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Carie Manke

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COMMENT

STUDENT-ON-STUDENT SEXUAL HARASSMENT: A CASE COMMENT ON THE SUPREME COURT'S DECISION IN *DAVIS V. MONROE COUNTY BOARD OF EDUCATION*

INTRODUCTION

Student-on-student sexual harassment is an increasingly serious and pervasive problem for society and educational institutions.[1] Until recently, however, few clear guidelines existed to inform federally funded educational institutions of their potential liability for failure to identify, investigate, and punish peer sexual harassment. While Congress enacted Title IX to prohibit sexual discrimination under any education program or activity receiving federal financial assistance, it was unclear whether an individual could bring a private damages action against a school board in cases involving peer sexual harassment.[2]

In May 1999, the United States Supreme Court first addressed the issue of school liability for peer sexual harassment in *Davis v. Monroe County Board of Education.*[3] The Supreme Court held that "recipients of federal funding may be liable for subjecting their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment, and the harasser is under the school's disciplinary authority."[4] The Court based its decision on a series of Supreme Court and Circuit Court decisions. First, the Court relied on *Menitor Savings Bank, FSB v. Vinson* [5] to provide the foundation for the inclusion of sexual harassment within those discriminatory acts prohib-

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1. *See* Andrea Giampetro-Meyer, *Sexual Harassment in Schools*, 12 WIS. WOMEN'S L.J. 301 (1997); *see also* American Association of University Women Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools 7-11 (1993) (finding four out of five students between the eight and eleventh grades reported having been the target of sexual harassment).

2. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

3. *Davis*, 526 U.S. at 633.

4. *Davis*, 526 U.S. at 646-47.

5. 477 U.S. 57, 65 (1986).

ited by Title IX.[6] The Court also reinforced the notice requirement established in *Pennhurst State School & Hospital v. Halderman,*[7] finding that Title IX inherently requires that the funding recipient receive adequate notice so that it may adequately assess its potential liability.[8] Third, despite the failure of Title IX to expressly authorize a private right of action by a person injured under Title IX,[9] the Supreme Court relied on *Cannon v. University of Chicago*[10] to establish an implied private right of action.[11] The Court further relied on *Franklin v. Gwinnett County Public Schools*,[12] which held that monetary damages were available for plaintiffs claiming a private right of action under Title IX.[13] Finally, the Supreme Court adopted the standard developed in *Gebser v. Lago Vista Independent School District*[14] which requires "deliberate indifference" by the school board to "known acts of student-on-student sexual harassment" before imposing liability.[15]

Unfortunately, while resolving the broad question of school liability for peer sexual harassment, the Court has failed to clarify many specifics and has generated a series of new controversies. This comment reviews the jurisprudence surrounding Title IX and *Davis*, describes the majority and dissenting opinions in *Davis*, and seeks to analyze these controversies, as well as the state of law regarding student-on-student sexual harassment in light of the Supreme Court's ruling.

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6. *See Davis*, 526 U.S. at 639.
7. 451 U.S. 1, 17 (1981).
8. *See Davis*, 526 U.S. at 640.
9. *See* 20 U.S.C. §§ 1681-88 (1994).
10. 441 U.S. 677, 717 (1979).
11. *See Davis*, 526 U.S. at 639.
12. 503 U.S. 60, 76 (1992).
13. *See Davis*, 526 U.S. at 639.
14. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).
15. *See Davis*, 526 U.S. at 643-47 (in *Gebser*, the Court required: "actual knowledge" by a school official "who at a minimum ha[d] authority to address the alleged discrimination and to institute corrective measures" on behalf of the school district; and "deliberate indifference" by the school district to the harassed student's rights under Title IX, *Gebser*, 524 U.S. at 290); *see also* C. Scott Williams, *Schools, Peer Sexual Harassment, Title IX, and Davis v. Monroe County Board of Education*, 51 BAYLOR L. REV. 1087, 1094-95 (1999).

I. BACKGROUND

A. *History*

1. Title IX

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."[16] The impact of Title IX on the education system in the United States has been widespread. Nearly every educational institution is a grant recipient that accepts some type of federal financial assistance, and, therefore, must comply with Title IX or risk revocation of its federal funding.[17] However, the extent of the impact of Title IX continues to evolve, reflecting both Congressional amendments that allow for a broader application of the statute[18] and attempts by the courts to stretch the boundaries of Title IX liability. As a result, Title IX has shifted from a statute used primarily to "implement gender equity reforms in education programs and activities into a powerful cause of action for employees and students seeking money damages for sexual discrimination in educational programs receiving federal funds."[19]

By enacting Title IX, Congress sought to close "loopholes in existing legislation relating to general education programs and employment resulting from those programs,"[20] and in doing so, deter the use of "federal resources to support discriminatory practices" and "provide individual citizens effective protection against those practices."[21] Specifically, Congress designed Title IX to bridge "the gender gap[s] in civil rights legislation"[22] created by Title VI and Title VII of the Civil Rights Act.

Congress enacted Title VI in 1964, in an effort to end discrimination based on race, color, or national origin in any program receiving federal

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16. *See* 20 U.S.C. § 1681 (1994) (the statute defines education as "any public or private preschool, elementary or secondary school, or any institution of vocational, professional, or higher education except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each school, college or department). 20 U.S.C. § 1681(c).

17. *See id.* at § 1681(a).

18. *See* Julie Carroll Fay, *Gebser v. Lago Vista Independent School District: Is it Really The Final Word on School Liability For Teacher-To-Student Sexual Harassment?*, 31 CONN. L. REV. 1485, 1490-91 (1999) (citing Rehabilitation Act Amendments, 42 U.S.C. § 2000d-7 (1986)).

19. Franklin v. Gwinnet County Pub. Sch., 503 U.S. 60, 65 (1992); Williams, *supra* note 15, at 1092.

20. Emmalena K. Quesada, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard of Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1021 (1998) (citing 118 Cong. Rec. 5803 (1972)).

21. Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

22. Fay, *supra* note 18, at 1490.

funding.[23] Congress enacted Title VII, on the other hand, to prevent an employer from discriminating against employees, or potential employees, with respect to "compensation, terms, conditions, or privileges of *employment*, because of such individual's race, color, religion, *sex*, or national origin."[24] Title VII provides protected classes of employees the right to work in an environment free from discrimination, intimidation, and ridicule.[25] Like Title XII, Title IX prohibits discrimination based on sex (shifting the setting from the employment context to the education context); but the statutory language in Title IX more closely reflects the language in Title VI, as both statutes prohibit discrimination in institutions receiving federal funds.[26]

2. Sexual Harassment and Title IX: *Meritor Savings Bank, FSB v. Vinson*[27]

To establish a cause of action under Title IX, an individual must demonstrate that: 1) the educational program received federal assistance; 2) the individual was excluded from participating in, denied the benefits of, or subjected to discrimination in an educational program; and 3) the exclusion was on the basis of sex.[28] As in Title VII, the statutory language of Title IX does not explicitly define "on the basis of sex" or expressly prohibit sexual harassment as a form of discrimination.[29] However, the Department of Education's Office of Civil Rights (OCR), responsible for enforcement of Title IX, has adopted two categories of sexual harassment.[30] The evolution of these categories can be traced to Title VII and the employment context.[31]

In 1980, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing Title VII, promulgated guidelines, which expanded the definition of 'exclusion on the basis of sex' to include sexual harassment,[32] thereby making sexual harassment in

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23. *See* § 601 of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000d-2000d-2, 2000d-4 (1994).

24. 42 U.S.C. § 2000e-2(a) (1994) (emphasis supplied).

25. *See* Giampetro-Meyer, *supra* note 1, at 306.

26. *See* 42 U.S.C. § 2000d.

27. 477 U.S. 57 (1986).

28. *See* Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996).

29. *See* 20 U.S.C. §1681 (1994).

30. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13,1997) [hereinafter 62 Fed. Reg. 12,034]; ED/OCR: Sexual Harassment: It's Not Academic Pamphlet [hereinafter ED/OCR Pamphlet]; Karen E. Edmondson, *Davis v. Monroe Board of Education Goes to College: Holding Post-Secondary Institutions Liable Under Title IX for Peer Sexual Harassment*, 75 NOTRE DAME L. REV. 1203, 1206 (2000).

31. *See Meritor*, 477 U.S. at 65.

32. *See id.*

the workplace a violation of Title VII.[33] The EEOC divided sexual harassment into two categories: quid pro quo harassment and hostile environment harassment.[34]

Six years later, in *Meritor Savings Bank, FSB v. Vinson*, the United States Supreme Court adopted the EEOC guidelines and recognized both categories of harassment as discrimination "on the basis of sex."[35] In *Menitor*, a female bank employee brought Title VII sexual harassment suit against her employer and her supervisor alleging her supervisor subjected her to a hostile work environment.[36] The Supreme Court held "that the plaintiff stated a claim under Title VII, and recognized that 'hostile environment' sexual harassment is a form of sex discrimination actionable under Title VII."[37]

Relying on the EEOC Guidelines and the *Menitor* decision, the OCR adopted similar guidelines stating both categories of sexual harassment were applicable to the educational context.[38] According to OCR guidelines, quid pro quo harassment "occurs when a school employee conditions a student's access to educational opportunities on the student's compliance with unwelcome sexual conduct."[39] It can also occur when an employee causes a student to believe that the employee will make an educational decision based on whether or not the student submits to unwelcome sexual conduct.[40] Hostile environment sexual harassment "occurs when sexual harassment by an employee, student, or third party is sufficiently severe to create a hostile educational environment or interfere with a victim's access to education."[41] This type of harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[42] "Conduct is unwelcome if the student does not request or invite the conduct, and views it as offensive or undesirable."[43]

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33. *See* 29 C.F.R. § 1604.11(a) (1985).

34. *See id.*

35. *See Meritor*, 477 U.S. at 65. The Court noted that the guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.*

36. *See id.* at 60.

37. *Id.* at 73.

38. *See* 62 Fed. Reg. 12,034, *supra* note 30; ED/OCR Pamphlet, *supra* note 30.

39. 62 Fed. Reg. 12,034, *supra* note 30; ED/OCR Pamphlet, *supra* note 30; Kelly Dixson Furr, *How Well are the Nation's Children Protected from Peer Harassment at School?: Title IX Liability in the Wake of Davis v. Monroe County Board of Education*, 78 N.C. L. REV. 1573, 1583 (2000).

40. *See* 62 Fed. Reg. 12,034, *supra* note 30; ED/OCR Pamphlet, *supra* note 30.

41. 62 Fed. Reg. 12,034, *supra* note 30; ED/OCR Pamphlet, *supra* note 30; Furr, *supra* note 39, at 1583.

42. Giampetro-Meyer, *supra* note 1, at 307; Furr, *supra* note 39, at 1583.

43. ED/OCR: Sexual Harassment: It's Not Academic Pamphlet.

3. Notice under Title IX: *Pennhurst State School and Hospital v. Halderman*[44]

Title IX, like Title VI, has been "construed by the Supreme Court as having been enacted pursuant to the Spending Clause of the Constitution."[45] In *Pennhurst State School and Hospital v. Halderman*, the Supreme Court likened legislation enacted pursuant to Congress' spending power to a contract, whereby the State or recipient of federal funding agrees to comply with federally imposed conditions in exchange for federal funds.[46] Thus, Congress's power under the Spending Clause depends on "whether the state or funding recipient voluntarily and knowingly accepts the terms of the 'contract.'"[47] No acceptance of potential liability can occur if the state or funding recipient is "unaware of the conditions or is unable to ascertain what is expected of it."[48] Therefore, Congress must speak with a clear, unambiguous voice if it intends to impose a condition on the receipt of federal funds.[49]

In *Pennhurst*, a "mentally retarded" resident of Pennhurst, a state-operated living facility for mentally retarded individuals, brought suit against both the facility and the state of Florida alleging inhuman and dangerous conditions.[50] Florida was a participant in the Developmentally Disabled Assistance and Bill of Right Act (Act), a federal-state grant program.[51] The resident alleged that the defendants violated his constitutional rights and his statutory rights under the Act (which states that mentally retarded persons "have a right to appropriate treatment, services, and habitation in the setting that is least restrictive of . . . personal liberty.").[52] The Supreme Court held that the States did not receive adequate notice to be held liable since nothing in the Act or its legislative history suggests "that Congress intended to require the States to assume the high cost of providing 'appropriate treatment' in the 'least restrictive' environment to their mentally retarded citizens."[53] In other words, Congress failed to speak clearly enough so that the state could make an in-

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44. 451 U.S. at 1.

45. U.S. CONST. art. I, § 8, cl. 1; *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998); Fay, *supra* note 18, at 1491.

46. *See Pennhurst*, 451 U.S. at 17.

47. *Id.*

48. *Id.*

49. *See id.*

50. *See id.* at 5-6.

51. *See id.* at 1, 11-12.

52. *Id.* at 1 (quoting 42 U.S.C. §§ 6010(1) and (2)).

53. *Id.*

formed choice.[54] As a result, the Court held that Florida was not liable for monetary damages.[55]

Consistent with the *Pennhurst* decision, Title IX "creates a contract between the government and the educational grant recipient[56] such that a violation of Title IX by the grant recipient may ultimately result in the revocation of its federal funds."[57] Therefore, Title IX inherently requires that the federal government provide the grant recipient with adequate notice in order to achieve the goal of voluntary compliance.[58] No acceptance of liability can occur by an educational funding recipient if the recipient is unaware or unable to ascertain the conditions or prohibitions outlined in Title IX.[59]

4. Private Right of Action Under Title IX: *Cannon v. University of Chicago*[60]

Title IX does not expressly authorize a private right of action.[61] However, in 1979, in *Cannon v. University of Chicago*,[62] the Supreme Court determined that Title IX includes an implied private right of action, thereby allowing an individual to bring a private civil suit for sex discrimination committed by federally funded institutions.[63] The Court held that a female student, denied admission to two medical schools which received federal funding, was not limited to administrative remedies for a Title IX violation and "instead had the statutory right to bring a private civil lawsuit in federal court."[64] "The Court inferred that Congress had intended to provide a remedy under Title IX, even though the language authorizing a private cause of action was absent from Title IX."[65]

The Court based its opinion on three factors. First, the "plaintiff was a member of the class for whose benefit Title IX was enacted."[66] Second, Title IX was "patterned after Title VI of the Civil Rights Act of 1964," and "both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibiting

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54. *See id.* at 3.
55. *See id.* at 18.
56. Fay, *supra* note 18, at 1491.
57. *Id.*
58. *See id.*; 20 U.S.C. § 1682 (1994).
59. *See Pennhurst*, 451 U.S. at 17.
60. Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).
61. *See* § 901, 86 Stat. 373, codified as amended in 20 U.S.C. § 1681; *Cannon*, 441 U.S. at 683.
62. *Cannon*, 441U.S. at 677.
63. *See id.* at 689.
64. *Id.* at 717.
65. *Id.* at 688-89; Williams, *supra* note 15, at 1093 (1999).
66. *Cannon*, 441 U.S. at 693-94.

discrimination."[67] The Court reasoned that a private remedy must be available under Title IX since "critical language in Title VI had already been construed as creating a private remedy."[68] Third, a "private remedy under Title IX would not 'frustrate the underlying purpose of the legislative scheme'" since the use of federal funds by the university justified the government's interest in a private cause of action.[69] Further, the Court stated that historically the federal, rather than state, courts have protected against "invidious discrimination,"[70] and, thus, the creation of a federal remedy would not infringe upon subject matter "traditionally regulated to state law."[71]

5. Monetary Damages Under Title IX: *Franklin v. Gwinnett County Public Schools*[72]

The Supreme Court in *Cannon*, while "permitting a private right of action under Title IX, limited available damages to equitable and injunctive relief."[73] However, in *Franklin v. Gwinnett County Public Schools*[74], where a female student alleged that intentional sexual harassment and abuse by a male teacher made the school environment hostile[75], the Supreme Court unanimously held that monetary damages were available for plaintiffs claiming a private right of action under Title IX.[76] The Court relied heavily on its previous decisions permitting compensatory damages for claims of intentional discrimination under Title VI.[77] Despite the fact that Title IX is silent "on the issue of available remedies," the Court presumed all appropriate remedies were available.[78] The Court reasoned "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[79] After all, "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."[80]

The Court further noted that the presumption that remedies are limited under statutes enacted pursuant to the Spending Clause of the United

67. *Id.* at 695-96; Williams, *supra* note 15, at 1093.
68. *Cannon*, 441 U.S. at 696; Fay, *supra* note 18, at 1494.
69. *Id.*
70. *Id.*
71. *Id.*
72. 503 U.S. 60 (1992).
73. *Cannon*, 441 U.S. at 717.
74. *Franklin*, 503 U.S. at 60.
75. *See id.* at 63.
76. *See id.* at 76.
77. *See id.* at 70.
78. *Id.* at 66.
79. *Id.* at 70-71.
80. *Id.* at 75.

States Constitution is not applicable to intentional violations. In addition, the Court held that Title IX unquestionably places on public schools a "duty not to discriminate on the basis of sex, and when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."[81]

6. Institutional Liability for Sexual Harassment: Title IX Standard

a. Institutional Liability: *Rowinski v. Bryan Independent School District* [82] and *Brzonkala v. Virginia Polytech Institute and State University*[83]

Unfortunately, the *Cannon* and *Franklin* opinions provided "little guidance regarding the specific analysis of a Title IX sexual harassment claim or the applicable standard for institutional liability."[84] The *Franklin* Court, like many other courts, strongly implied that Title VII principles were applicable in evaluating Title IX sexual harassment claims within schools.[85] Nevertheless, various circuits developed different theories for liability.[86]

In *Rowinski v. Bryan Independent School District*[87], the Court of Appeals for the Fifth Circuit held that institutional liability would arise only if "a plaintiff [could] demonstrate that the school district responded to sexual harassment claims differently based on sex."[88] In *Rowinski*, three male students repeatedly physically and verbally abused Janet, an eighth-grade female student, and her sister.[89] One male student regularly swatted Janet's bottom and made comments such as, "When are you going to let me fuck you? What bra size are you wearing?" and "What size panties are you wearing?"[90] The student also groped Janet's genital area and grabbed her breasts.[91] The girls and their mother complained eight times before the school suspended the male student from riding the bus for three days.[92] When another male student allegedly reached up one of the girl's skirt while making crude remarks, the school suspended him for three days.[93] During class, a third student reached under Janet's shirt and

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81. *Id.* at 75; Williams, *supra* note 15, at 1094.
82. 80 F.3d 1006 (5th Cir. 1996).
83. 132 F.3d 949 (4th Cir. 1997).
84. *Cannon*, 441 U.S. 677, 771; *Franklin*, 503 U.S. at 70-71.
85. *See Franklin*, 503 U.S. at 75.
86. *See* Edmondson, *supra* note 30, at 1226.
87. *Rowinsky*, 80 F.3d at 1006.
88. *Id.* at 1016.
89. *See id.* at 1008.
90. *Id.*
91. *See id.*
92. *See id.*
93. *Rowinsky*, 80 F.3d at 1009.

unfastened her bra.[94] The school only suspended the boy for the rest of the day and the following day, based on the Vice Principal's belief that the boy's conduct was not sexual in nature.[95] The girls' mother brought suit alleging the school had "condoned and caused hostile environment sexual harassment."[96] The Fifth Circuit dismissed her complaint for failure to state a claim under Title IX, finding that the school was liable only if it treated sexual harassment of boys more or less serious than it treated sexual harassment of females.[97] In other words, so long as the school treated harassment consistently, regardless of whether the treatment was appropriate, the school was not liable.

Alternatively, the Fourth Circuit developed a "knew or should have known standard" in *Brzonkala v. Virginia Polytech Institute and State University*.[98] Brzonkala, a freshman at Virginia Tech, was gang raped by two university football players.[99] Following the rape, she became depressed, attempted suicide, and withdrew from classes.[100] The University found one of the players guilty of sexual assault and suspended him for a year, but later, without notifying Brzonkala, set aside the suspension as excessive, reduced the charge to abusive language, and allowed the football player to return on full scholarship.[101] Brzonkala filed suit alleging that Virginia Tech, by failing to punish the rapist in any "meaningful manner," violated Title IX.[102] Affirming Brzonkala's claim under Title IX, the Court held that to succeed in a Title IX hostile environment sexual harassment claim, a plaintiff must establish: "1) that she [or he] belongs to a protected group; 2) that she [or he] was subject to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her [or his] education and create an abusive educational environment; and 5) that some basis for institutional liability has been established."[103] In reference to the fifth requirement, the Court stated institutional liability would arise if the university "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action."[104]

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94. *See id.*
95. *See id.*
96. *Id.*
97. *See id.* at 1016.
98. *Brzonkala*, 132 F.3d at 960.
99. *See id.* at 953.
100. *See id.*
101. *See id.* at 955.
102. *See id.* at 956.
103. *Id.* at 958; Edmondson, *supra* note 30, at 1210.
104. *Brzonkala*, 132 F.3d at 960.

b. School Liability for Teacher Sexual Harassment: *Gebser v. Lago Vista Independent School District*[105]

Thus, the stage was set for the United States Supreme Court to establish a consistent standard. In *Gebser v. Lago*, a female high school student, allegedly seduced by a male teacher, "asked the district court to hold the school district liable, because the teacher had subjected her to sexual harassment sufficiently severe or persuasive to alter the conditions of the victim's education and create an abusive learning environment."[106] The student's argument, based on agency principles, was rejected by the Supreme Court in favor of a standard requiring: 1) "actual knowledge" by a school official " who at a minimum ha[d] authority to address the alleged discrimination and to institute corrective measures on behalf of the school district;" and 2) "deliberate indifference" by the school district to the harassed student's rights under Title IX.[107] This two-prong test, used to assess liability for teacher sexual harassment under Title IX, provided a framework for judicial resolution of peer sexual harassment cases, and it served as the foundation for the United States Supreme Court's decision in *Davis v. Monroe County Board of Education.*

II. *DAVIS V. MONROE COUNTY BOARD OF EDUCATION*

A. *Facts*

The petitioner's daughter, LaShonda, was allegedly the victim of a prolonged pattern of sexual harassment by G.F., a fifth-grade, male classmate.[108] The harassment commenced in December 1992 and ended in mid-May 1993 after G.F. was charged with, and pleaded guilty to, sexual battery.[109] During this period, LaShonda and her mother, Ms. Davis, reported a series of incidents involving sexual harassment to school faculty and administrators.[110] According to LaShonda, G.F. twice attempted to touch her breasts and genital area making vulgar statements such as "I want to get in bed with you" and "I want to feel your boobs."[111] LaShonda reported both incidents to her mother and her classroom teacher.[112] Furthermore, Ms. Davis contacted the teacher, who as-

105. 524 U.S. 274 (1998).
106. Williams, *supra* note 15, at 1094-95.
107. *Gebser*, 118 S. Ct. at 1995; *see also* Williams, *supra* note 15, at 1095.
108. *See* Davis v. Monroe County Bd. of Education, 526 U.S. 629, 633 (1999).
109. *See Davis*, 526 U.S. at 633-34.
110. *See id.*
111. *Id.* at 633.
112. *See id.* at 633-34.

sured her that she had informed the principal.[113] However, the school took no disciplinary action.[114]

The alleged harassment continued when G.F. "placed a door stop in his pants" and acted in a sexually aggressive manner toward LaShonda.[115] LaShonda reported the event to her gym teacher who took no action.[116] Similarly, the school took no action when G.F. engaged in harassing conduct towards LaShonda in front of yet another teacher, even though both LaShonda and her mother reported the incident.[117] Despite these reports, G.F. again directed sexually harassing conduct toward LaShonda during gym class, causing LaShonda to again report the incident to two teachers.[118] G.F. continued the harassing conduct by rubbing his body against LaShonda "in the school hallway in what LaShonda considered a sexually suggestive manner."[119] Again, LaShonda reported the matter and told her mother she did not "know how much longer she could keep G.F. off her."[120]

Other female classmates similarly were victims of G.F.'s conduct, and a group of female students, including LaShonda, attempted to speak with the principal, but a teacher denied them access.[121] LaShonda's mother also spoke with the principal about G.F.. The principal told her that he would "threaten him a little bit harder" and asked why LaShonda was the only one complaining.[122] Ms. Davis then complained to the school superintendent, but the school still took no disciplinary action to punish or curtail G.F.'s harassing conduct.[123] Despite numerous requests, the school made no effort for three months even to separate G.F. and LaShonda, who were seated next to each other in class.[124] At the time of LaShonda's harassment, the County Board of Education "had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue."[125]

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113. *See id.* at 634.
114. *See id.*
115. *Davis*, 526 U.S. at 634.
116. *See id.*
117. *See id.*
118. *See id.*
119. *Id.*
120. *Davis*, 526 U.S. at 634.
121. *See id.*
122. *Id.; see also* Aurelia D. v. Monroe County Bd. of Educ., 862 F.Supp. 363, 364 (M.D. Ga. 1994).
123. *Davis*, 526 U.S. at 635; *Aurelia D.*, 862 F.Supp. at 364.
124. *See Davis*, 526 U.S. at 635.
125. *Id.*

Because of the harassment, LaShonda's previously high grades dropped, she was unable to concentrate, and her father discovered she had written a suicide note.[126]

B. *Procedural History*

Ms. Davis, on behalf of LaShonda, sued the school board and school officials under Title IX of the Education Amendments of 1972 for failure to remedy G.F.'s sexual harassment of LaShonda.[127] Ms. Davis alleged that: 1) the board was a recipient of federal funding for purposes of Title IX; 2) "the persistent sexual advances and harassment by" G.F. interfered with LaShonda's "ability to attend school and perform her studies and activities"; and 3) the defendant's deliberate indifference to "the unwelcome sexual advances" of G.F. "created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX."[128] The United States District Court for the Middle Court of Georgia dismissed the suit for failure to state a claim upon which relief could be granted.[129] Specifically, the district court dismissed the suit against the school officials "on the ground that only federally funded educational institutions [not School Boards] are subject to liability in private causes of action under Title IX."[130] The Court dismissed the suit against the School Board because "Title IX provide[s] no basis for liability absent an allegation that the Board or an employee of the Board had any role in the harassment."[131] Thus, the Court found that peer sexual harassment provides no ground for a private cause of action under the statute.[132]

Ms. Davis appealed the decision regarding the school board.[133] The Court of Appeals for the Eleventh Circuit reversed, holding that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment."[134] An *en banc* Court then voted to vacate the opinion and grant the school board's motion for rehearing.[135] The Eleventh Circuit, sitting *en banc*, held that Title IX was passed pursuant to Congress' legislative authority under the Constitution's Spending Clause[136] and that the statute, therefore, must

126. *See id.*
127. *See id.* at 634.
128. *Id.* at 636, quoting the complaint.
129. *Aurelia D.*, 862 F.Supp. at 368.
130. *Id.* at 367.
131. *Davis*, 526 U.S. at 636 (quoting *Aurelia D.*, 862 F.Supp. at 368).
132. *See Aurelia D.*, 862 F.Supp. at 367.
133. *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996).
134. *Davis*, 74 F.3d at 1193 (borrowing from Title VII law and the language in *Franklin*, *see supra* text accompanying notes 76-83.
135. *See* Davis v. Monroe County Bd. of Educ., 91 F.3d 1418, 1418 (11th Cir. 1996).
136. U.S CONST. art. I, § 8, cl. 1.

provide potential recipients of federal education funds with "unambiguous notice of the conditions they are assuming when they accept" it.[137] While Title IX provides recipients with notice that they must stop their employees from engaging in discriminatory conduct, it does not provide "notice of a duty to prevent student-on-student harassment."[138] The dissent argued that by not identifying "the perpetrator of discrimination, [the statute] encompasses misconduct by third parties."[139] The Supreme Court granted certiorari to determine "whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment."[140]

C. *Majority Opinion*

On May 24, 1999, in a majority opinion written by Justice O'Connor, the United States Supreme Court voted five to four to reverse the Eleventh Circuit's decision.[141] The Court held that a private Title IX damages action may lie against a school board in cases of student-on-student harassment, "but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities."[142] The Court further held that "such an action will lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[143]

The Court's decision reflects the 'actual knowledge plus deliberate indifference' test developed in *Gebser*.[144] In addition, the Court relied on its holdings *Canton*, where it held an implied private right action exists under Title IX; *Franklin*, where it held monetary damages were an appropriate remedy for violations of Title IX; and *Pennhurst*, where the Court established the parameters of the notice requirement for statutes enacted pursuant to Congress' power under the Spending Clause.[145] The Court also recognized, as it did in *Gebser*, that liability for damages under Title IX is not based on agency principles.[146]

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137. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1399 (11th Cir. 1997).
138. *Davis*, 120 F.3d at 1401.
139. *Id.* at 1412 (Barkett, J., dissenting).
140. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 637 (1999).
141. *See id.* at 632.
142. *Id.* at 633.
143. *Id.*
144. *See id.* at 642-43; *see also* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. at 1995 (1999).
145. *See Davis*, 526 U.S. at 639-43.
146. *See id.* at 643.

Applying these judicial standards, the Court found that Title IX "proscribes harassment with sufficient clarity" to satisfy notice requirements for Spending Clause legislation,[147] and noted that "the regulatory scheme surrounding Title IX [and common law] has long provided fund recipients with notice that they may be held liable for their failure" to protect students from acts of a third party.[148] However, the court limited liability for student-on-student sexual harassment under Title IX "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."[149] The court reasoned that by exercising control over the harasser and the environment in which the known harassment occurs, a school district that responds with deliberate indifference essentially subjects its students to the harassment.[150] At a minimum, deliberate indifference must "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."[151] Whether sexual harassment has occurred depends on factors "including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."[152] Damages, according to the Court, are unavailable "for simple acts of teasing and name-calling," even where these comments target gender differences.[153]

Contrary to the Department of Education Office of Civil Rights guidelines, the Supreme Court further limited liability by adopting an actual notice standard.[154] Thus, the courts cannot hold a school liable for sexual harassment by a third party absent a school official's actual knowledge of the harassment.

In the instant case, the Court held that petitioners stated a claim.[155] Labeling G.F.'s conduct as "severe, pervasive, and objectively offensive,"[156] the Court recognized that the School Board was a funding recipient under Title IX and that the Board retained significant "control over the context in which the harassment occurred".[157] Furthermore, despite numerous complaints, the school board made no effort whatsoever to investigate or put an end to the harassment and, as a result, LaShonda allegedly suffered harm.[158] Thus, the Court concluded that the Eleventh

147. *Id.* at 650.
148. *Id.* at 643.
149. *Id.* at 645.
150. *See id.*
151. *Id.* (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)).
152. *See Davis*, 526 U.S. at 651.
153. *Id.* at 652.
154. *See id.* at 650.
155. *See id.* at 653-54.
156. *Id.*
157. *See id.* at 646.
158. *See Davis*, 526 U.S. at 634-35.

Circuit erred in dismissing Ms. Davis' complaint, and the case was remanded.[159]

D. *Dissent*

In the dissent, Justice Kennedy (joined by Chief Justice Rehnquist, Justice Scalia and Justice Thomas) expressed a number of objections to the majority's opinion. First, the dissent feared that the majority's decision would allow the federal government to interfere in the historically state-controlled school system.[160] Second, the dissent argued, "neither the DOE's Title IX regulation nor state tort law . . . could [or does] provide states" with the required notice that the statute prohibits the conduct.[161] Third, the dissent asserted that the majority's decision would trigger a wave of litigation resulting in an escalation of financial costs and a diversion of scarce resources.[162] They further asserted that the decision raises a series of conflicting interests between the harasser's rights and the rights of the harasser's victim.[163] Fifth, according to the dissent, the majority fails to sufficiently define sexual harassment or provide clear guidelines.[164] Finally, the dissent argued that Title IX is applicable only to acts of principles or agents, not third parties.[165]

III. ANALYSIS

The Supreme Court's opinion in *Davis* purports to put an end to the debate of whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment.[166] However, the Court's decision leaves many questions unanswered and is not without controversy.

Of particular concern is the question of federal interference in, and potential control of, areas otherwise traditionally outside federal reach.[167] The Court's decision arguably allows the federal government and courts to set policy, becoming the final arbitrators and ever-present regulators of school policy.[168] The dissent argued that this grant of power fails to protect state and local government autonomy required by our constitu-

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159. *See id* at 654.
160. *See id.* at 654-55 (Kennedy, J., dissenting).
161. *Id.* at 669 (Kennedy, J., dissenting)
162. *See id* at 680 (Kennedy, J., dissenting).
163. *See id.* at 682-83 (Kennedy, J., dissenting).
164. *See Davis*, 526 U.S. at 675 (Kennedy, J., dissenting).
165. *See id.* at 662-63 (Kennedy, J., dissenting).
166. *See id.* at 663.
167. *See id.* at 654-55 (Kennedy, J., dissenting).
168. *See id.* at 686 (Kennedy, J., dissenting).

tional system.[169] Ultimately, the dissent feared that the introduction of federal control into the school system "has the potential to obliterate distinctions between national and local spheres of interest."[170] There was further concern that the Court's decision "invites courts and juries to second-guess school administrators in every case to judge . . . whether the school's response was 'clearly unreasonable.'"[171] Questioning school disciplinary action is something the Supreme Court has in the past, consistently refused to do.[172] The dissent feared that ultimately, such interference could serve to transform every school disciplinary decision into a jury question.[173] A strong argument can be made that day-to-day decisions concerning school policy, student behavior, and disciplinary enforcement are best made by parents, teachers, and school administrators guided by local- or state-based policy.[174] These entities are arguably better able to monitor and react to the needs of local schools and students.

Conversely, increased federal interference may provide much needed direction. In the past, school administrators, and school employees have been inconsistent, and often ineffective, in their treatment of peer sexual harassment.[175] The *Davis* decision offers some uniformity in the form of general guidelines to school administrators. Such consistency could potentially allow schools to quickly address legitimate complaints and weed out frivolous ones. Furthermore, despite federal interference, the Supreme Court's decision arguably conferred a degree of deference to school officials. To avoid liability, school districts "must merely respond to known peer harassment in a manner that is not clearly unreasonable."[176] Thus, the Court's standard is flexible enough to accommodate different school districts' concerns and procedures.

Notice requirements are a second area of controversy. The Court addresses several notice issues. First, there was a question as to whether Title IX provides notice to fund recipients of potential liability for the acts of third parties. The dissent argued that the *Gebser* decision makes clear that the Spending Clause's 'clear and unambiguous notice rule' "requires both that the recipients be on general notice of the kind of conduct the statute prohibits, and—at least when money damages are sought—that they be on notice that illegal conduct is occurring in a given situation."[177] Arguably, the majority is unfaithful to these principles since "neither the DOE's Title IX regulation nor state tort law . . . could or did

169. *See id.* (Kennedy, J., dissenting).
170. *Davis*, 526 U.S. at 654 (Kennedy, J., dissenting).
171. *Id.* at 678-79 (Kennedy, J., dissenting).
172. *Id.* at 674 (Kennedy, J., dissenting).
173. *See id.* at 679 (Kennedy, J., dissenting).
174. *See id.* at 684 (Kennedy, J., dissenting).
175. *See* Edmondson, *supra* note 30, at 1205.
176. *Davis*, 526 U.S. at 650.
177. *Id.* at 672 (Kennedy, J., dissenting).

provide States the notice required by our Spending Clause principles."[178] Title IX does not give schools clear notice that the conduct the majority labels peer sexual harassment is gender discrimination within the meaning of the statute, nor does it give notice that the school could be held liable for money damages for failure to respond to third party discrimination.[179] The dissent argued "most of the regulations cited by the majority merely forbid grant recipients to give affirmative aid to third-parties who discriminate."[180] The other regulations "forbid grant recipients to delegate the provision of student (or employee) benefits and services to third parties who engage in gender discrimination in administering . . . the school's program."[181] The regulations do not indicate a duty "to remedy discrimination by third parties over whom the school may arguably exercise some control."[182] Each DOE regulation is "predicated on a grant recipient's choice to give affirmative aid to, or to enter into voluntary association with, a discriminating entity."[183] "The relationships regulated by the DOE are thus quite different from school-student relationships . . . [thereby] confirm[ing] that the regulations did not provide adequate notice of a duty to remedy student discrimination."[184]

The majority further concluded that state tort law provides states the requisite notice.[185] However, they said it is wrong to conclude that a state knows it is liable under a federal statute simply because the underlying conduct might form the basis for a state tort action.[186]

A related argument is that "Title IX did not give States unambiguous notice that accepting federal funds meant ceding to the federal government power over the day-to-day disciplinary decisions of schools."[187] Thus, the majority wrongly imposes on the "States liability that was unexpected and unknown, but the contours of which are . . . [still] unknowable."[188]

The Court's decision raises a second notice concern: whether a school official needs to receive actual or constructive notice of peer sexual harassment before the school can be held liable. The Court has

178. *Id.* at 669 (Kennedy, J., dissenting).
179. *See id.* (Kennedy, J., dissenting).
180. *Id.* (Kennedy, J., dissenting).
181. *Id.* at 670 (Kennedy, J., dissenting).
182. *Davis*, 526 U.S. at 670 (Kennedy, J., dissenting).
183. *Id.* at 671 (Kennedy, J., dissenting).
184. *Id.* (Kennedy, J., dissenting).
185. *See id.* at 644.
186. *See id.* at 668-69 (Kennedy, J., dissenting).
187. *Id.* at 658 (Kennedy, J., dissenting).
188. *Id.* at 657 (Kennedy, J., dissenting).

adopted an actual notice standard.[189] Such a standard is arguably too high to protect children and "encourages school districts . . . to [simply] react to harassment rather than take a preventive stance."[190] Alternatively, a constructive notice standard would force schools to develop clear policies to prevent, control, and detect harassment.[191] The Court also failed to clarify who must receive the actual notice in order to impute actual knowledge to the school.[192] However, given the majority's reliance on *Gebser*, an argument can be made for adopting *Gebser's* requirements. *Gebser* required notice to "an official of the recipient entity with authority to take corrective action to end the discrimination."[193]

A third area of concern is the potentially significant financial costs associated with the decision. Many school districts are currently administratively overwhelmed by all types of disciplinary problems, and "lack the resources even to deal with serious problems of violence."[194] The additional liability imposed by *Davis* will likely exaggerate this shortfall. The dissent feared that the Court's opinion is "so broad that it will support untold numbers of lawyers who will prove adept at presenting cases that will withstand the defendant school districts' pretrial motions."[195] Furthermore, the limiting principles developed by the Court are not likely to prevent litigation. The ease with which Title IX elements can be alleged and proven could result in a staggering flood of liability and a corresponding heavy financial burden on school districts, the taxpayers, and the children they serve.[196] In fact, the cost of defending against a single peer sexual harassment suit could overwhelm many school districts, as the school's financial liability could approach or exceed a district's total federal funding.[197]

As legal and administrative costs rise, school boards and administrators will likely divert scarce resources away from basic education services.[198] Associated costs will also likely rise. For example, the school districts might be required to provide individual tutoring for those harassing students removed from the classroom setting. Potential financial costs are further exaggerated by the absence of damage caps for judi-

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189. *See id.* at 644; Harvard Law Review Ass'n, *Title IX—School District Liability for Student-on-Student Sexual Harassment*, 113 HARV. L. REV. 368, 377 (1999).

190. Furr, *supra* note 39, at 1597; *See also* Harvard Law Review Association, *supra* note 189, at 374.

191. *See* Furr, *supra* note 39, at 1596.

192. *See* Edmondson, *supra* note 30, at 1226.

193. *Id.*

194. *Davis*, 526 U.S. at 666 (Kennedy, J., dissenting).

195. *Id.* at 677 (Kennedy, J., dissenting).

196. *See Id.* at 686 (Kennedy, J., dissenting).

197. *See id.* at 680 (Kennedy, J., dissenting).

198. *See id.* at 658 (Kennedy, J., dissenting).

cially implied private causes of action under Title IX.[199] Furthermore, no provision exists in Title IX for agency investigation or conciliation of complaints in an effort to eliminate "frivolous suits or settle meritorious ones at minimal cost."[200] The depletion of educational resources arguably was not Congress' intent when it enacted Title IX.[201]

A stronger argument can be made that a school district should be financially liable if it fails to live up to its responsibility. "It is imperative that schools create and foster a learning environment that will provide all students the opportunity to reap the greatest rewards of the prescribed curriculum" in an environment free of sexual harassment.[202] Furthermore, schools have a responsibility to society to guide and mold impressionable people.[203] If a school treats peer sexual harassment with indifference, the school should bear the financial cost. It should bear the responsibility for maintaining control and defining appropriate boundaries. If a school fails to live up to this responsibility, there must be proper measures of accountability. To avoid financial liability under *Davis*, school districts need only make a legitimate effort to inspect the complaint, and take corrective measures.[204] Only when the school responds with deliberate indifference after actual knowledge would it risk liability under Title IX.[205]

Arguably, a consistent approach to peer sexual harassment would allow school districts to avoid the financial liability. Under *Davis*, every school district knows what it needs to do to avoid potential liability. Therefore, legitimate complaints can be addressed more promptly and effectively by imposition of these standards. However, consistency is not likely to eliminate all risk of suit, since a school district under *Davis* may risk suit regardless of the consistency or reasonableness of its response.[206]

A fifth concern is a series of potentially costly conflicting interests arising under *Davis* and Title IX. First, a "student's demand for a harassment-free classroom will conflict with the alleged harasser's claim to mainstream placement under the Individuals with Disabilities Educational Act [IDEA] or with his state constitutional right to continuing free public education."[207] And, the majority does not explain what constitutes

199. *See id.* at 680 (Kennedy, J., dissenting).
200. *Davis*, 526 U.S. at 681 (Kennedy, J., dissenting).
201. *See id.* (Kennedy, J., dissenting).
202. Micheal W. McClain, *New Standards for Peer Sexual Harassment in the Schools: Title IX Liability Under Davis v. Monroe County Board of Education*, 28 J.L. & EDUC. 611, 618 (1999).
203. *See id.*
204. *See Davis*, 526 U.S. at 644-45.
205. *See id.*
206. *See id.* at 680 (Kennedy, J., dissenting).
207. *Id.* at 682 (Kennedy, J., dissenting).

'equal access to education'. Second, "a student's claim that the school should remedy a sexually hostile environment may conflict with the alleged harasser's claim" that the First Amendment protects his offensive speech.[208] This conflict is especially pertinent when the harassment occurs at universities, which do not exercise custodial and tutelary power over their adult students.[209] In addition, certain states have enacted state codes that prohibit private schools from encroaching on a student's First Amendment rights.[210] Third, "schools that remove a harasser from the classroom and then attempt to fulfill their continuing education obligation by placing the harasser in any kind of group setting, rather than by hiring expensive tutors for each student, will find themselves at continuing risk of Title IX suits brought by the other alternative education students."[211] Fourth, "federal law imposes constraints on school disciplinary actions."[212] For example, the Individuals with Disabilities Act places "strict limits on the ability of schools to take disciplinary actions against students with behavior disorder disabilities, even if the disability was not diagnosed prior to the incident triggering discipline."[213] If, as the majority represented, the behavior constituting "actionable peer sexual harassment so deviates from the normal teasing and jostling of adolescence that it puts schools on clear notice of potential liability, then a student who engages in such harassment may have at least a colorable claim of severe emotional disturbance within the meaning of IDEA."[214] The courts will need to adequately address these potential conflicts in the future.

What constitutes 'peer sexual harassment' presents a sixth area of concern for schools and courts. The *Davis* Court did little to clarify the boundaries except to note that teasing does not represent sexual harassment.[215] The dissent argued, however, that most students' behavior may be inappropriate, or even "objectively offensive," at times.[216] Similarly, the dissent argued that almost all children are victims of childish behavior inflicted by other children at one time or another as they mature.[217] Absent clear guidelines, the dissent feared that childish, immature behavior will be labeled as gender discrimination, and that the fear of liability may breed a climate of alarm that encourages school administrators to "label even the most innocuous of childish conduct sexual harassment."[218] However, while unclear cases may arise, there is certainly a

208. *Id.* at 683 (Kennedy, J., dissenting).
209. *See id.* at 666-67 (Kennedy, J., dissenting).
210. *See* Edmondson, *supra* note 30, at 1221.
211. *Davis*, 526 U.S. at 665 (Kennedy, J., dissenting).
212. *Id.* (Kennedy, J., dissenting).
213. *Id.* at 666 (Kennedy, J., dissenting).
214. *Id.* (Kennedy, J., dissenting).
215. *See id.* at 676.
216. *Id.* (Kennedy, J., dissenting).
217. *See Davis*, 526 U.S. at 672-73 (Kennedy, J., dissenting).
218. *Id.* at 681 (Kennedy, J., dissenting).

difference between childish and inappropriate behavior. Where to draw the line should arguably be left to the control of local authorities, as this interpretation is dictated by the circumstances surrounding each case.

What constitutes 'deliberate indifference' is a similar area of concern. The Court's requirement that a school cannot respond in a clearly unreasonable manner is arguably vague.

A final concern associated with the *Davis* decision is that of agency. The dissent argued that the primary purpose of Title IX is "to prevent recipients of federal financial assistance from using the funds in a discriminatory manner."[219] Thus, "Title IX prevents discrimination by the grant recipient, whether through the acts of its principals or the acts of its agents."[220] Based on this argument, there is "no basis to think that Congress contemplated liability for a school's failure to remedy discriminatory acts by students, or that the States would believe the statute imposed on them a clear obligation to do so."[221] In fact, according to the dissent, when Title IX was enacted, the concept of "sexual harassment" as gender discrimination had not been recognized or considered by the courts.[222] Nevertheless, the majority rejected an agency limitation on Title IX thereby expanding the 'enough control' line to encompass students.[223] While strong arguments exist on both sides, an even stronger argument can be made that agency should not be an issue. The Supreme Court's rationale for imposing liability on schools for a student's sexual harassment is not to punish the school for the behavior of a student, but rather to punish the school for failing to remedy persistent, severe, known acts of sexual harassment.[224]

Thus, *Davis*, while resolving the broad question of school liability for peer sexual harassment, failed to clarify many specifics and generated a series of new controversies. Future rulings must address these issues. In the interim, combating peer sexual harassment at the school level will require a broad, proactive approach encompassing proper training, identification, investigation and discipline. Such an approach will serve to deter peer sexual harassment and to decrease school liability should harassment occur. To decrease the frequency of sexual harassment, schools need to adopt clear anti-harassment policies and procedures.[225] These policies should be published by schools in manuals and presented to all members of the school community. Students, parents, teachers, and

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219. *Id.* at 658 (Kennedy, J., dissenting).
220. *Id.* (Kennedy, J., dissenting).
221. *Id.* at 663-64 (Kennedy, J., dissenting).
222. *See id.* at 674 (Kennedy, J., dissenting).
223. *See Davis*, 526 U.S. at 664.
224. *See id.* at 633.
225. *See* ED/OCR Pamphlet, *supra* note 30; Williams, *supra* note 15, at 1110-12.

school administrators must be educated as to the scope of peer sexual harassment and the need for immediate incident reporting to appropriate school authorities. The types of behavior that constitute sexual harassment need to be identified and strongly condemned.[226] There should be no question of indifference on the part of the school. Schools should develop a reporting system to process complaints and identify several school employees as liaisons for students and parents.[227]

Schools need to adequately inform school employees about Title IX, the *Davis* decision, and potential school liability. If a sexual harassment complaint arises, the school needs to investigate the complaint promptly and reasonably. The accused harasser should be removed from the classroom, parents should be notified, and the investigation procedure explained. The school should maintain detailed records of all interviews with students and witnesses. Finally, schools need to develop and implement clear disciplinary procedures. Remedial actions must be reasonably calculated to end the harassment and prevent further incidents. Appropriate action may include official written warning to the harasser, sanctions, prohibition, potential suspension, or discharge. The discipline should reflect the students' ages, frequency of inappropriate conduct, and the seriousness of the harassment. All students should be entitled to appropriate due process.[228]

IV. CONCLUSION

Davis provides broad guidelines to assess the liability of federally funded educational institutions for student-on-student sexual harassment. Federal fund recipients may be liable for subjecting their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment, and the harasser is under the school's disciplinary authority.[229]

While *Davis* offers consistency and general guidelines, it simultaneously generates a series of new, unresolved concerns and controversies in need of clarification. Clearer boundaries will need to be established regarding the scope of the federal government's role in state school systems. Criteria need to be established for balancing the potential financial costs associated with violations of Title IX with the societal costs associated with undeterred peer sexual harassment. What constitutes both sexual harassment and deliberate indifference by a school is also in need of clarification. Future rulings will need to adequately and effectively re-

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226. *See id.*
227. *See id.*
228. *See id.*
229. *See Davis*, 526 U.S. at 648.

solve these issues if peer sexual harassment is to be successfully deterred.

Carie Manke[*]

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[*] J.D. Candidate 2002, University of Denver College of Law. I would like to thank my family for their tremendous support and encouragement.