60 (1992).

80. *Davis*, 74 F.3d at 1190-91.

81. 864 F.2d 881 (1st Cir. 1988). *Lipsett* involved a female medical student in the residency

"mixed employment-training context."⁸² The *Lipsett* court said that Title IX's legislative history "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII."⁸³ The *Davis* court reasoned that if Title VII standards are applicable to the mixed employment-training context and to harassment caused by other third parties,⁸⁴ Title VII standards should be applicable to peer harassment in the educational setting as well.⁸⁵ In addition, the court relied on a Letter of Findings by the Office of Civil Rights that stated "[i]f the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."⁸⁶ The *Davis* court accorded the OCR Letters of Findings great deference because OCR is the agency charged with the administration of Title IX,⁸⁷ something the *Rowinsky* court did not do.⁸⁸

After deciding that Title IX applies to peer sexual harassment

program whose supervisors and coworkers subjected her to an atmosphere of sexual harassment at the hospital. *But see Rowinsky*, 80 F.3d at 1006 (noting that *Lipsett* is not entirely opposite because medical students in a residency program are also employees, thus making Title VII standards more applicable).

82. *Davis*, 74 F.3d at 1190 (quoting *Lipsett*, 864 F.2d at 897).

83. *Id.*

84. The court also cited to *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir. 1995). In *Murray*, the plaintiff was a dental student who was subjected to a hostile working and learning environment created by a patient. The Second Circuit found that if a school has notice of the harassment, "the educational institution may be held liable under standards similar to those applied in cases under Title VII. *Murray*, 57 F.3d at 249. In *Murray*, however, the plaintiff lost her claim because she failed to show that the college had notice of the hostile environment. *Murray*, 57 F.3d at 249-51.

85. *Davis*, 74 F.3d at 1192.

86. *Davis*, 74 F.3d at 1192 (quoting Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992), Docket No. 09-92-6002, at 2).

87. *Davis*, 74 F.3d at 1195 n.4 (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982)). *See also Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1573 (N.D. Cal. 1993) (noting that OCR Letters of Findings are entitled to some deference "as they express the opinion of an agency charged with implementing Title IX and its regulations.").

88. *Rowinsky*, 80 F.3d 1006, 1015 (5th Cir. 1996). The *Rowinsky* court stated that Letters of Finding by OCR do not constitute an agency "interpretation" because they are written in reference to a specific incident or claim in order to force an institution to voluntarily comply with Title IX. *Id.* at 1015. Examples of agency interpretations that would meet the qualifications to be accorded great weight would be OCR's Policy Memorandum and OCR's implementation regulation at 34 C.F.R. § 106 (1995) because these represent "deliberate policy statements and [are] consistent with past agency interpretations." *Id.* (quoting 59 [sic] C.F.R. § 106 (1995)). The *Rowinsky* court noted that the policy memorandum left the issue of peer sexual harassment unresolved. *Rowinsky*, 80 F.3d at 1015, 1015 n.22 (citing OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)). *But see Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,036 (1997) [hereinafter *Sexual Harassment Guidance*] (explaining that *Rowinsky* misconstrued OCR's long-standing interpretation of Title IX). This Casenote will not squarely address the issue of what is the proper weight attributable to an administrative agency interpretation.

claims, the court held that when a school board "knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has 'be[en] denied the benefits of, or be[en] subjected to discrimination under' that educational program in violation of Title IX[.]"⁸⁹

After considering this, the *Davis* court then went on to consider the validity of the plaintiff's allegations using the theory applied in *Meritor*.⁹⁰ The court used a Title VII approach and analogized the harassment LaShonda endured and her complaints to the school board to a workplace scenario.⁹¹ The Title VII approach requires that an employer take steps to assure that the working environment is free from sexual harassment that is "sufficiently severe or pervasive enough to alter the condition of the victim's employment and create an abusive working environment."⁹² The court applied LaShonda's situation to the factors focused on by the *Meritor* Court,⁹³ and found that she established a prima facie claim under Title IX for sexual discrimination due to the school board's failure to remedy a sexually hostile environment despite knowledge of the harassment.⁹⁴

Very few cases have directly addressed the issue of peer sexual harassment,⁹⁵ but these cases are becoming more frequent as the numbers and seriousness of peer sexual harassment incidents continue to increase.⁹⁶

89. *Davis*, 74 F.3d at 1194 (quoting Title IX, 20 U.S.C. § 1681(a) (1994)).

90. *Id.* (citing *Meritor*, 477 U.S. at 66-73).

91. *Davis*, 74 F.3d at 1194-95.

92. *Id.* at 1189-90 (quoting *Meritor*, 477 U.S. at 67 (1986)). The harasser's intent to make the victim feel uncomfortable is irrelevant. See Stephen Henderson, *Sexual Harassment*, CHI. TRIB., May 23, 1996, at 1 (noting that a harasser who emphasizes that his behavior was accidental, unintentional or a joke may still be liable for creating a hostile environment if a reasonable person would perceive the behavior as sexual harassment).

93. *Davis*, 74 F.3d at 1194. See *supra* note 11 and accompanying text. Regarding the fifth element, the court applied Title VII standards and case law, which holds an employer liable if it "knew or should have known of the harassment, to determine if a school should be liable when it has actual or constructive knowledge of the harassment." *Id.* (citing *Meritor*, 477 U.S. at 66-73; *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22-23 (1993); *Henson v. Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)). This Casenote proposes that the school be held liable when it has actual knowledge of the harassment and fails to take prompt and appropriate remedial action. See *infra* Part VI.

94. *Davis*, 74 F.3d at 1195. Judge Birch, in his dissenting/concurring opinion, however, found the application of Title IX to claims of sexual harassment by students "unprecedented" and applied only by an overly broad reading of Title IX. Judge Birch also felt that the school board did not intentionally discriminate against LaShonda on the basis of sex, and therefore, intentional discrimination, as prohibited by Title IX, was not at issue. Rather, Judge Birch felt that the issue was whether the school board was negligent, and that Title IX should not cover the negligent behavior of a school board as the majority infers from its broad reading of Title IX. *Davis*, 74 F.3d at 1195-96 (Birch, J., concurring in part and dissenting in part).

95. See *infra* notes 151-52 and accompanying text.

96. See Elizabeth Levitan Spaid, *Schools Grapple With Peer Harassment*, THE CHRISTIAN SCI.

The issue in most peer sexual harassment cases is whether Title IX makes a school liable for failing to stop hostile environment sexual harassment of one student by another when the school has knowledge of the harassment. Several legal scholars have argued that Title IX does impose such liability, and that the student should be allowed to recover damages from the school, because the Supreme Court in *Franklin* approved the incorporation of Title VII standards for a student to recover damages under Title IX in teacher-student sexual harassment cases.⁹⁷ One scholar argues for imposing school liability for failure to prevent peer sexual harassment under the duty theory.⁹⁸ Another argument imposes Title VII standards when the school has notice of the harassment.⁹⁹

MONITOR, Jan. 21, 1993, at 3 (noting that Susan Strauss, a sexual harassment consultant in Minnesota, believes that peer harassment is not a new phenomenon and that it is becoming more prevalent).

97. See generally Jill Suzanne Miller, *Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699 (1995) (arguing that with a narrow definition of sexual harassment, Title VI and Title VII standards should apply to peer sexual harassment. Currently, liability is imposed only on educational institutions. The author proposes that liability should fall on the school official(s) who knew or should have known that one student's questionable actions would have offended other students). Title VI, in language identical to Title IX, prohibits race discrimination in any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000(d) (1994). This Casenote will not focus on Title VI, nor on damages. See also Sherer, *supra* note 13 (proposing that peer sexual harassment creates a hostile educational environment, that a school setting is comparable to a workplace environment, and that Title IX should be expanded to cover peer sexual harassment. The author proposes a five part test similar to that used by the *Davis* court.); Elizabeth J. Gant, *Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972: An Avenue of Relief For Victims of Student-to-Student Sexual Harassment in the Schools*, 98 DICK. L. REV. 489 (1994) (arguing that sexual harassment in school among students is comparable to sexual harassment in the workplace among co-workers, and that applying Title VII standards of liability to schools will help eliminate the growing problem of peer sexual harassment).

98. See Dolan, *supra* note 15, at 215 (asserting that a special relationship exists between school officials and school children, and thus, officials have an affirmative duty to protect students against peer sexual harassment). The author discusses the special relationship doctrine of *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and proposes a "reasonable foreseeability" standard of review in determining school official liability to help prevent peer sexual harassment. Dolan, *supra* note 15, at 240. The author also argues that mandatory school attendance laws further support the notion that a duty exists. Dolan, *supra* note 15, at 240.). See also *Pagano v. Massapequa Pub. Sch.*, 714 F. Supp. 641 (E.D.N.Y. 1989) (holding that schools owe some duty of care to elementary school students who are legally required to attend school, thus allowing a § 1983 claim to go forward). But see *Mennone v. Gordon*, 889 F. Supp. 53 (D. Conn. 1995) (explicitly disagreeing with *Pagano* and holding that a teacher is entitled to qualified immunity in peer sexual harassment suits because Title IX imposes a duty on schools (and teachers) to protect students from the harassment of other teachers, not from other students, even where the teacher is a proper Title IX defendant). This Casenote does not address the duty argument. Rather, it will focus on the Title VII argument, as well as arguments used in *Rowinsky* and other peer sexual harassment cases, which are mainly based on Title IX's language and history.

99. Dolan, *supra* note 15, at 240-44.

*D. The Problem of Peer Sexual Harassment and the Misunderstandings
Hindering a Solution*

The problem of peer sexual harassment is growing, pervasive, and serious. A 1993 study by the American Association of University Women ("AAUW") entitled "Hostile Hallways" surveyed 1,632 students, in grades eight through eleven in seventy-nine public schools.¹⁰⁰ The study found that 85 percent of girls and 76 percent of boys experienced some type of sexual harassment in the school environment, mostly by their peers.¹⁰¹ The study revealed that student-student sexual harassment is more common than student-teacher harassment.¹⁰² One-third of the girls and twelve percent of the boys who were victims of sexual harassment reported not wanting to go to school because of the harassment.¹⁰³

Studies show that girls are more frequently the victims of peer sexual harassment,¹⁰⁴ and that it impacts girls much more harshly than boys.¹⁰⁵ Peer sexual harassment has negative effects on a girl's self-esteem and productivity.¹⁰⁶ She may not want to go to class,¹⁰⁷ or will drop a class in order to avoid the harassers.¹⁰⁸ Some girls have even quit school because of peer sexual harassment, thereby altering the career paths they may have taken had the harassment been stopped.¹⁰⁹

Studies also show that boys do not realize the impact their actions

100. Dolan, *supra* note 15, at 219 n.37 (citing AAUW Survey, *supra* note 15, at 5).

101. Dolan, *supra* note 15, at 219 n.38 (citing AAUW Survey, *supra* note 15, at 7).

102. Of the students who reported sexual harassment, 18 percent claimed they were harassed by a school employee. The remainder were victims of sexual harassment by peers. Dolan, *supra* note 15, at 219 n.39 (citing AAUW Survey, *supra* note 15, at 10).

103. Sherer, *supra* note 13, at 2134 n.78 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 6). See *infra* notes 107-09, and accompanying text (discussing the effects of peer sexual harassment on the educational choices of its victims).

104. Sherer, *supra* note 13, at 2128 n.42 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 2).

105. Baurac, *supra* note 57, at 1.

106. Sherer, *supra* note 13, at 2132 n.64 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 12).

107. Sherer, *supra* note 13, at 2153 n.189 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 4).

108. Sherer, *supra* note 13, at 2153 n.189 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 4)).

109. Dolan, *supra* note 15, at 225 n.103 (citing AAUW Survey, *supra* note 15, at 15-16); Dolan, *supra* note 15, at 226 (explaining that sexual harassment often deters women from pursuing fields in science and engineering, as well as non-traditional employment, such as auto-repair). The Rowinsky sisters eventually left the school district and moved to another town. Bill Hewitt, Jack Boulware, Anthony Duignan-Cabrera, Joseph Harmes & Carol Simons, *Bitter Lessons; School Days Aren't Golden Rule Days Anymore, And Some Parents Are Suing To Keep Their Kids From Being Abused*, PEOPLE, Oct. 28, 1996, at 52, 54.

have on their female classmates.¹¹⁰ Males find sex talk "titillating," while females find it intimidating, and it makes them feel vulnerable.¹¹¹ Males also misunderstand the seriousness of their actions. As one male student put it: "It's a man thing. When a girl has on something revealing, you have to say something about it. If the girl doesn't tell us we're sexually harassing her, we're going to continue to do it."¹¹²

The misunderstanding is not just between the victims and the harassers. Victims do not always get the attention they deserve because the problem of peer sexual harassment is frequently misunderstood by school¹¹³ and court officials,¹¹⁴ the parents of the harassers,¹¹⁵ and the media. One news writer listed the *Davis* decision in an article entitled "Stupid Court Tricks" because he claimed, incorrectly, that it gave the mother of the victim a cause of action under Title IX although the mother had not been sexually abused.¹¹⁶ The article further said that the mother complained because a boy had 'pestered' her daughter.¹¹⁷ The abuse suffered by Ms. Davis, a 10-year-old girl, however, lasted over six months and led her to contemplate suicide and write a suicide note. In another case, peer sexual harassment led to one teen's suicide.¹¹⁸

Such misunderstandings are the result of people being unaware

110. Sherer, *supra* note 13, at 2132 n.65 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 12).

111. Deborah Tannen & Peggy Brawley, . . . *And Why Don't Some Men Understand*, PEOPLE, Oct. 28, 1991, at 48.

112. SUSAN STRAUSS, SEXUAL HARASSMENT AND TEENS, A PROGRAM FOR POSITIVE CHANGE 17 (1992).

113. At least one school official brushed off a complaint by a female student with a simple "boys will be boys" response. See *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449 (9th Cir. 1995) (quoting the statement of a counselor to a female student who complained that her peers were making sexual comments to her and writing lewd things about her on bathroom walls), *reconsideration granted*, 949 F. Supp. 1415 (N.D. Cal. 1996).

114. The *Rowinsky* decision refused to acknowledge that a power relationship exists among students, despite the fact that studies have proven that such a relationship does exist. *Rowinsky*, 80 F.3d at 1011 n.1. See *infra* notes 237-44 and accompanying text.

115. See Jane Gross, *Where "Boys Will Be Boys," And Adults Are Befuddled*, N.Y. TIMES, Mar. 29, 1993, at A1 (reporting on a group of approximately 25 California high school boys known as the "Spur Posse" who were accused of systematically raping, molesting, and intimidating female students). Gross noted that some parents of the boys were "downright boastful of their sons." *Id.* at A13.

116. See John Leo, *Stupid Court Tricks*, U.S. NEWS & WORLD REP., Mar. 18, 1996, at 24. The author apparently misunderstood that the plaintiff's mother brought the suit as next friend of her minor daughter, LaShonda. *Davis*, 74 F.3d 1186, 1186 (11th Cir. 1996), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

117. Leo, *supra* note 116, at 24.

118. Doug Grow, *Suicide Ended Kathi's Fight For Dignity*, MINNEAPOLIS STAR TRIB., July 5, 1993, at C3.

that this behavior is unacceptable.¹¹⁹ The misunderstandings of the severity of peer sexual harassment and its effects; the conflict among the circuits on whether a plaintiff has a cause of action under Title IX when the harassment is caused by peers; and the questions which remained to be answered after *Franklin*¹²⁰ illustrate the need for the law to set clear, consistent guidelines to determine when a victim will have a cause of action under Title IX, and whether Title VII standards should apply.

III. PRIOR HISTORY AND BACKGROUND INFORMATION

A. Purpose of Title IX

In 1972, in response to increasing awareness of sex discrimination in education,¹²¹ Congress enacted Title IX to address two different aspects of the concern. First, Congress did not want to distribute federal funds to education institutions that practiced sex discrimination.¹²² Second, Congress wanted to protect the victims of such discrimination. Senator Birch Bayh, the sponsor of Title IX, intended for Title IX to be "a strong and comprehensive measure which ... is needed ... to provide women with solid legal protection as they seek education and training for later careers"¹²³ He realized that "because education provides access to jobs and financial security, discrimination here is doubly destructive for women."¹²⁴ Title IX exists to prevent a person, on the basis of sex, from being "denied the benefits of ... any academic, extracurricular, ... or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance."¹²⁵ Scholars argue and studies and Congressional findings show that peer sexual harassment prevents victims from enjoying the full benefits of their education.¹²⁶

119. See CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 27 (1979); *infra* note 136 and accompanying text.

120. See Charles J. Russo, Virginia Davis Nordin & Terrence Lead, *Sexual Harassment and Student Rights: The Supreme Court Expands Title IX Remedies*, 75 EDUC. LAW REP. 733 (1992) (discussing the points *Franklin* did not address).

121. 118 CONG. REC. 5802-15 (1972).

122. See 117 CONG. REC. 39,252 (1971) (statement of Rep. Mink) (explaining that because women pay taxes into the Federal Treasury, Congress resents that these funds support institutions that discriminate).

123. 118 CONG. REC. 5,806-07 (1972).

124. *Id.* at 5804.

125. 34 C.F.R. § 106.31(a) (1996).

126. See ESEA: *Framework For Change: Hearings on S.1513 Before the Comm. on Labor and Human Resources and the Subcomm. on Education, Arts, and Humanities*, 103d Cong., 1st Sess. 632 (1994) (statement of Sen. Mikulski) [hereinafter *ESEA Hearings*] (quoting statistics from the AAUW survey which illustrate that sexual harassment undermines a school's ability to provide a safe

B. Determining Who Can Sue Under Title IX

To help accomplish Congress' goals, the Supreme Court in *Cannon v. University of Chicago*¹²⁷ recognized an implied private right of action under Title IX for students and employees of federally funded educational institutions who are discriminated against on the basis of their sex. The *Cannon* Court used a four-part test from an early Title IX case in order to determine whether a private right of action is to be implied under a federal statute.¹²⁸ The four part test asks:

(1) is the plaintiff one of the class for whose especial benefit the statute was enacted? (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? and (4) is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?¹²⁹

The *Rowinsky* majority did not discuss this case, but the dissent in *Rowinsky* would have used this test, in conjunction with the Supreme Court's reasoning in *Franklin*, to grant the plaintiff a right of action.¹³⁰ When interpreting Title IX, the majority in *Davis* noted that "[t]here is no doubt that if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."¹³¹ The *Davis* majority did not use the *Cort* factors to determine if a cause of action existed. Instead, they relied on Sen. Bayh's statements, and used factors from the *Meritor* and *Harris* decisions.¹³²

and equitable learning environment. Senator Mikulski emphasized the survey's findings that 23 percent of females who were sexually harassed received lower grades on tests they took after the harassment, as did 9 percent of boys who were sexually harassed, and that one-third of the girls reported not going to school as a result of sexual harassment). See also *Hearings on Reauthorization of H.R. 6, The Elementary and Secondary Education Act of 1965: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor, 103d Cong., 1st Sess., 429-31 (1993)* (statement of Anne L. Bryant, president of AAUW) (explaining that sexual harassment and discrimination, combined with many teachers' inadvertent yet common favoritism of boys, causes low self-esteem. Bryant discussed a 1991 AAUW poll that documented a relationship between a female's low self-esteem and her ability to excel in male-oriented fields, such as mathematics and science).

127. 441 U.S. 677 (1979).

128. See *Cort v. Ash*, 422 U.S. 66 (1975) (holding under this test that a woman who, because of her sex, is denied admission to an education program that receives federal funds, has a cause of action under Title IX).

129. *Id.* at 78.

130. See *Rowinsky*, 80 F.3d 1006, 1017-20 (Dennis, J., dissenting).

131. 74 F.3d 1186, 1190 (11th Cir. 1996) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (holding that Title IX prohibited discrimination of employees as well as students of federally funded educational institutions) (citations omitted)).

132. *Davis*, 74 F.3d at 1190, 1194. See *supra* notes 90-93 and accompanying text.

C. Definition of Sexual Harassment

This Casenote acknowledges that schools should not be liable for every potentially bothersome sexual act or remark one student may make to another.¹³³ However, situations such as those in *Rowinsky* and *Davis*, where the harassment is prolonged and severe enough to alter the conditions of one's education,¹³⁴ should be covered in the definition. Part of the problem of sexual harassment is that because it is difficult to define, women and girls often don't know that the behavior they are being subjected to is wrong, and often will not report it,¹³⁵ thus perpetuating the problem.¹³⁶ Nevertheless, the current definition of sexual harassment is as follows:

Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services, or treatment protected under Title IX.¹³⁷

The EEOC¹³⁸ issued the following guidelines in 1980 for the Title VII definition of workplace sexual harassment:

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environ-

133. Examples of behavior that would not be covered include isolated or innocent behavior, such as a boy holding his nose when a girl walks by, or standing in a girl's way. See Miller, *supra* note 97, at 723. Miller argues that a universal definition of peer sexual harassment is essential to protect victims of sexual harassment, as well as to protect schools from excessive liability. *Id.*

134. See Sherer, *supra* note 13, at 2161-62 (explaining that trivial and isolated incidents will not present a Title IX claim if the severity and frequency of the abuse are examined in every case). Sherer relies in part on *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991), a Title VII case which held that "the harasser's conduct ... must be pervasive or severe." *Id.* at 2161.

135. See Dolan, *supra* note 15, at 225 n.100 (citing AAUW Survey, *supra* note 15, at 14) (noting that victims of sexual harassment usually tell no one of the incidents, and if they do report it to anyone, it is to a friend. The AAUW survey found that only 7 percent of the sexually harassed students reported the harassment to a teacher, and 23 percent turned to a parent).

136. The inability to define sexual harassment in clear terms may explain why women did not report it until recently. See MACKINNON, *supra* note 119, at 27 ("It is not surprising that women would not complain of an experience for which there has been no name. Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a generalized, shared, and social definition of it inaccessible.") (footnote omitted).

137. This is the definition adopted by the Office of Civil Rights. See Sherer, *supra* note 13, at 2126 & n.30.

138. See *supra* note 4.

ment.¹³⁹

While some states have their own definitions of peer sexual harassment,¹⁴⁰ critics of letting each state develop its own definition argue that this results in unclear and inconsistent guidelines,¹⁴¹ and may result in less protection for students in some states.¹⁴²

1. *The Importance of a Clear Definition, and Proposed Guidelines*

It is important to have a consistent definition in order for a school to know its potential liability. This Casenote emphasizes that a school would not be responsible for every act of a sexual nature. Rather, the schools would be liable only for abuse that is "sufficiently severe or pervasive to alter the conditions of the victim's [education] and create an abusive [learning] environment."¹⁴³ Jill Suzanne Miller argues that the definition enforced in *Harris v. Forklift Systems*,¹⁴⁴ a Supreme Court Title VII case, in conjunction with EEOC guidelines, is appropriate for the peer sexual harassment context.¹⁴⁵

2. *Defining a Hostile Environment that is Pervasive Enough to Alter the Conditions of One's Education*

Miller explains the *Harris* principle, which asks whether a reasonable person would find the questionable behavior objectively hostile.¹⁴⁶ *Harris* also asks whether the victim subjectively finds the environment abusive enough to negatively alter her working conditions.¹⁴⁷ In applying this definition, Miller argues that a school administration would be liable "if they knew or should have known that a reasonable student would have found their environment hostile, and if the student actually perceived that the peer harassment

139. 29 C.F.R. § 1604.11(a) (1995). Part (b) then explains that the EEOC will examine the "totality of the circumstances" when determining whether alleged conduct constitutes sexual harassment. For further definitions of "quid pro quo" sexual harassment, as compared to "hostile environment" sexual harassment, see *supra* note 2, and accompanying text.

140. See *infra* Part V.B, notes 306-11, and accompanying text.

141. See Miller, *supra* note 97, at 723 (explaining that a clear definition will prevent forcing teachers to intervene in harmless situations that are a "natural part of social maturity").

142. See Miller, *supra* note 97, at 723 n.217 (proposing that a universal definition will allay critics' fears that students will have sexual harassment claims for acts of innocent flirtation by other students).

143. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

144. 510 U.S. 17 (1993).

145. See Miller, *supra* note 97, at 722-23.

146. Miller, *supra* note 97, at 723 (citing *Harris*, 510 U.S. at 17).

147. Miller, *supra* note 97, at 723.

negatively affected his or her education.”¹⁴⁸ Using EEOC guidelines, Miller then asks whether the allegedly harassing conduct:

- (i) has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
- (ii) has the purpose or effect of unreasonably interfering with a student’s education; or
- (iii) otherwise adversely affects a student’s educational opportunities.¹⁴⁹

Although this Casenote advocates Miller’s definition of hostile education environment, this Casenote proposes that the school would be required to have actual knowledge of the harassment, not just constructive knowledge, in order to be found liable.

D. Relevant Title IX Case Law

Very few cases have directly addressed the issue of peer sexual harassment and Title IX liability. This is because Title IX specifically requires schools to implement grievance procedures,¹⁵⁰ and therefore, many cases are settled and not litigated.¹⁵¹ Because of this lack of precedent, courts have looked to the standards of Title VII and Title VI.¹⁵² Of the cases that have addressed peer sexual harassment, many that approved the application of Title VII standards never applied them because the cases were resolved on other grounds.

148. Miller, *supra* note 97, at 723.

149. Miller, *supra* note 97, at 724 (quoting Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. § 1609)).

150. 34 C.F.R. § 106.8 (1995).

151. Miller, *supra* note 97, at 702-03. Miller also offers two other explanations for the scarcity of peer sexual harassment cases. One is the long term of one’s employment compared to the short term of one’s education. A student may graduate from school before litigation is completed, often making her claim moot. *Id.* at 703 (citing Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 527 (1987)). But see Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1297-98 (N. D. Cal. 1993) (holding that the fact that the plaintiff had graduated from high school did not render moot her claims for damages for hostile environment sexual harassment claim under Title IX, but only rendered moot her claim for prospective relief); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75-76 (1992) (allowing damages in a teacher-to-student harassment case because equitable remedy of prospective relief was inadequate given that the teacher no longer taught at that school, and the plaintiff was no longer a student in that school system). Second, courts have traditionally deferred to the decisions of school administrators. Miller, *supra* note 97, at 703 (citing Schneider, *supra*, at 528).

152. Miller, *supra* note 97, at 703-704. Because this Casenote focuses on the analysis of the Rowinsky court, it will not discuss Title VI.

1. *Guidance from the Supreme Court in Franklin v. Gwinnett County Public Schools*¹⁵³

Christine Franklin brought a Title IX claim alleging she was sexually harassed by a teacher at her high school.¹⁵⁴ The teacher, Andrew Hill, harassed Ms. Franklin beginning in the fall of her sophomore year (1986); she filed her complaint in December of 1988.¹⁵⁵ The harassment included personal phone calls, forcibly kissing her on the mouth in the school parking lot, engaging her in sexually oriented discussions on whether she would consider having sex with an older man, and on three occasions, removing Christine from class by requesting her teacher to excuse her, and taking her to a private office where he coerced her to have intercourse with him.¹⁵⁶ While many other teachers and administrators knew of Hill's harassment of Christine and of other female students, none took action, and they even discouraged Franklin from pressing charges against Hill.¹⁵⁷ Instead, the school allowed Hill to resign on the condition that all charges against him be dropped.¹⁵⁸

Franklin is mainly a damages case.¹⁵⁹ The issue was whether the implied right of action under Title IX which was recognized in *Canon v. University of Chicago*¹⁶⁰ supported a claim for monetary damages.¹⁶¹ Using older case law dealing with rights and remedies, the Court held that Title IX authorizes an award of compensatory damages.¹⁶² The Court implicitly found that the way the Gwinnett Public Schools (and other schools) handled the problem, with a school promise to fire (or force the resignation of) an accused harasser in exchange for the victim's promise not to press charges, is not a sufficient remedy for a victim of sexual harassment.¹⁶³ The Court found

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

154. *Id.* at 63.

155. *Id.*

156. *Id.*

157. *Id.* at 64.

158. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 64 (1992).

159. See Virginia Davis Nordin, Terrence Leas & Charles J. Russo, *Sexual Harassment and Student Rights: The Supreme Court Expands Title IX Remedies*, 75 EDUC. L. REP. 733, 741-42 (1992) (explaining that the main holding of *Franklin*—that the plaintiff can not go without a remedy—will apply to all federal cases, not just to sexual harassment cases).

160. 441 U.S. 677 (1979).

161. 503 U.S. at 62-63.

162. *Id.* at 66-71. The court cited to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), and *Bell v. Hood*, 327 U.S. 678 (1946). *Id.* at 66-67.

163. The Court explained that backpay under a Title VII analysis "does nothing" for Christine because she was a student when the discrimination occurred. *Franklin*, 503 U.S. at 76.

that Congress did not intend to limit the remedies available under Title IX,¹⁶⁴ especially in light of two amendments to Title IX that were enacted after *Cannon*¹⁶⁵ which did not limit the remedies available.¹⁶⁶ The Court held that Title IX “[u]nquestionably” placed a duty on the Gwinnett School District to protect its students from intentional sexual discrimination, including sexual harassment, by a teacher, employee, or agent of the school, and authorized the awarding of damages in a Title IX claim.¹⁶⁷

2. Early Title IX Cases that Looked to Title VII for Guidance

An early case that applied Title VII standards to a Title IX claim was *Lipsett v. University of Puerto Rico*.¹⁶⁸ In *Lipsett*, the First Circuit applied Title VII standards to a mixed employment-educational context. The plaintiff was a medical student who was both a student and an employee of the school, as were her harassers.¹⁶⁹ The court held that it had “no difficulty extending the Title VII standard to discriminatory treatment by a supervisor” to a Title IX mixed employee-student context case.¹⁷⁰ Using the Title VII standard, the court held that a school is liable for the hostile environment discrimination suffered by the plaintiff if “an official representing the institution knew, or ... should have known, of the harassment’s occurrence, *unless* that official can show that he or she took steps to halt it.”¹⁷¹

In *Patricia H. v. Berkeley Unified School District*,¹⁷² the court held that Title IX mandates that institutions receiving federal financial assis-

Also, because the person who subjected her to the discrimination (Hill) no longer taught at the school, and Christine no longer attended the school either, “prospective relief accords her no remedy at all.” *Id.* The Court stated that the Government’s response that administrative action would help other students who are similarly situated (i.e., still in school), “acknowledges that the Government’s approach would leave petitioner remediless.” *Id.*

164. *Franklin*, 503 U.S. at 73.

165. *Id.* at 72-73. The Court noted that the Rehabilitation Act Amendments of 1986 abolished the States’ Eleventh Amendment immunity from suits under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. 42 U.S.C. § 2000d-7(a)(1) (1996). The Court further noted that Congress expanded the coverage of each of these antidiscrimination laws with the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687-88, 29 U.S.C. § 794, 42 U.S.C. § 6107 & 42 U.S.C. § 2000d-4(a) (1994)).

166. *Franklin*, 503 U.S. at 73.

167. *Franklin*, 503 U.S. 60, 74-76 (1992) (suggesting in dicta that a school should not be held liable for an unintentional violation, because presumably the school would have no notice of the violation).

168. 864 F.2d 881 (1st Cir. 1988).

169. *Id.* at 897.

170. *Id.*

171. *Id.* at 901.

172. 830 F. Supp. 1288 (N.D. Cal. 1993).

tance proscribe the maintenance of a sexually hostile education environment.¹⁷³ Patricia H., a mother of two minor daughters, was romantically involved with a teacher at her daughter's high school.¹⁷⁴ The suit claimed that the teacher sexually abused the girls at home and while on a family vacation.¹⁷⁵ The mother alleged that while no sexual abuse or harassment took place at the high school, the teacher's presence there created a hostile education environment for her daughters.¹⁷⁶ The court held that it could not say that mere presence of the abuser, as a matter of law, did not create a hostile education environment.¹⁷⁷ The court also said, however, that it does not mean that a hostile environment did exist, and the court left this to the jury.¹⁷⁸ Following Title VII case law guidelines,¹⁷⁹ as well as OCR recommendations,¹⁸⁰ the court said that the jury should use a "reasonable student" standard which should take into consideration "the age of the victim(s); the frequency, duration, repetition, location, severity, and scope of the acts of harassment; [and] the nature of [sic] context of the incidents."¹⁸¹

Most importantly, by looking to *Franklin* and to Title VII standards as *Franklin* and *Lipsett* did, the court found that the law permits plaintiffs to state a claim for hostile environment sexual harassment under Title IX.¹⁸² The *Patricia H.* court felt that the work environment and the school setting are similar, and that "a student should have the same protection in school that an employee has in the workplace."¹⁸³

173. *Id.* at 1289, 1293.

174. *Id.* at 1294.

175. *Id.*

176. *Id.* at 1296.

177. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1296-97 (N.D. Cal. 1993).

178. *Id.*

179. *Id.* (citing *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991)).

180. *Id.* at 1296 (citing OCR's Request for Judicial Notice).

181. *Id.*

182. *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1291-93 (N.D. Cal. 1993).

183. *Id.* at 1292 (citing *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 149 (5th Cir. 1992) ("there is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter. Women need not endure sexual harassment ... under any circumstances, the school setting included."), *cert. denied, sub nom. Caplinger v. Doe*, 506 U.S. 1087 (1993)). After the Supreme Court declined to review the case, the Fifth Circuit granted a new hearing, *Doe v. Taylor Indep. Sch. Dist.*, 987 F.2d 231 (5th Cir. 1993). See also *Sherer, supra* note 13, at 2155-57 (noting that given the similarities between the workplace and the classroom, young students, because of their reliance on school officials, have a greater need for protection from sexual harassment, and explaining that the classroom is the precursor to the workplace); *Gant, supra* note 97, at 507-09 (noting the many similarities between the workplace and educational institutions).

3. Cases that Address Peer Sexual Harassment

The first federal case to directly address the issue of peer sexual harassment was *Doe v. Petaluma City School District*.¹⁸⁴ In *Doe*, the plaintiff's classmates wrote lewd obscenities about her on bathroom walls, and repeatedly referred to her as the "hot dog bitch," "slut," "hoe," and regularly asked her if she had a "hot dog" in her pants.¹⁸⁵ The harassment lasted for two years and was severe enough that Doe's mother had to withdraw her from the school.¹⁸⁶ During those two years, however, Doe had complained to her high school counselor repeatedly, but his only response was that "boys will be boys."¹⁸⁷ The counselor never told Doe or her parents that the school had a Title IX policy and representative.¹⁸⁸ Doe sued him individually under Title IX, and also sued the school.¹⁸⁹ The district court held that Title IX prohibits hostile environment sexual harassment,¹⁹⁰ and denied the counselor's claim of qualified immunity.¹⁹¹ The counselor appealed.¹⁹² While the appellate court found that individuals had qualified immunity and could not be sued under Title IX because a school official's duty to prevent sexual harassment from peers was not clearly established at the time of Doe's harassment,¹⁹³ the appellate court implied that it would have applied Title VII standards had the harassment and the counselor's response occurred after the *Franklin* case was decided. The *Petaluma II* court noted that Doe was not required to prove that she had a right to be free from sexual harassment from peers, because the issue was whether the counselor

184. 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995), *reconsideration granted*, 949 F. Supp. 1415 (N.D. Cal. 1996) [hereinafter *Petaluma I*]. Right before the case came to trial, the school settled for \$250,000. *School District in California Settles Sex Harassment Suit*, N.Y. TIMES, Dec. 27, 1996, at A24.

185. *Petaluma I*, 830 F. Supp. at 1565. Doe was also threatened for telling school officials about the harassment, was degraded during lunch and class, and was on one occasion slapped by another student. *Id.* at 1564-65.

186. *Id.* at 1565-66. Jane Doe's parents withdrew her immediately after a female student approached her and wanted to fight; the altercation was prevented by the intervention of school employees. *Id.* at 1565.

187. *Id.* at 1565.

188. *Id.* at 1564.

189. *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449 (9th Cir. 1995) [hereinafter *Petaluma II*].

190. *Petaluma I*, 830 F. Supp. at 1571. The court added that in order for a plaintiff "to obtain damages under Title IX (as opposed to declaratory or injunctive relief), [the plaintiff] must allege and prove intentional discrimination on the basis of sex by an employee of the educational institution." *Id.* The district court rejected the application of Title VII's less rigid "knew or should have known but failed to prevent" approach. *Id.*

191. *Id.* at 1578.

192. *Petaluma II*, 54 F.3d at 1448.

193. *Id.* at 1450-51.

had qualified immunity.¹⁹⁴ Rather, Doe was required to prove that she had a right to receive protection from peer sexual harassment from an individual school counselor.¹⁹⁵ The court noted a Fifth Circuit case¹⁹⁶ that said that a school principal and superintendent had a duty to prevent teacher-to-minor sexual harassment, but that no precedent established the duty to prevent peer sexual harassment.¹⁹⁷ The court also accorded little weight to an opinion letter by OCR which stated that the school district had a duty to protect Doe from peer sexual harassment.¹⁹⁸

As for applying Title VII standards to impose school liability for peer sexual harassment, the court was adamant that without a precedent to give the plaintiff a "clearly established right"¹⁹⁹ to protection by a counselor from peer sexual harassment, the plaintiff could not hold a school official individually liable.²⁰⁰ The *Franklin* decision has been cited for putting school districts on notice that the school district indeed could be held liable for damages for failing to prevent teacher-student sexual harassment,²⁰¹ but *Franklin* was decided in 1992. This was after the counselor mishandled Doe's complaints,

194. *Id.* at 1450, 1451 n.1.

195. *Id.* at 1451. The court said the issue was whether the counselor "had a duty to act to prevent such harassment, not whether the harassment itself was permitted under Title IX." *Id.* at 1451 n.1. For the purposes of this Casenote, Title IX will apply only to school districts, not to individual school officials.

196. *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1995) (citing *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir.), *cert. denied, sub nom. Lankford v. Doe*, 513 U.S. 815 (1994)). The *Petaluma* court further distinguished *Taylor* from *Petaluma* because *Taylor* involved physical abuse, and gave rise to a substantive due process claim for the violation of the right to bodily integrity. *Petaluma II*, 54 F.3d at 1451.

197. *Petaluma II*, 54 F.3d at 1451-52.

198. *Id.* at 1452. The court stated that an OCR opinion letter does not clearly impose a duty on the counselor to act to protect students from peer sexual harassment. *Id.*

199. *Id.* at 1451. The dissent in *Petaluma* argued that the majority's reading of prior case law was too narrow, in that the majority looked for precedent that required a counselor to protect a plaintiff from peer harassment, while the majority ignored other case law that found a right for plaintiffs to be free from sexual harassment in an educational environment. *Id.* at 1453 (Pregerson, J., dissenting). One case noted by Judge Pregerson was *Pagano v. Massapequa Public School*, 714 F. Supp. 641 (E.D.N.Y. 1989) (holding that a § 1983 claim lies for school officials' failure to prevent continuing physical and verbal abuse by other students). Judge Pregerson added that Title VII standards have been frequently imposed in Title IX cases that deal with both quid pro quo and hostile environment sexual harassment cases. "[B]ecause Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, ... [Title VII] is the most appropriate analogue when defining Title IX substantive standards." *Id.* at 1454 (quoting *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987) (alterations in original)).

200. *Petaluma II*, 53 F.3d at 1451.

201. *Id.* at 1450. See also *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) (citing *Franklin* to support the proposition that to seek money damages, the plaintiff must show that the school district intentionally discriminated against her when it failed to act on plaintiff's complaints of peer sexual harassment).

and too late to put him on notice that he had a duty to protect the plaintiff. The court said,

If [the counselor] engaged in the same conduct today, he might not be entitled to qualified immunity ... [Under the *Franklin* decision] ... [i]t might be that today a Title VII analogy likening [the counselor] to an employer and Doe to an employee might provide an argument to consider in a similar Title IX case. However, those arguments are not properly before us.²⁰²

While this statement is dicta, and the *Rowinsky* plaintiff did not rely on it, the statement suggests that the *Petaluma II* court would have applied Title VII standards had the *Franklin* and perhaps the *Davis* decisions, which provide the needed precedent, already been decided.

With this background, this Casenote now discusses the analysis in *Rowinsky*.

IV. AN ANALYSIS OF THE *ROWINSKY* DECISION

The issue in *Rowinsky* was whether Title IX imposes liability on a school district for peer-created hostile environment sexual harassment.²⁰³ A broader question presented was whether the recipient of federal education funds can be held liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents.²⁰⁴

A. *The Language of Title IX*

The court held that Title IX liability is limited to discrimination by grant recipients, and does not apply to third parties because the word "under" in Title IX means "by" and not "in," as *Rowinsky* argued.²⁰⁵ The court focused on the plain language of the statute and found that Title IX was drafted in a way that identifies a benefited class in order to imply a private right of action.²⁰⁶ The court explained that the "open-ended language of Title IX" was not drafted by Congress simply to prevent certain people from engaging in certain conduct, but that it was written to protect the rights of the bene-

202. *Petaluma II*, 54 F.3d at 1452.

203. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996).

204. *Id.* at 1010. The court referred to grant recipients or its agents as "grant recipients." *Id.* at 1011 n.10.

205. *Id.* at 1011. The relevant portion of Title IX provides that "[n]o person in the United States shall, on the basis of sex, ... be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1994).

206. *Rowinsky*, 80 F.3d at 1012.

ficiaries.²⁰⁷ The court then assumed *arguendo* that "under" means "in," and went on to determine who is prohibited from discriminatory conduct under Title IX. To establish this, the court relied on three factors: the scope and structure of Title IX, the legislative history, and agency interpretations.²⁰⁸

While the court found that "under" does not mean "in," legal scholars have interpreted Title IX otherwise.²⁰⁹ Monica Sherer argues that the statute does not make any distinction "between the level of education of the victim nor between employee and student victims. Therefore, any elementary or secondary school student discriminated against because of sex should have a claim against his or her school."²¹⁰ Using the language of Title IX, Sherer then contends that victims of peer sexual harassment are both denied benefits and discriminated against in school, in accordance with the language of Title IX.²¹¹ Peer sexual harassment, particularly when not taken seriously or not halted, affects a victim's ability to concentrate in school.²¹² Sexual harassment may affect her ability to learn, her attendance, and the courses she decides to take.²¹³ In addition, it may cause her grades to suffer, thus affecting further educational goals, such as career choice or college selection.²¹⁴ Sherer explains that holding schools accountable for the conduct of students will serve Title IX's purpose of helping to give women equal educational opportunities. This Casenote advocates Sherer's interpretation of Title IX.

B. *The Language of the Regulations of the Department of Education*

This Casenote submits that because of the limited case law involving peer sexual harassment, the Fifth Circuit should have considered the Department of Education regulations before settling on its narrow interpretation of "discrimination." Sherer acknowledges that

207. *Id.* (citing *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 (1979)).

208. *Id.*

209. See Sherer, *supra* note 13, at 2152-54; Gant, *supra* note 97, at 511-13 (explaining that a hostile environment caused by peer sexual harassment denies victims the benefits of an education program, while subjecting them to discrimination under that program. To support this proposition, Gant cited the courts in *Patricia H. and Petaluma I.*).

210. Sherer, *supra* note 13, at 2152-53.

211. Sherer, *supra* note 13, at 2153.

212. Dolan, *supra* note 15, at 225 n.104 (citing AAUW Survey, *supra* note 15, at 15-16).

213. Gant, *supra* note 97, at 513 n.211 (citing AAUW Survey, *supra* note 15, at 15-16, which found that one in three girls who were sexually harassed did not want to go to school or speak in class).

214. Gant, *supra* note 97, at 513. See *supra* notes 106-12, part I.C (discussing the effects of peer sexual harassment).

Congress gives little guidance in the text of Title IX regarding peer sexual harassment. To supplement this lack of guidance, Sherer proposes that courts consider the Department of Education's regulations.²¹⁵ These federal regulations require that:

[I]n providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment.²¹⁶

This Casenote also draws attention to subpart (7) of the Department of Education regulations, which further prohibits grant recipients from:

[o]therwise limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity.²¹⁷

Sherer concludes that if a school investigates most student complaints, but fails to investigate complaints of peer sexual harassment, the school has violated parts (1)-(4) of the Department of Education regulations.²¹⁸ Female students are denied services if a school punishes a claim of sexual harassment in a manner that is different from how it handles or investigates other claims such as cheating, fighting, or swearing.²¹⁹ If a school does not punish harassers, or punishes them lightly, this demonstrates that the school treats the students with "different ... sanctions,"²²⁰ thus violating section (4). As for section (7), this Casenote proposes that if a school with knowledge failed to adequately prevent the harassment from continuing, the victim's opportunity to enjoy the privilege of her education has been limited.²²¹ In fact, knowing that the school will *not* protect her may

215. Sherer, *supra* note 13, at 2154.

216. Sherer, *supra* note 13, at 2154 (quoting 34 C.F.R. § 106.31(b)(1)(4) (1996)).

217. 34 C.F.R. § 106.3(b)(7) (1996).

218. Sherer, *supra* note 13, at 2154-55.

219. Sherer, *supra* note 13, at 2155.

220. 34 C.F.R. § 106.31(b)(4) (1995).

221. *See* Gant, *supra* note 97, at 513. Sexual harassment harms female students in two ways. First, female students are denied the opportunity to receive an education equal to their male counterparts. Second, it prevents female students from developing skills they need. Both of these consequences violate the purposes of Title IX. *Id.* *See* 118 CONG. REC. S5808 (1972) (statement of Sen. Bayh).

further prevent the student from enjoying the benefits of her education.²²²

1. *Proof of the School's Discriminatory Intent Should Not be Required*

While the district court in *Rowinsky* was correct in examining the school's response to the complaints, the Fifth Circuit erred by making this the sole examination.²²³ In addition, the court erred in requiring the plaintiff to prove that the school intended to discriminate on the basis of sex through its improper handling of the complaint.²²⁴

The *Petaluma* court, on reconsideration, explicitly rejected the *Rowinsky* court's reasoning.²²⁵ By looking solely at whether the school treated a female student's claims differently from a claim by a male, the court may deny the female student a remedy altogether.²²⁶ This is because girls are the victims of sexual harassment, whether by peers or by others, more often than boys.²²⁷ If there are no male complaints on file, a court has nothing to compare the school's handling of the female's complaints, thus leaving her without a remedy,²²⁸ which is precisely what the *Franklin* Court wanted to prevent.²²⁹

This Casenote advocates the "intent" requirement as explained by several district court cases:²³⁰ "intentional discrimination" on the

222. *Accord* Gant, *supra* note 97, at 508 (noting that young students have great reliance on school officials to protect them). *See infra* note 250 (explaining that sexual harassment harms young women to a greater extent than women in the workforce because of their immaturity and reliance on teachers to protect them).

223. The dissent in *Rowinsky* would have agreed with this, as it felt that the plaintiffs "stated valid claims" under Title IX, and were entitled to proceed to trial. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1017 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) (Dennis, J., dissenting).

224. *Rowinsky*, 80 F.3d at 1016 ("[A] plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex."). The *Davis* court, however, did not require proof of an intent to discriminate because Title VII does not require such intent. Rather, *Davis* employed the Title VII standard, and imposed liability on the school district if it "knew or should have known" of the harassment and failed to take adequate remedial measures. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1195 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

225. *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415 (N.D. Cal. 1996) [hereinafter *Petaluma III*] (order granting plaintiff's motion for reconsideration in light of developing case law dealing with peer sexual harassment). The court applied Title VII's "knew or should have known" of the harassment standard. *Id.* at 1423. If a school knew or should have known of the harassment and then did nothing to prevent or remedy it, no further proof of the school's intent to discriminate is necessary. *Id.* at 1426.

226. *Id.* at 1420-21. The *Petaluma III* court felt that the reasoning in *Rowinsky* "yields extreme results inconsistent with the body of discrimination law." *Id.*

227. *See supra* notes 101-04 and accompanying text.

228. *Petaluma III*, 949 F. Supp. at 1421.

229. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

230. *See Nelson v. Almont Community Sch.*, 931 F. Supp. 1345 (E.D. Mich. 1996) (holding

part of the school board should be inferred from the totality of the circumstances.²³¹ The court should consider, in addition to a comparison of the school's handling of female and male complaints, evidence that the school had actual knowledge and failed to prevent the harassment; that the school tolerated the harassment despite numerous reports by the victim, her parents, other students, or the victim's attorney; that the school failed to implement OCR and sexual harassment policies and grievance procedures; and the pervasiveness or seriousness of the harassment.²³² Other considerations may include whether the school inquired into the victim's increasing tardiness or absences from classes.²³³ In *Rowinsky*, the BISD employed a bus driver who disregarded school bus seating procedures, failed to investigate the matter promptly (and ultimately did so only after repeated urgings by Mrs. Rowinsky), failed to accurately record the complaint, and failed to inform the plaintiff of Title IX or any grievance procedures.²³⁴ The only punishment meted out against one harasser was a three-day suspension from riding the bus (the other harasser received no punishment).²³⁵ The victims, on the other hand, endured a hostile environment that existed for an entire school year.²³⁶ Had the *Rowinsky* court allowed intent to be inferred by examining the relevant factors, it may have concluded that the school's failure to take appropriate remedial action created and sub-

that a school's intent to discriminate may be inferred from its failure to remedy the harassment despite actual knowledge); *Petaluma I*, 830 F. Supp. 1560, 1575-76 (N.D. Cal. 1993) (stating that a school's failure to remedy a hostile environment is circumstantial evidence of the school's intent to discriminate); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1023 (W.D. Mo. 1995) (inferring intent if the school knew of the harassment and failed to take proper remedial action); *Oona R.S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1466 (N.D. Cal. 1995) (inferring intent if the school tolerated the harassment, failed to take adequate steps to deter or punish the harassers, or encouraged the harassment).

231. Title VII does not require the victim to prove her employer intended to discriminate, even in cases of co-worker harassment. Rather, Title VII looks at the totality of the circumstances. 29 C.F.R. § 1604.11 (b) (1995). The *Davis* court applied Title VII standards and held the school liable because it knew of the harassment and failed to take prompt and remedial action to end it. *Davis* did not require intent. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1195 (11th Cir.), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996).

232. See *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (taking these factors into consideration and finding that there was a genuine issue of material fact of whether the school intentionally discriminated against the plaintiff in its handling of her complaints because of the victim's sex). This Casenote does not require that the plaintiff prove the school discriminated in its handling of her complaints on the basis of her sex. Rather, the school must have knowingly tolerated a hostile environment by failing to take appropriate remedial measures.

233. *Id.*

234. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008-09 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

235. *Id.* at 1009.

236. *Id.*

jected the victims to a prolonged hostile environment.

C. The Court Denied the Application of Title VII for the Wrong Reasons

The court hastily decided that "importing a theory of discrimination from the adult employment context into a situation involving children is highly problematic."²³⁷ The court explained that there is a power relationship among employers and employees, and also among co-workers, and that an employer may be held responsible for the actions of an employee through the theory of respondeat superior.²³⁸ The court then stated that in school, there is a power relationship between the institution and the student,²³⁹ but then mistakenly continued that "[i]n the context of two students ... there is no power relationship ... a key ingredient" to the harassment by a co-worker analogy.²⁴⁰ This decision is misguided and unfortunate.²⁴¹ If the court believed that a power relationship was the missing ingredient that would have given Jane and Janet a cause of action, then the court failed to examine it sufficiently, relegating it to a footnote. As Sherer notes, and the *Rowinsky* decision demonstrates, adults tend to overlook the difference in power among peers.²⁴² The power relationship exists in tiers of popularity, in identifying students who are favored by a teacher or principal (perhaps imputing school liability because school authority is involved), and social as well as academic pressures to which students succumb.²⁴³ Sherer explains that students, in an effort to belong to a particular social group, may withstand uncomfortable behavior from a popular peer.²⁴⁴

237. *Id.* at 1011 n.11.

238. *Id.*

239. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1010 n.11 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) (citing Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 533-36 (1987)).

240. *Id.* This assumption, that a power relationship is needed between co-workers to hold an employer liable for the harassment between the co-workers, is incorrect. See *infra* notes 252-53 and accompanying text.

241. It is possible that the *Rowinsky* court made this assertion because it mistakenly assumed that accepting an agency/co-worker theory would automatically impose strict liability on school districts for peer sexual harassment. See *Recent Case: Sexual Harassment—Title IX—Fifth Circuit Holds School District Not Liable For Student-To-Student Sexual Harassment—Rowinsky v. Bryan School District*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 65 U.S.L.W. 3033 (U.S. Oct. 7, 1996) (No. 96-4), 110 HARV. L. REV. 787 (1997) [hereinafter *Recent Case*]. The *Rowinsky* court failed to recognize, however, that no cases have suggested that strict liability will be the standard for third party acts. *Id.* This Casenote does not advocate a strict liability standard.

242. Sherer, *supra* note 13, at 2131 n.58 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 11).

243. Sherer, *supra* note 13, at 2131 n.59 (citing WHO'S HURT AND WHO'S LIABLE, *supra* note 13, at 11).

244. Sherer, *supra* note 13, at 2131. Sherer also noted Gross, *supra* note 115, at A13, which detailed that some girls who were targeted by the Spur Posse were "willing" to have sex with the

The *Rowinsky* court further reasoned that Title VII is inappropriate because “[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer, or co-worker.”²⁴⁵ The court did not deny that the victim was harmed by the harassment. Rather, the court stated that, without the power relationship, the harasser had no coercive effect on the victim.²⁴⁶ The court incorrectly believed that a power relationship, which leads to a “coercive effect” on the victim, is necessary to impute employer liability for co-worker’s harassment of another co-worker,²⁴⁷ and thus held that this coercive effect is necessary for sexual harassment to “exist” among peers.

Notwithstanding the contention that a power relationship does exist, a “coercive effect” exists as well. Congressional studies have revealed teacher favoritism towards boys.²⁴⁸ This favoritism, in conjunction with a victim’s knowledge that the school will not protect her from abuse, may have a coercive effect on the victim, such as forcing her to leave the school.²⁴⁹ Studies show that young girls and teenagers are more vulnerable to the effects of sex discrimination and harassment than adult women.²⁵⁰ In addition, scholars and legislators alike have expressed concern that failing to teach boys that harassment is wrong may turn them into workplace harassers in the future.²⁵¹ Further, a coercive effect is not required by case law dealing with workplace hostile environment sexual harassment by co-

boys because it would help make them popular. Sherer, *supra* note 13, at 2132 & n.68.

245. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1011 n.11 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

246. *Id.*

247. The majority noted that the cases *Rowinsky* cited to, which found employer liability for the acts of third parties, were inapplicable because the power of the employer was implicated in each case. *Id.* at 1011 n.11.

248. *See supra* note 126 and accompanying text.

249. The parents of the Petaluma plaintiff withdrew her from school because of the severity of the harassment. *Petaluma II*, 54 F.3d at 1454.

250. *See Baurac, supra* note 57, at 1; Gant, *supra* note 97, at 508 (stating that a student victim’s potential lack of maturity and greater reliance on school officials to protect her as compared to the maturity of a woman harassed at work and her reliance on her employer, highlights the student victim’s greater need for protection from school officials). *See also Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982) (noting that school children are “too young to be considered capable of mature restraint”), *cert. denied*, 463 U.S. 1207 (1983); *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992) (en banc) (Sloviter, C.J., dissenting) (noting that the law recognizes that children are incapable of mature judgment), *cert. denied*, 506 U.S. 1079 (1993).

251. *See* 139 CONG. REC. S11,931 (daily ed. Sept. 15, 1993) (statement of Sen. Mikulski) (stating that condoning abusive behavior with a “boys will be boys” brush off is unacceptable). *Cf. Kirstin Downey Grimsley, Co-Workers Cited in Most Sexual Harassment Cases: Management Group’s Study Disputes Stereotype*, WASH. POST, June 14, 1996, at D1 (detailing a recent study which found that 49.7 percent of sexual harassment claims were filed against co-workers, not superiors).

workers. One of the leading Title VII cases, *Henson v. City of Dundee*,²⁵² stated that "the capacity of any person to create a hostile environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual."²⁵³ If a coercive effect, and even a power relationship is not necessary in a Title VII analysis, these elements are unnecessary in a Title IX analysis for peer sexual harassment as well.

1. *The Similarities Between Work and School:*

Scholars and courts alike have recognized the strong similarities between the workplace and the learning environment.²⁵⁴ One scholar, Elizabeth Gant, addresses their structural and functional similarities.²⁵⁵ She explains that in both situations, the victim is required to attend, complete her work, and meet deadlines and due dates.²⁵⁶ The social atmospheres are also similar: each has breaks, a lunch hour, socializing which may include flirting, school (or work) sponsored social events, and dealing with and answering to authority.²⁵⁷

Acts of sexual harassment in school tend to mirror those of the workplace. In school, there is far more harassment and a greater hostile environment created by peers than by teachers or employees.²⁵⁸ In work, co-workers are harassed and/or subjected to a hostile work environment more often by co-workers than by a supervisor.²⁵⁹ In both situations, females are more often the victims, with males as

252. 682 F.2d 897 (11th Cir. 1982).

253. *Id.* at 910 (cited in *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1022 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) (Dennis, J., dissenting)). *Henson* also stated that "[t]he environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace." *Id.* *Accord* *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (explaining that women never know when a verbal sexual harassment will escalate into a violent physical sexual assault).

254. *See Petaluma III*, 949 F. Supp. at 1425-26 (comparing the numbers of women harassed in the workplace to the comparably high numbers of females harassed in schools); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal., 1993) (noting that the few differences between work and school only emphasize the need for greater protection of students from sexual discrimination); *Davis*, 74 F.3d at 1192 (declaring that public policy requires that schoolchildren receive at least as much protection as workers).

255. Gant, *supra* note 97, at 507-10.

256. Gant, *supra* note 97, at 507.

257. Gant, *supra* note 97, at 507-08. *See also* Sherer, *supra* note 13, at 2155-58 for a similar comparison of school and work.

258. *See supra* note 102 and accompanying text (explaining the problem of peer sexual harassment).

259. Grimsley, *supra* note 251, at D1, D3 (revealing that nearly 50 percent of harassed workers are victimized by their co-workers).

the harassers.²⁶⁰ These simple yet important parallels further demonstrate that applying Title VII case law and principles in a school setting is appropriate. The following sections will demonstrate that the concerns of the *Rowinsky* court would be resolved by applying Title VII standards.

D. *The Scope and Structure of Title IX*

The court stated that Title IX was enacted under the Spending Clause of the Constitution, indicating that Title IX prohibits discriminatory acts only by grant recipients.²⁶¹ The court contended that while it is plausible that Title IX could encompass ending discrimination by third parties, it is more probable that Title IX applies only to grant recipients because the purpose of a spending condition is to "induce the grant recipient to comply with the requirement in order to get the needed funds."²⁶² If schools were liable for the acts of third parties, over whom they lack control, the risk of failure would be so high that no school would want the funding.²⁶³ The court concluded that this would in turn make the condition of Title IX, federal funding in exchange for preventing sex discrimination, almost useless.²⁶⁴

1. *How a Title VII Application Would Resolve the Rowinsky Majority's Concerns*

Had the court applied Title VII standards, the school would only be liable for harassment that it had knowledge of, and also for harassment that is severe or pervasive enough to alter the conditions of the victim's education.²⁶⁵ Thus, the notice requirement and the

260. Dolan, *supra* note 15, at 244 n.6 (citing a 1980 U.S. Merit Protection Service Board Study which found that 42 percent of females and 15 percent of males were harassed on the job). These percentages have remained constant over the past 15 years. The following numbers represent the Board's survey results for workers who experienced unwanted sexual attention in 1987: 42 percent of women and 14 percent of men; and in 1994: 44 percent of women and 19 percent of men. Bill McAllister, *Sexual Harassment Remains a Problem in Government*, *Study Says*, WASH. POST, Nov. 14, 1995, at A17. See Sherer, *supra* note 13, at 2128 (citing survey results that show female students are more often harassed than male students).

261. There is some debate as to whether Title IX was enacted under the Spending Clause or under the 14th Amendment. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1013 n.14 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). This debate is of no consequence regarding damages. The *Franklin* court held that a money damage remedy is available under Title IX, regardless of the source of its enactment. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992).

262. *Rowinsky*, 80 F.3d at 1013.

263. *Id.*

264. *Id.*

265. This comports with the Title VII requirement of a "hostile environment." See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (holding that "the harasser's conduct ... must be per-

qualifications for the seriousness of the abuse prevents the school from being liable for the acts of "the multitude of third parties [over whom they have little control] who could conceivably violate the prohibitions of Title IX,"²⁶⁶ which is what the *Rowinsky* court was concerned with. This quote from the *Rowinsky* decision should be construed narrowly, if not considered dicta, because in *Rowinsky* (and *Davis* as well), school officials did have or take control over the harassers. In *Davis*, the teacher had an opportunity to move the plaintiff's seat away from the harasser, and did not.²⁶⁷ In *Rowinsky*, the school monitored the students with video cameras, and therefore, could see which students it had to reprimand, thereby solving the problem before it escalated to the point where the plaintiff had to file a lawsuit.²⁶⁸ Also, in *Rowinsky*, the second bus driver assigned Jane the seat next to her harasser.²⁶⁹ Both of the *Rowinsky* instances (the first, an action by a school official; the second, an inaction by a school official) tolerated, if not increased, the hostility of the environment.²⁷⁰ Thus, the school boards did have "control" over the situation in some respect, and would be held liable not for the conduct of its harasser-students, but for its own conduct of tolerating the hostile and discriminatory environment.²⁷¹ The *Rowinsky* reasoning has been criticized for failing to recognize that a school board's "inaction may constitute actionable discrimination."²⁷²

vative or severe" enough to "create an abusive working environment."). Also, note that Title VII imposes liability on an employer who had actual or constructive knowledge of the harassment, but that this Casenote advocates an actual knowledge requirement for schools to be held liable.

266. *Rowinsky*, 80 F.3d at 1013.

267. *Davis*, 74 F.3d 1186, 1186 (11th Cir. 1996).

268. *Rowinsky*, 80 F.3d at 1008. Had the school reviewed the tapes earlier, or on a regular basis, or at least after the plaintiff's first complaint, the school also would have had notice.

269. *Id.* at 1008.

270. *But cf.* *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992) (en banc) (explaining that the school's inattention to male students' misbehavior neither created the danger in question nor made the victims more vulnerable to it), *cert. denied*, 506 U.S. 1079 (1993), *cited in* Dolan, *supra* note 15, at 229. *Middle Bucks* involved two female vocational students who were in the same graphics art class as their male harassers. The girls alleged that forced touching, fellatio, and masturbation of male students took place regularly over a five month period in a unisex bathroom and darkroom. *Middle Bucks*, 972 F.2d at 1366, 1378. Despite complaints to a school official, no action was taken. *Id.* at 1366. The court in *Middle Bucks*, however, acknowledged that the line was "blurred" and that it was "not prepared to say that the conduct charged to the school ... crossed the line." *Id.* at 1377.

271. *See Petaluma III*, 949 F. Supp. 1415, 1421 (N.D. Cal. 1996).

272. *Id.* (quoting *Bator v. State of Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994)). *Bator* is a Title VII case in which the court held that a supervisor who has been informed of the harassment and fails to stop it is in violation of the Equal Protection Clause. This Casenote will not discuss Equal Protection Clause claims in the context of Title IX suits. *See also* Sexual Harassment Guidance, *supra* note 88, at 12,036, 12,039-40 (explaining that *Rowinsky* misunderstood a school's liability under Title IX, and that Title IX holds the school liable not for the actions of its students, but for permitting the harassment to continue once it has knowledge of it). *Accord*

Such factors (including the school's response to the complaints, whether through its actions or inactions) would be taken into consideration in conjunction with the regulations of the Department of Education.²⁷³ For instance, an inquiry into whether school officials in *Davis* refused to move the seat of a male student who had been beaten up by another boy would be helpful in determining if the school treated all students the same, or if it increased the hostility of the environment only in cases of sexual harassment (i.e., for the female student by denying her request for a new seating assignment). This inquiry would further prevent the school from being liable for every incident or for incidents which it did not have knowledge of, since intent to discriminate would only be inferred if the school has knowledge of the situation and failed to appropriately remedy the situation. The majority's reasoning, that a school board's inaction does not equal an intent to discriminate, should be construed narrowly to the situation where the school board or officials did not have knowledge of the harassment.

This Casenote acknowledges that schools can not control the actions of every student,²⁷⁴ even after punishment, as G.F.'s persistent behavior demonstrates.²⁷⁵ A Title VII application would address this as well. Under Title VII, a supervisor is liable for the acts of co-workers that the employer knew or should have known about "unless [the employer] can show that it took immediate and appropriate corrective action."²⁷⁶ In *Rowinsky*, the court should have inquired into the promptness and appropriateness of the only punishment it gave to one harasser.

The *Rowinsky* majority, in a footnote, makes an analogy that is not entirely apposite.²⁷⁷ The court hypothesizes that the parents of a female student "discourage her from taking advantage of opportunities at school because they believe that a woman should not concentrate on an education,"²⁷⁸ thus denying her the full benefits of an education. The court explains that if the school had knowledge of

Recent Case, *supra* note 241, at 790-91.

273. 34 C.F.R. 106.31 (b) (1996). See *supra* notes 215-22 and accompanying text.

274. Some scholars argue that just as employees have attendance requirements at work, schools have control over students because of mandatory attendance laws in almost every state, and even truancy laws that penalize students for unexcused absences. See Gant, *supra* note 97, at 508-09; Dolan, *supra* note 15, at 234-38, 244 n.204 (discussing how the state exercises lawful control over children's liberty for up to eight hours a day).

275. *Rowinsky*, 80 F.3d at 1008 (noting that G.F.'s three day suspension did not deter him from harassing Jane and Janet).

276. 29 C.F.R. § 1604.11(d) (1995).

277. *Rowinsky*, 80 F.3d at 1013 n.15.

278. *Id.*

the discrimination and failed to stop it, the school would be liable under Title IX according to Mrs. Rowinsky's theory.²⁷⁹ An absurd result, I agree. However, in this analogy, the girl is being discriminated against by her parents, who are not under the control of the school. Students have to be in the same school together because of attendance laws and students are subject to the behavior policies of the school; the school has an equal amount of control or "power" over male harassers as it does over female victims.²⁸⁰ In the court's hypothetical, the school has no control, however, over the behavior of the parents, although it still has control over the female victim. Further, schools are generally only liable for incidents that occur on school grounds, during school hours.²⁸¹ Just as employers are only responsible for acts of their employees committed in the scope of their employment,²⁸² so should schools only be liable for the acts of students committed while under compulsory school supervision.²⁸³

279. *Id.*

280. See Dolan, *supra* note 15, at 234 (arguing that mandatory attendance laws, the immaturity of the student, and the broad discretion extended by the state to schools in controlling students create a special relationship between the school and the student. She also argues that the student is in the functional custody of the state). But see Maldonado v. Josey, 975 F.2d 727, 732 (10th Cir. 1992) (explaining that compulsory attendance laws do not create a duty for the school to protect students from the private acts of third parties), *cert. denied*, 507 U.S. 914 (1993); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (en banc) (holding that the relationship between a school and a student is not "custodial").

281. Schools are usually not liable for incidents that occur during school functions such as dances or graduation ceremonies where attendance is voluntary and optional. See Dolan, *supra* note 15, at 230 (discussing *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994)). *Leffall* held that no special relationship existed between school and student when student was shot to death after a high school dance because the student was in no way compelled to attend the dance. *Leffall*, 28 F.3d at 529. The court explained that "even though the student may have been compelled to attend school during the day, any special relationship that may have existed lapsed when compulsory attendance ended." *Id.* Dolan points out that the court did not say that a special relationship never exists between a school and a student, but that it did not exist "during a school-sponsored dance held outside of the time during which students are required to attend school for non-voluntary activities." Dolan, *supra* note 15, at 231 (citing *Leffall*, 28 F.3d at 529)).

282. In a negligence action, an employer is liable for harm caused by the negligent conduct of his employee within the scope of the employee's employment. RESTATEMENT (SECOND) OF AGENCY § 242 (1957). The dissent in *Rowinsky* would have applied agency law to hold a school liable for the acts of its students. *Rowinsky*, 80 F.3d at 1021 n.7 (Dennis, J., dissenting). This Casenote does not advocate the agency approach because in cases of intentional sexual discrimination (where the school had notice) the issue is not one of negligence. For a brief discussion of what constitutes the scope of one's employment, as opposed to a "frolic and detour," which is not in the scope of one's employment, see RICHARD EPSTEIN, CASES AND MATERIAL ON TORTS, 454-57 (6th ed. 1995). Cf. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72-73 (1986) (rejecting the argument that an employer is automatically liable for the wrongs of an employee, whether or not it had notice of the wrongs, but also stating that lack of notice will not necessarily shield an employer from liability).

283. OCR, however, has stated that Title IX protects students in all aspects of "the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere." Sexual Harassment Guidance, *supra* note 88, at

The *Rowinsky* court also argues that Title IX's other provisions contain language that expressly mentions grant recipients in the exemptions.²⁸⁴ The court reasons that the emphasis on grant recipients in other provisions "supports a conclusion that [Title IX] applies only to the practices of the recipients themselves."²⁸⁵ As argued earlier, a school violates Title IX if it has a practice of knowingly allowing harassment to continue and thus subjecting the victim to "discrimination under" its educational program. Additionally, the text of Title IX makes no reference to *whom* is prohibited from discriminatory behavior; thus emphasizing the importance of the personal right conferred by Title IX, which is to be free from sex-based discrimination in any educational program.²⁸⁶

E. Legislative History

The *Rowinsky* court criticizes *Davis* for its "selective use of legislative history,"²⁸⁷ despite its own narrow interpretation of Title IX's purposes. *Rowinsky* focuses on Bayh's purposes of preventing federal money to be used for discriminatory purposes, and providing protection for victims of these discriminatory practices.²⁸⁸ The court reasons that because Sen. Bayh focused on eliminating discrimination in "all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales,"²⁸⁹ that this list is exhaustive. The list, however, is not exhaustive; Title IX ensures equal athletics opportunities as well,²⁹⁰ which does not appear in this quote.

The court is correct in acknowledging that even Sen. Bayh realized that Title IX, while far-reaching, "is not a panacea" or cure-all for every discriminatory practice.²⁹¹ The court, however, limited Title IX's intended applicability to those problems mentioned by Bayh, such as "employment practices for faculty and administrators, ... access to programs within the institution such as vocational education

12,038.

284. *Rowinsky*, 80 F.3d at 1013.

285. *Id.*

286. *Cf. Oona R-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452, 1462-63 (N.D. Cal. 1995).

287. *Rowinsky*, 80 F.3d at 1010 n.8.

288. *Rowinsky*, 80 F.3d at 1013 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979)).

289. *Rowinsky*, 80 F.3d at 1014 (citing 118 CONG. REC. 5802, 5803 (1972)).

290. 34 C.F.R. § 106.41 (1996). *See Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993) (ordering Colgate University to grant women's ice hockey team, previously a club sport, varsity status), *vacating as moot*, 802 F. Supp. 737 (N.D.N.Y. 1992).

291. *Rowinsky*, 80 F.3d at 1014 (quoting 118 CONG. REC. at 5808 (1972)).

classes, and so forth."²⁹² However, Bayh wanted Title IX to be an "important first step" to provide women with "an equal chance to attend the schools of their choice, [and] to develop the skills they want"²⁹³ These intended areas of application were based on areas where the problem of abuse had been reported to him.²⁹⁴ At this time, there was little awareness of the problem of peer sexual harassment, or even sexual harassment, as this was before the EEOC guidelines came out in 1980.²⁹⁵ Even before the EEOC guidelines, sexual harassment was held to be a violation of Title IX.²⁹⁶ One could argue that since the problem of sexual harassment is now more openly addressed, Sen. Bayh would not want federal money being spent on schools that allow female students to be subjected to this form of discrimination. While Bayh did suggest that further legislation might be necessary, the legislation has yet to be developed. Congress is aware of the gender inequality problems young girls face in United States' educational programs, such as sexual harassment and disfavor (both intentional and subconscious) of girls by teachers, and recent legislation has reflected this concern.²⁹⁷ However, with all of the recent studies done on peer sexual harassment, Congress has not enacted a peer sexual harassment law, perhaps because Title IX already exists and is the best defense to combat this growing problem.²⁹⁸

292. *Id.* (quoting 118 CONG. REC. at 5807 (1972)).

293. *Id.* (quoting 118 CONG. REC. at 5808 (1972)).

294. *Id.* (quoting 118 CONG. REC. at 5807 (1972)).

295. See Sherer, *supra* note 13, at 2168 n.149 (explaining that American society only recently recognized the problem of sexual harassment, and as awareness of peer sexual harassment increases, claims under Title IX may increase as well); MACKINNON, *supra* note 119, at 27.

296. See *Alexander v. Yale Univ.*, 459 F. Supp. 1, 5 (D. Conn. 1977) (holding that a plaintiff who alleges sexual harassment "is within the class Title IX was designed to protect"), *aff'd on other grounds*, 631 F.2d 178, 185 (2d Cir. 1980) (agreeing with the district court that a justiciable claim for relief under Title IX was presented).

297. See ESEA Hearings *supra* note 126, at 632 (statement of Sen. Mikulski) (noting the AAUW Survey results and stating that peer sexual harassment is one of many problems of inequity in education, and that improvement money should be given to schools and states working to develop sexual harassment policies). Also, because boys often feel flattered, and enjoy sexual comments made about them, they do not suffer the same negative impact as a result of peer sexual harassment as girls do. See Sherer, *supra* note 13, at 2132; Jennings and Howell, *supra* note 15, at C3; Marjorie Williams, *From Women, An Outpouring of Anger, Rhetoric Underscores Deep Divisions in How the Sexes View Harassment*, WASH. POST, Oct. 9, 1991, at A1 (noting that while harassment results in great intimidation for females, males largely escape this impact).

298. As the two amendments to Title IX demonstrate, Congress has sought to expand the coverage of Title IX, not to limit it. See *supra* note 165 and accompanying text. Also, when writing legislation such as ESEA, Congress uses Title IX as its point of reference, in reliance that Title IX will provide schools with enough guidance to formulate their own policies. See 139 CONG. REC. S11,916-03, S11,932, S11,933 (daily ed., Sept. 15, 1993) (statements of Sen. Kennedy and Sen. Mosley-Brown).

V. AVENUES OF RELIEF FOR VICTIMS OF PEER SEXUAL HARASSMENT

A brief explanation of other claims and remedies available to victims of peer sexual harassment, as well as current Title IX procedures, is helpful in demonstrating their minimal impact and effectiveness, and in supporting the expansion of protection under Title IX.

A. 42 U.S.C. § 1983 Claims

Victims of peer sexual harassment often also claim that the school violated her or his civil rights under 42 U.S.C. § 1983²⁹⁹ by tolerating the harassment or by failing to prevent it. In a § 1983 claim, the victim sues a school official or employee in her or his official capacity in order to obtain damages. However, these claims have many disadvantages for the victim. First, the cost of a § 1983 claim is borne by the plaintiff, while a Title IX claim is brought by the government.³⁰⁰ Second, the plaintiff in a § 1983 case must meet a higher standard of proof. The plaintiff must prove that she had a "clearly established right" to be free from peer sexual harassment, and must further prove that a state actor (a school official or employee) deprived her of this right.³⁰¹ Even if she does prove this, school officials often invoke a successful defense of qualified immunity,³⁰² claiming that a reasonable person in their position would not have felt that his or her actions (or in many cases, inactions by failing to prevent more harassment) were violating the plaintiff's civil rights,³⁰³ or that no special relationship existed to require the school official to protect the student.³⁰⁴ Most § 1983 claims are unsuccessful because of this

299. 42 U.S.C. § 1983 (1994), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

300. In a Title IX claim, OCR initiates and investigates an alleged Title IX violation, thus saving the victim the cost of paying an attorney if she files only a § 1983 claim. See *infra* Part V.C.

301. *Middle Bucks*, 972 F.2d at 1367 (citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979)).

302. See *Petaluma II*, 54 F.3d 1447, 1450-53 (allowing counselor's qualified immunity defense because harassment of student by peers occurred before *Franklin* was decided, and thus, there was notice to the counselor that he was obligated to protect the student from harassment).

303. *Id.* at 1450 ("[t]he contours of the [clearly established] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

304. See, e.g., *DeShaney v. Winnebago County Dep't. of Soc. Serv.*, 489 U.S. 189 (1989) (holding that the state owed no constitutional duty to protect a child from his abusive father); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (holding that a school had no duty to protect a mentally retarded high school student from sexual attack while at school); *Middle Bucks*, 972 F.2d at 1372 (holding that students are not in custody of the school, and

higher burden of proof.³⁰⁵

B. State Remedies

Only five states have legislation that requires schools to implement and distribute sexual harassment policies that apply to harassment by peers.³⁰⁶ Of the few states that do, only two—California and Florida—require that the policy also include a punishment of expulsion or suspension for harassers.³⁰⁷ Even though the number of states with laws that require their schools to address the problem of peer sexual harassment is small, it is an improvement from 1993, when only two states—Minnesota and California—required their schools to have such policies.³⁰⁸ This increase may be due to an increased awareness of the problem.³⁰⁹

Unfortunately, most cases of peer sexual harassment are never fully litigated because they have little prosecutorial merit for the victim, or because they are settled out of court, thus having little impact on or precedence over later peer sexual harassment claims.³¹⁰

Allowing Title IX to impose liability on schools for failing to stop known peer sexual harassment will give states an incentive to develop and enforce peer sexual harassment policies to protect themselves from a loss of funding and/or a payment of damages to the victims under Title IX.³¹¹

therefore, the school has no duty to protect students from peer sexual harassment).

305. For a more detailed explanation of the disadvantages of § 1983 claims, see Gant, *supra* note 97, at 491-94; Sherer, *supra* note 13, at 2143 & n.130.

306. MINN. STAT. § 127.46 (West 1994) (mandating that school boards adopt harassment policies that apply to both employees and students); CAL. EDUC. CODE § 48900.2 (West 1995) (stating that a pupil may be suspended or expelled for committing sexual harassment as defined in CAL. EDUC. CODE § 212.5); FLA. STAT. ANN. § 230.23 (West 1996) (requiring schools to give notice to pupils that a pupil's violation of the school's sexual harassment policy is grounds for specified punishment); MICH. COMP. LAWS ANN. § 380.1300A (West 1987 & Supp. 1996) (requiring that schools adopt sexual harassment policies that apply to employees and students); WASH. REV. CODE ANN. § 28A.640.020 (West 1982 & Supp. 1996) (requiring schools to adopt harassment policies that apply to employees as well as peers).

307. California requires that harassers in grades four through ten be either suspended or expelled. CAL. EDUC. CODE. § 48900.2 (West 1995). Florida mandates in or out of school suspension, expulsion, other disciplinary actions, and/or criminal penalties. FLA. STAT. ANN. § 230.23 (West 1996). Michigan's statute says that the policy must, at a minimum, proscribe the penalties for violating the sexual harassment policy, but does not mandate what those penalties should be. MICH. COMP. LAWS ANN. § 380.1300a (West 1987 & Supp. 1996).

308. Minnesota was the first state to pass such a policy in 1992, followed by California in 1993. See Sherer *supra* note 13, at 2139-42; Gant, *supra* note 97, at 515.

309. See Gant, *supra* note 97, at 515 & n.227 (noting that other states have begun to discuss implementing sexual harassment policies in their schools).

310. See Sherer, *supra* note 13, at 2141-42. See *supra* note 184 (discussing the settlement of the *Petaluma* case in California).

311. See Dolan, *supra* note 15, at 243-44; Gant, *supra* note 15, at 506, 515-16. See also Ellen Vargyas, *Franklin v. Gwinnett County Public Schools and its Impact on Title IX Enforcement*, 19 J.C. &

C. OCR Procedures

Any person with a concern regarding sexual harassment or discrimination in school may file a complaint with the OCR Representative at the school.³¹² The concern may be one of actual sexual harassment, or a complaint that the school has violated procedural requirements of Title IX regulations.³¹³ A person may also file a complaint on behalf of a student or students who allegedly have been sexually harassed.³¹⁴

OCR then investigates and reviews the complaint to determine if Title IX has been violated.³¹⁵ If no violation is found, the case is closed.³¹⁶ If a violation is found, OCR will enter into negotiations with the school to demand compliance with Title IX.³¹⁷ If this fails, OCR will begin administrative proceedings to stop the harassment.³¹⁸ If the administrative review board finds that the school has violated Title IX, all federal funding will be cut.³¹⁹

1. The Shortfalls of OCR Procedures and Remedies

Prior to *Franklin*, which authorized damages to the victim, the complainant had no specific remedy under Title IX.³²⁰ Further, OCR has, perhaps wisely, never exercised its power to cut off funding from any school.³²¹ Critics argue that terminating funds only hurts the students and the quality of their education, does not compensate the victim, and will not deter peer sexual harassment.³²² Because of the limited relief in OCR procedures and other avenues, courts should construe Title IX to allow a victim of peer sexual harassment a cause

U.L. 373, 381 (1992) (explaining that prior to *Franklin*, because Title IX provided little remedy to the actual plaintiff and was rarely enforced, schools had little incentive to address sex-based discrimination).

312. 34 C.F.R. § 100.7 (1996).

313. 34 C.F.R. § 100.7(b)-(c) (1996).

314. *Id.*

315. 34 C.F.R. § 100.7(d)(1) (1996).

316. 34 C.F.R. § 100.7(d)(2) (1996).

317. 34 C.F.R. § 100.7(d)(1) (1996). The "informal means" of negotiations may include visits, phone calls, and letters to the school.

318. 34 C.F.R. § 100.8 (1996).

319. 34 C.F.R. § 100.8(a)-(c) (1996).

320. See Vargyas, *supra* note 311, at 381. See also Alexandra A. Bodnar, *Arming Students For Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549 (1996) (arguing that Title IX should be amended to expressly prohibit school toleration of peer sexual harassment).

321. See Vargyas, *supra* note 311, at 381.

322. See Sherer, *supra* note 13, at 2150-51 (citing Pamela W. Kernie, Comment, *Protecting Individuals From Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 166 (1992)).

of action, and grant damages if necessary to give the plaintiff an appropriate remedy, as required by *Franklin*.

VI. RECOMMENDATIONS

1. *A Proposed Test to Determine if a Plaintiff Has a Cause of Action in Peer Sexual Harassment Claims*

When determining if a plaintiff has a cause of action under Title IX, this Casenote advocates a modified *Davis* approach.³²³ To establish a prima facie case of sexual harassment, the plaintiff must allege and prove all of the five elements. The test this Casenote recommends is: (1) Is the plaintiff a member of a protected group?; (2) Was she subject to unwelcome sexual harassment?; (3) Was the harassment based on her sex?; (4) Was the harassment sufficiently severe or pervasive enough to alter the conditions of her education and create an abusive educational environment?; and (5) Did the school have actual knowledge of the harassment and fail to take prompt and appropriate remedial measures? Only the fifth element differs from *Davis*.³²⁴ While *Davis* allows a cause of action where the school knew or should have known of the harassment and failed to stop it,³²⁵ this Casenote advocates a cause of action (and school liability) if the school had *actual* (not just constructive) knowledge of the harassment and failed to take prompt and remedial action. If a school has notice of the harassment and fails to take prompt remedial measures, the school has violated Title IX because it allows a student to be subject to sex-based discrimination under its educational program. The violation is intentional because the school had knowledge of the harassment.³²⁶

323. The test used by *Davis* is the test that is commonly used in Title VII cases. See *supra* note 11 and accompanying text. See *Meritor*, 477 U.S. at 66-73; *Harris*, 510 U.S. 17, 20-23 (1993); *Henson*, 682 F.2d at 903-05. See also *Sherer*, *supra* note 13, at 2158-67 (proposing a similar test and explaining each element).

324. *Davis* required that "some basis for institutional liability" be established by the plaintiff. *Davis*, 74 F.3d at 1194.

325. The *Davis* court relied on its own holding in *Henson v. Dundee*, 682 F.2d 897, 905 (11th Cir. 1982), and held a school liable if school officials "knew or should have known of the harassment ... and failed to take prompt remedial action." *Davis*, 74 F.3d at 1195 (quoting *Henson*, 682 F.2d at 905).

326. Cf. *Franklin*, 503 U.S. at 74-75 ("The point of not permitting monetary damages for an unintentional violation is that the [institution receiving federal funding] lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case ... in which intentional discrimination is alleged.") (citations omitted).

There is the possibility that requiring actual knowledge may encourage schools to ignore the problem so they can argue that they should not be held liable because they did not have knowledge of the harassment. There are two ways of handling this. First, if a court can determine that a school deliberately remained ignorant of the harassment (or had actual

2. Applying the Test to the Facts in *Rowinsky*

First, as females, Jane and Janet are members of the group Title IX was designed to protect. Second, they were subject to unwelcome harassment as they repeatedly complained to school officials and their parents about the harassment. Third, the harassment was based on their sex and was sexual in nature since it involved groping of the genitalia, breasts, buttocks, and sexual propositions. These actions constitute "verbal and physical conduct of a sexual nature."³²⁷

Fourth, to determine whether hostile environment existed, courts should look to Title VII hostile environment standards. A hostile environment is one that is "permeated with 'discriminatory intimidation, ridicule, and insult.'"³²⁸ This inquiry would examine (1) the frequency of the incident; (2) the seriousness of the incident;³²⁹ (3) whether the harassment is "physically threatening or humiliating rather than merely offensive";³³⁰ and (4) "whether it unreasonably interferes with the plaintiff's performance" and/or ability to learn.³³¹ These factors must be viewed both subjectively³³² and objectively.³³³

knowledge of it and denied it), the court should view this as an intentional violation of Title IX by subjecting a student to discrimination under their educational program. Second, if a school fails to provide adequate channels through which it can obtain notice of the harassment, the court may inquire as to whether the adequate notice channels were intentionally not created to maintain ignorance. Not having adequate grievance procedures to deliberately avoid Title IX liability could be viewed as an intentional violation of Title IX, particularly if the school does have grievance procedures for other types of student complaints. (This is an example of the rare situation where the *Rowinsky* reasoning may actually be useful to victims of sexual harassment). Examples of adequate channels could be as simple as informing students that, if they are harassed, they should report it to a school employee, or perhaps the OCR representative.

327. 29 C.F.R. § 1604.11(a) (1996).

328. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 65).

329. Less serious incidents may become pervasive if they occur frequently, while very serious incidents need only happen once to create a hostile environment for the victim.

330. *Davis*, 74 F.3d at 1194. See also Sexual Harassment Guidance, *supra* note 88, at 12,041-42 (suggesting that the ages and sex of the harasser and the victim, the number of victims involved, along with any other incidents of discrimination at the school, whether sex-based or not, should be considered in addition to the factors listed in *Davis*).

331. *Davis*, 74 F.3d at 1194. See Sexual Harassment Guidance, *supra* note 88, at 12,041 (explaining that in addition to tangible effects, such as falling grades and class absences, a hostile environment may exist even though a victim of sexual harassment still attends classes and maintains her grades, despite being angered and humiliated by the harassment). Similarly, Title VII recognizes that the effects of sexual harassment are not always tangible or obvious, but can also be emotional or psychological, and can result from a hostile environment. See *Meritor*, 477 U.S. at 64.

332. If a plaintiff does not subjectively perceive the environment to be abusive or hostile, then the conduct has not altered the conditions of her environment. *Davis*, 74 F.3d at 1194 (quoting *Harris*, 510 U.S. at 22).

333. Title VII requires that a reasonable woman would find the conduct severe and pervasive enough to create a hostile or abusive environment. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). *Ellison* recognized that women are more sensitive and vulnerable to the threat of sexual harassment, while men are unaware of the threat that women perceive. *Id.* at 879. Since females are impacted more harshly than males in cases of peer sexual harassment as well, a similar

In Jane and Janet's case, a hostile environment existed because (1) the harassment occurred on a regular (almost daily) basis for approximately eight months. It involved physical assaults, groping of their genitals, and subjection to obscene and vulgar language directed towards them by more than one harasser; (2) the conduct, such as physical groping and unwelcome requests for sex, was physically threatening and humiliating; (3) a reasonable woman would have been offended by this conduct; (4) Jane and Janet were reasonably offended by the conduct and the fact that they repeatedly reported the conduct in an effort to end it, to no avail, demonstrates that a hostile environment existed.

Fifth, the school had actual knowledge of the harassment, as evidenced by the girls' complaints to the school bus driver, and the parents' visits and telephone calls with numerous school officials at various levels, as well as the assistant principal's own admission that he learned of the assault from another student.³³⁴

A school would be liable if it knew of the harassment and failed to take appropriate measures to remedy the harassment. The school should take "prompt and adequate remedial action."³³⁵ Examples of proper action for first time offenders could include a parent conference with the harasser, or an apology to the victim.³³⁶ This allows the harasser to realize his behavior is wrong, and will help prevent such conduct in the future, rather than a simple punishment with no explanation, which may be less likely to deter the harasser.³³⁷ Continued offenses may merit suspension or expulsion as punishment.³³⁸

While the school in *Rowinsky* punished two of the harassers with three-day suspensions, it was not prompt in its punishments and, in fact, administered punishments only after Mrs. Rowinsky repeatedly demanded action.³³⁹ The school was slow and inaccurate in investigating the incidents, and when it finally replaced the first bus driver, the new driver did not enforce the seating restrictions.³⁴⁰ Although one of the harassers stopped harassing the girls right after his suspension, the other continued to harass Jane and Janet for four

reasonable woman test should apply to Title IX cases as well. See also Sherer, *supra* note 13, at 2162-64 (explaining other standards that are sometimes used, such as reasonable victim).

334. *Rowinsky*, 80 F.3d at 1008-09.

335. *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

336. See Sherer, *supra* note 13, at 2166.

337. Accord Sherer, *supra* note 13, at 2166-67.

338. Sherer, *supra* note 13, at 2166.

339. *Rowinsky*, 80 F.3d at 1008-09.

340. *Id.*

months after his suspension.³⁴¹ His reasons for finally ending the harassment are not specified in the case, but he certainly was not encouraged to end the harassment by the school's meager discipline.³⁴² To the credit of the school, it promptly punished the third harasser, who was accused of reaching under Janet's shirt and unfastening her bra, with a day and a half suspension.³⁴³ The school, however, never informed the plaintiff about the existence of Title IX.³⁴⁴ Here, the court could have concluded that the school failed to respond promptly and effectively, and this failure constituted an intentional violation of Title IX. This Casenote submits that given the lack of a prompt and appropriate remedy despite knowledge of the harassment, the court should have recognized that the plaintiff had a valid cause of action.³⁴⁵

VII. CONCLUSION

The problem of peer sexual harassment is real and growing, as evidenced by the increasing number of Title IX claims.³⁴⁶ It is time for a clear, workable guideline to help prevent courts and schools from trivializing incidents of peer sexual harassment, and to help schools identify and address the problem. The well-established case-law of Title VII provides the basis for these guidelines. OCR has taken the first step in providing guidance to the courts by recently developing guidelines after submitting initial proposals to schools for review.³⁴⁷

As this Casenote has demonstrated, without a Title IX cause of action, a plaintiff's remedies are limited. Relief on the state, federal, and administrative level is insufficient; and institutional remedies are

341. *Id.*

342. *Id.* at 1009.

343. *Id.*

344. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1009 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

345. Under this test, if the court finds that a school did take prompt and appropriate remedial action, the school would not be liable.

346. See Rone Sherman, *School Districts Sued on Sexual Harassment By Fellow Students*, NAT'L L.J., Dec. 13, 1993, at 10 (explaining that awareness of peer sexual harassment as a problem has led to an increase in complaints filed with the Department of Justice. In 1988, the Department of Justice received 27 student complaints of sexual harassment, either by school employees or by students. In 1993, the Department of Justice received 156 such complaints).

347. In compliance with 20 U.S.C. § 3412 (1994), on August 16, 1996, OCR sent initial proposals to schools. See Sexual Harassment Guidance: Peer Sexual Harassment, 61 Fed. Reg. 42,728 (1996). The proposal was initiated because of an increased inquiry of the extent of a school's liability under Title IX, as well as the *Rowinsky* court's rejection of "the authority of other Federal courts and OCR's longstanding construction of Title IX." See Sexual Harassment Guidance, *supra* note 88, at 12,034-35, 12,039 n.27.

not adequate under *Franklin*. A cause of action under Title IX will provide plaintiffs with a much-needed remedy and the potential to obtain damages.

In addition to providing a remedy for plaintiffs, imposing Title IX liability gives schools an incentive to implement their own policies and programs on peer sexual harassment, thereby helping to eliminate the problem through prevention, and by promoting a discrimination-free and abuse-free education with equal opportunities for male and female students.