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# ***Davis v. Monroe County Board of Education: Setting a Stringent Standard of Fault for School Liability in Peer Sexual Harassment Under Title IX—Demanding Responsible Proactive Protection***

## I. INTRODUCTION

“Mommy I don’t want to go to school today.” “Young lady, education is important and you do not have a choice, you are going.” It is a struggle for many parents each morning to motivate their children to attend school.<sup>1</sup> There are numerous reasons lurking behind a child’s resistance, one of which should not be that the child is repeatedly being harassed by a peer while school officials knowingly disregard the victim’s complaints.<sup>2</sup> The law requires that children attend school; however, this does not entail that a student forfeit individual protections merely upon entering a public school.<sup>3</sup> Moreover, it has long been recognized that proper education incorporates instructing children on the basic

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1. See Am. Ass’n of Univ. Women Found., *Hostile Hallways: The AAUW Survey on Sexual Harassment in America’s Schools*, June 1999. The AAUW commissioned Louis Harris and Associates who conducted a total of 1,632 surveys completed by seventy-nine schools across the Nation, in grades eight through eleven. *Id.* at 5. Researchers found an alarming 81% of students reported some experience of sexual harassment, of which four out of five had been the target of peer sexual harassment. *Id.* at 7. In comparing sexual harassment of girls and boys: “among the 81% who report being harassed, the gender gap is surprisingly narrow: 85% of girls and 76% of boys” participating in the surveys say they have been victims of both physical and non-physical sexual harassment. *Id.* at 11.

2. See Marcia Coyle, *Schools Liable When Students Sexually Harass Students*, TEX. LAW., May 31, 1999, at 2 (quoting Jim Harrington, director of the Texas Civil Rights Project, after the Court’s decision in *Davis*, “school districts will have to stop burying their head[s] in the sand and take steps to make sure that young women are treated properly, with respect, and not abused”). See also Lauri Murphy, Editorial, *Letters Page*, ROCKY MTN. NEWS, Apr. 25, 1999, at 8B. The author points out that the sad reality of the Massacre at Columbine High School is that it resulted from a situation that had been escalating for some time, and administrators and parents that were aware of it dismissed the conflict as “harmless” teasing. *Id.*

3. See *Doe v. Renfrow*, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting) (noting that although there is a compelling state interest in assuring that school officials are not overburdened in attempting to fulfill their duty as educators to maintain a learning environment, students are still afforded the protection of the Fourth Amendment).

technical and behavioral skills necessary to function as productive citizens.<sup>4</sup>

School officials have a duty to strive to create a positive environment that is conducive to learning.<sup>5</sup> The Court has recognized that fulfilling this duty requires that school officials be given greater leniency when proactively intervening and enforcing policies in order to heighten awareness and cease behaviors that threaten one's right to an education.<sup>6</sup> Despite the Court's general recognition of a duty and the authoritative right of school officials to fulfill this duty,<sup>7</sup> the courts and Congress have been reluctant to translate this supervisory duty into an identifiable and enforceable standard, resulting in uncertainty as to the scope of an educator's duty.<sup>8</sup>

School officials lacking a clear understanding of their duty causes confusion, which effectively exacerbates the problems of violence, harassment, and drugs that critically threaten the American educational system.<sup>9</sup> The Court's failure to address the scope of this duty should not permit school officials to ignore the existence of these problems, nor will it cause them to disappear. Millions of Americans were horribly reminded that the problems still exist on April 20, 1999, as the Nation watched the murderous rampage of two students at Columbine High School in Littleton, Colorado.<sup>10</sup> Following this tragedy, its horrors became even more shocking as investigations revealed that these students methodically planned their attack, targeting athletes whom they believed instigated abuse and

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4. See *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 729 (M.D. Ala. 1968) (noting that school officials have a duty and responsibility to maintain an educational atmosphere).

5. *Id.*

6. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (allowing school officials more leniency in searching students than indicated in the Bill of Rights because of the unique characteristics of the public school). See also *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (granting schools a certain degree of flexibility in school disciplinary procedures because a determination of reasonableness cannot disregard the custodial duties of school officials and their primary responsibility to educate and train young people).

7. See generally *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (examining the scope of a school's permissible authority to enforce disciplinary policies, and finding that a school's interest in carrying out the educational process outweighs a student's right to partake in conduct that is disruptive to this process, even when such conduct falls within the scope of one's First Amendment rights).

8. See *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 366 (M.D. Ga. 1994), *aff'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

(addressing the scope of school official's supervisory duty and determining that the standard for evaluating whether the duty has been fulfilled shall be deliberate indifference). See also 57 AM. JUR. 2D *Municipal, County, School and State Tort Liability* § 540 (1988) (discussing duties and general standards of tort liability for public educational agencies in cases where the lack of supervisory conduct is at issue).

9. See *Moore*, 284 F. Supp. at 731 (addressing illegal drug activity in a school dormitory, the court found, pursuant to a balancing test, that a student's right to privacy is outweighed by the school's special need to discourage illegal activity and enforce discipline in furtherance of its duty to operate an educational institution).

10. See Editorial, *Investigating Columbine The Issue: FBI's Lead Investigator Has Close Ties To The School; Our View: The Bureau Has to be Prepared for Criticism*, ROCKYMTN. NEWS, May 11, 1999, at 34A.

harassment toward the group of students the Columbine Killers associated.<sup>11</sup> The Columbine Massacre may represent the most egregious outcome possible when school officials act indifferently and fail to take disciplinary action towards on-going disruptive behavior in schools.<sup>12</sup> Yet, Columbine clearly illustrates that the school environment provides a breeding ground for hate, sexism, racism, and violence, and in its aftermath it is imperative that school officials and parents join forces to combat these social evils.<sup>13</sup>

In the wake of the Columbine tragedy, there are many lessons to be learned, and one that must not be ignored is the impact that bullying, teasing, and ridicule have upon the most vulnerable of our citizens—children in schools.<sup>14</sup> Despite the presence of these problems, society is advancing in its attempts to eliminate discrimination and harassment by responsibly promoting awareness in order to further prevention.<sup>15</sup> Although the Government cannot erase stereotypical beliefs that lead to discrimination and harassment, positive changes occurring in society are allowing sexism to emerge from its dark closet.<sup>16</sup> Advancement is inevitable because of the recognition of sexism as a form of discrimination that is pervasive in society.<sup>17</sup> Nevertheless, it is important that the Federal Government's efforts to rid society of sexism not be limited to enforcement in the employment arena under Title VII.<sup>18</sup>

Under Title IX, Congress provides federal funding to educational institutions

11. See Brian Weber, *District Was Warned of Increased Violence Sheriff's Conclusions About Situation Are Still Exaggerations, School Officials Say*, ROCKY MOUNTAIN NEWS, Apr. 22, 1999, at 13A (noting that following the attack other students came forward, claiming that athletes continually harassed and intimidated students who were outsiders, and school administrators continually ignored complaints even after two of the athletes were arrested for assaulting a student, allegedly because he was Jewish).

12. See E.R. Shipp, Letters to the Editor, *The 'Why' of Littleton*, WASH. POST, May 9, 1999, at B8.

13. See *State v. Drake*, 662 A.2d 265, 267 (N.H. 1995) (commenting that school officials are charged with the paramount duty of fostering a learning environment "that facilitates learning and promotes responsible citizenship").

14. See Lauri Murphy, Editorial, *Letters Page*, ROCKY MOUNTAIN NEWS, April 25, 1999 at 8B.

15. See Matthew Bowers & Alice Warchol, *Zero Tolerance is Unavoidable, Educators Insist but Critics Say Schools are Crossing Line Between Student Protection, Harassment*, VIRGINIAN-PILOT & LEDGER STAR, May 30, 1999, at A1 (citing June L. Arnette, Associate Director National School Safety Center (encouraging worried principals to err on the side of caution and develop good policy because it is better to be safe than sorry)).

16. See *id.* (advocating a philosophy of "zero tolerance" in schools ("no weapons, no threats, no excuses") because "what ifs" have grown scarily more plausible and it is too risky to take the chances that come with loosening rules).

17. See 42 U.S.C. § 1981(a) (1999) (explicitly providing relief for harassment in employment discrimination, and specifically in the form of monetary damages). See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 282 (1998) (extending a private right of action to a student sexually harassed by a school official after recognizing that when necessary, courts shall yield when permitting monetary vindication of a right frustrates the purpose of the statute involved).

18. See generally *Gebser*, 524 U.S. 274 (1998).

conditioned on the mandate that the institutions enforce policies furthering non-discrimination on the basis of gender.<sup>19</sup> In exercising this spending power, Congress' authority to enforce the prohibitions of the Statute provide it with the power to ultimately terminate funding if recipients fail to adequately uphold their duties.<sup>20</sup> At a minimum, this framework should demand responsible proactive attempts by school officials to cease peer harassment of which they are aware and that rises to a level of harmful intimidation, the nature of which threatens an individual's right to an education.<sup>21</sup>

In *Davis v. Monroe County Board of Education*, the Supreme Court reversed the decisions of the lower courts, opting instead to add meaning to the indeterminable scope of liability for educators in regards to their duty to prevent peer sexual harassment.<sup>22</sup> The Court's decision effectively supports the policy making efforts of Congress to actively combat sexual harassment by providing a cognizable standard for when a school may be found liable.<sup>23</sup> The Court's holding allows schools to be liable to individual victims of peer sexual harassment if they are found to be "deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities and benefits provided by the school."<sup>24</sup>

In attempting to protect victims of peer sexual harassment, *Davis* sets a very high standard, but when achieved, it permits an individual to bring a cause of action under Title IX.<sup>25</sup> This decision demonstrates that the Court and Congress are making a concerted effort to require schools to not only promote fairness and equality, but to take disciplinary action when a student refuses to respect these values.<sup>26</sup> School administrators have the awesome potential to dramatically influence the future of our Nation by molding citizens in an environment that

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19. Education Amendments of 1972, 20 U.S.C. § 901 *et seq.* (1972), as amended, 20 U.S.C. § 1681 *et seq.* (1994) (Title IX operates by conditioning offer of federal funding on promise by recipient not to discriminate, in what amounts to essentially a contract between recipient and government controlling dispersion of funds). Title IX was modeled after Title VII of the Civil Rights Act of 1964, which prohibits race discrimination in programs receiving federal funding and in its amended form allows an express right of action for monetary damages. § 1681 *et seq.*, 42 U.S.C. § 2000d *et seq.* (1999). Title VII is framed as an outright prohibition, while private causes of action under Title IX require a recipient's liability in damages be conditioned on actual notice and an opportunity for voluntary compliance before enforcement proceedings commence. *See Gebser*, 524 U.S. at 279-80.

20. *See* 20 U.S.C. § 1681 (1994).

21. *See* 34 C.F.R. §§ 106.8(b), 106.9(a) (1999) (requiring recipients of federal funds, in order to comply with the Department of Education's regulations, adopt and publish grievance procedures for resolution of discrimination complaints, and to notify students and others of the school's refusal to discriminate on the basis of sex in education programs or activities operated by those programs).

22. 526 U.S. 629 (1999).

23. *See id.* at 629-30.

24. *Id.* at 650.

25. *Id.* at 641-50.

26. *See id.*

explicitly rejects discriminatory behavior.<sup>27</sup> After *Davis*, schools will have to pay for the harm they are causing the individual victim and the disservice they are doing to society by not responding to offensive conduct in a reasonable manner given the circumstances.<sup>28</sup>

This Note will examine the Court's decision in *Davis* and explore the practical effects application of this new standard will have on advancing society's fight against harassment by providing an avenue of relief for individual victims of peer harassment. Part II-A will provide background information on Title IX<sup>29</sup> and will delve into the language of the statutory requirements Congress established for educational institutions receiving federal funding. Part II-B will illustrate the expansive reach of Congress' spending power through which it has the ability to control discrimination in schools, an area traditionally regulated by individual states.<sup>30</sup> Additionally, Part II-C will examine whether the language of the Statute places schools on proper notice of their duty to individuals, thus creating a justification for a private cause of action.<sup>31</sup> Part III presents the facts and procedural history of *Davis*,<sup>32</sup> followed by an analysis of the arguments and basis of support for the majority<sup>33</sup> and dissenting opinions<sup>34</sup> in Part IV. Part V discusses *Davis*' potential future judicial, legislative, and social implications.<sup>35</sup> Part VI concludes by applying common sense analysis to bolster positive support for the likely ramifications of the Court's decision.

## II. HISTORICAL BACKGROUND OF TITLE IX

### *A. The Development Of A Cause Of Action For Student-on- Student Sexual Harassment Under Title IX*

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

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27. See Julie Cart, *Slain Student's Family Sues Parents of Colorado Killers*, L.A. TIMES, May 28, 1999, at A11 (quoting attorney Geoffrey Fieger "[t]his lawsuit is about duty, this lawsuit is about accountability and this lawsuit is about responsibility").

28. See *Davis*, 526 U.S. at 636-38.

29. See *infra* notes 36-45 and accompanying text.

30. See *infra* notes 46-53 and accompanying text.

31. See *infra* notes 54-70 and accompanying text.

32. See *infra* notes 71-96 and accompanying text.

33. See *infra* notes 97-128 and accompanying text.

34. See *infra* notes 129-147 and accompanying text.

35. See *infra* notes 148-174 and accompanying text.

under any education program or activity receiving  
Federal financial assistance . . . .<sup>36</sup>

Congress passed Title IX in 1972 to abolish sexual discrimination in federally funded educational programs and activities.<sup>37</sup> This Statute attempted to close the loophole existing in anti-discrimination legislation, which provides no remedy for sexual discrimination in public educational institutions: Title VI of the Civil Rights Act of 1964 prohibited discrimination based on race or national origin,<sup>38</sup> while Title VII provisions eradicated discrimination based on sex, but only in the context of employment.<sup>39</sup> Recently, suits for peer sexual harassment under Title IX have emerged as the primary avenue for victims attempting to obtain monetary relief from public schools.<sup>40</sup> Although the language of Title IX, on its face, does not provide a statutory remedy for an individual sexually harassed, claimants in this area have successfully borrowed the theory of hostile environment harassment defined and prohibited under Title VII.<sup>41</sup> Using this theory, peer sexual harassment can be categorized as a violation of Title IX because the nature of the offensive conduct creates a hostile environment in which the school setting becomes one filled with sexually discriminatory intimidation, ridicule, and insult, thus denying the individual an equal right to federally funded education.<sup>42</sup>

Unlike employees, students are not agents of the schools.<sup>43</sup> A school's failure to remedy known private discrimination, such as harassment by students, does not

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36. 20 U.S.C. § 1681(a) (1994).

37. Pub. L. No. 92-318; Title IX § 901, 86 Stat. 373 (June 23, 1972). According to the bill sponsor, Senator Bayh, its purpose is to provide women of America something that is rightfully theirs—an equal chance to attain education. *See* S. Rep. 874, 92d Cong., 118 Cong. Rec. 5803 (1972) (enacted).

38. 42 U.S.C. §§ 2000d-2000d-4 (1994). Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

39. 42 U.S.C. §§ 2000e-2000e-17 (1998). Title VII reads, in relevant part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a)(1) (1994).

40. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (establishing the high standard of "deliberate indifference" that must be met to successfully obtain relief under Title IX in cases where the student is subjected to sexual harassment by a teacher); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsidered*, 949 F. Supp. 1415 (N.D. Cal. 1996) (holding for the first time that a cause of action exists for peer sexual harassment); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (holding, unanimously, that a student is entitled to monetary damages under Title IX and not just equitable relief for sexual harassment by a teacher).

41. By definition Title VII defines two types of sexual harassment: *quid pro quo* and hostile environment sexual harassment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

42. *See Moore v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986) (showing that Title VII standards, as set forth by the EEOC, are also appropriate for Title IX).

43. *Davis*, 120 F.3d at 1399-400 and n.13 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999) (arguing that because students are not agents of a school board, agency principles are inapposite to peer harassment under Title IX).

make the state actor itself guilty of the discrimination Title IX prohibits.<sup>44</sup> Possibly because of this apparent lack of incentive to combat sexual harassment, schools in the past have been reluctant to take action, often looking the other way when complaints arise.<sup>45</sup>

### *B. A Split In Lower Court Decisions In Determining The Rights For Victims Of Sexual Harassment In Schools*

In developing Title IX case law to extend to a victim the right to bring a cause of action against a school when the actor is a student, courts have sought guidance in teacher-on-student harassment cases.<sup>46</sup> Furthermore, courts give some deference to the Letter Findings expressed by the Office of Civil Rights (“OCR”), the agency responsible for implementing Title IX.<sup>47</sup> The OCR has indicated that a school’s failure to take action and attempt to remedy a situation effectively permits the harassment.<sup>48</sup> The Supreme Court first acknowledged that a student should be afforded the same statutory protection from sexual harassment in schools as in the workplace in *Franklin v. Gwinnett County Public Schools*.<sup>49</sup> The Court relied on the framework of Title VII jurisprudence to allow victims of sexual harassment in educational contexts monetary damages; however, the decision only addresses situations involving a teacher sexually harassing a student.<sup>50</sup> By interpreting the reasoning of *Franklin* narrowly, some courts have limited the extension of monetary relief under Title IX in the context of peer sexual harassment.<sup>51</sup> Furthermore, in *Gebser v. Lago Vista Independent School District*,<sup>52</sup> the Supreme Court set a high standard for liability in sexual harassment

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44. See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (stating that the courts should accord liability under Title IX that sweeps as broad as the language in the Provision). *But see* *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996) (holding that Title IX should be narrowly interpreted, only holding a school district liable for sexual harassment if school officials themselves participated in the discrimination).

45. See *Petaluma*, 830 F. Supp. at 1565 (noting that most often, schools respond to a victim’s complaints with the view that the harasser must have been provoked or by characterizing the behavior at issue as unavoidable adolescent teasing).

46. See *id.* at 1572.

47. See *id.* at 1573.

48. *Id.*

49. 503 U.S. 60 (1992).

50. See *id.* at 76.

51. See *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp 1437 (S.D. Tex. 1994) (deciding that a student’s peer sexual harassment claim was not supported by the decision in *Franklin*). See also *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996) (holding that individual monetary claims for relief are limited to situations in which the harassment at issue is attributed to the conduct of the grant recipients).

52. 524 U.S. 274 (1998).



involving teacher-on-student claims, requiring that the school officials be on notice of the harassment and exhibit “deliberate indifference” to the conduct.<sup>53</sup>

### *C. Justification For A Private Cause Of Action In The School Environment Under Title IX*

The majority of lower courts have found that Title VI and Title VII are the appropriate statutes for which to interpret and analogize extensions of liability under Title IX.<sup>54</sup> The Eleventh Circuit Court of Appeals in *Davis* argued that the Title VII standards provide minimum protection, while damage caused by sexual harassment is arguably greater in the classroom than in the workplace.<sup>55</sup> Harassment in the classroom is more severe because it generally has a greater and longer lasting impact, and occurs at a crucial point in the intellectual development where one should not be burdened by inhibitions that limit potential.<sup>56</sup> Moreover, while a decision to leave work to avoid harassment may not be in one’s best interest for career purposes, an adult victim has the authority to make this choice, whereas it is virtually impossible for a child to escape harassment in a school where one’s parents and the law require daily attendance.<sup>57</sup>

Although the language of Title IX does not mandate that schools take action against sexual harassment, undeniably, it must be recognized as a duty under Title IX, for when children are subjected to ridicule and conduct damaging to self-esteem, development is hindered and the repercussions ripple through society.<sup>58</sup> The law cannot expect children to endure sexually abusive conduct while growing up when the law does not tolerate such conduct at the adult level in the

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53. *Id.* at 277. The Court reasoned that Title IX is in effect a contract, thus, actual notice and opportunity to come into compliance are prerequisites to liability in private enforcement actions. *See id.* at 284-86. *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (noting the Court’s agreement with the Equal Employment Opportunity Commission that “Congress wanted courts to look to agency principles for guidance in this area”); Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) (establishing a basis of liability for the sexually harassing conduct of an employee being imputed to an employer under the doctrine of respondeat superior, when the plaintiff can show that the employer “knew or should have known” of the harassment in question and failed to take prompt remedial action).

54. Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571 (N.D. Cal. 1993), *reconsidered*, 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (finding Title IX similar to Title VII); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022 (W.D. Mo. 1995) (concluding that the anti-discrimination provision in Title IX should be enforced under Title VII standards); Seamons v. Snow, 84 F.3d 1226, 1231 n.5, 1233 (10th Cir. 1996) (expressing no opinion as to the district courts refusal to apply Title VII to Title IX, but considering the elements for a hostile environment claim); Burrow v. Postville Cmty. Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (finding the “the standards developed under Title VII for hostile employment environment sexual harassment are appropriate”).

55. Davis v. Monroe County Bd. Of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996), *rev’d*, 120 F.3d 1390 (11th Cir. 1997), *rev’d and remanded*, 526 U.S. 629 (1999).

56. *See id.*

57. *See id.*

58. *See* Am. Ass’n of Univ. Women Found., *supra* note 1, at 21.

workplace.<sup>59</sup> Yet, in holding schools liable under the hostile environment theory it must be determined how severe the peer sexual harassment must be before necessitating actions.<sup>60</sup> Additionally, considerations must be taken into account regarding the extent of control a school has over childish behavior that incorporates offensive utterances, comments, and vulgarities that are not persistent or go unreported until the victim leaves school.<sup>61</sup> The necessary level of severity is not one in which the child must be compelled to leave school before action is appropriate.<sup>62</sup> On the other end of the spectrum, absurd interpretations of one-time adolescent misbehavior should not be considered to impair the child's learning.<sup>63</sup> The Court has conceded that whether alleged harassment rises to an actionable level "depends on a constellation of surrounding circumstances, expectations and relationships"<sup>64</sup> and that recognition must be given to the wide range of immature behaviors typically displayed by children.<sup>65</sup>

After determining that student-on-student sexual harassment was actionable,

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59. See *Morse v. Regents of the Univ. Colo.*, 154 F.3d 1124, 1129 (10th Cir. 1998) (finding that the allegation that the educational institution "knew of harassment . . . and did not respond adequately" was sufficient to state a claim under Title IX).

60. See Jennifer C. Braceras, *New Menace in the Schools: Hand Holding*, WALL ST. J., May 25, 1999, at A26 (bashing the decision in *Davis* for making a federal case out of a teachers failure to prevent student comments, and examining how extreme policies against sexual harassment will become—suggesting that telling a classmate "you look nice" may constitute punishable behavior depending on the tone and expressive manner of the perpetrator).

61. See Christina Hoff Sommers, *The Preteen Sexual Harasser*, N.Y. TIMES, Jan. 9, 1999, at A15 (noting that in examining the issue in *Davis*, common sense suggests that fifth-grade misbehavior is best handled outside of the federal courts by teachers, principals, and parents or when necessary by local and state laws, but argues that common sense often loses in battles over gender politics).

62. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (requiring a plaintiff in a sexual harassment suit against a co-worker to demonstrate that the harassment is so severe and objectively offensive that it detracts from the victim's right to be free from sexual harassment and denies access to resources of the institution).

63. See David G. Savage, *Schools Ruled Liable for Sex Bias by Pupils*, L.A. TIMES, May 25, 1999, at A1 (quoting Julie Underwood, general counsel for the school board group "[w]e can live with this standard, [i]t will be rare if a school is held liable"). The author notes that the National School Boards Group is pleased with the threshold for liability set in *Davis* because it protects children while not putting schools at a huge financial risk (noting Executive Director, Anne Bryant's comment that six years ago, the group warned school officials they could be held liable for repeatedly ignoring complaints about severe peer harassment and that two years ago, the Education Department's Office for Civil Rights sent a similar warning). See *id.*

64. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 82 (1998).

65. See Dep't of Educ., Office for Civil Rights ("OCR"), *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 49, 12040 (Mar. 13, 1997) (including, but not limited to, the ages of the harasser and the victim and the number of individuals involved). See also Dep't of Educ., *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 47, 11448, 11448-50 (Mar. 10, 1994) (outlining guidelines for investigative measures under Title IV).

a panel of the Eleventh Circuit Court of Appeals in *Davis* set forth a cohesive balancing test for determining whether the harassment is severe enough to require a remedy.<sup>66</sup> The court held that Title IX is violated when the harassment permeates the educational setting with discriminatory intimidation, ridicule, and insult that is so severe and pervasive that it sufficiently alters the conditions of a student's environment and creates an abusive setting.<sup>67</sup> In determining when conduct crosses the line between child's play and the types of vulgar harassment that would necessitate attention, the court focused on the following factors: "(1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether [the conduct] is physically threatening or humiliating rather than merely offensive; and (4) whether [the conduct] unreasonably interferes with the plaintiff's performance."<sup>68</sup>

Lastly, before concluding that the behavior in question constitutes a violation under Title IX, the conduct must be found to be both objectively abusive from the viewpoint of a reasonable person and subjectively the victim must perceive the environment to be abusive.<sup>69</sup> This takes into account that a teacher may adjudge conduct in a different way than a student and helps to avoid categorizing simple childish play and flirting as behavior rising to the level of vulgar harassment that must be effectively controlled by school officials witnessing the conduct.<sup>70</sup>

### III. SUMMARY OF THE FACTS

Between December 1992 and May 1993, G.F.,<sup>71</sup> a male fifth-grade student at Monroe County, a Georgia elementary school, sexually harassed a fellow peer, LaShonda.<sup>72</sup> The offenses included repeated attempts by G.F. to fondle her and the use of vulgar language directed toward LaShonda.<sup>73</sup> The acts alleged in the complaint go far beyond school yard teasing. For example, in December, G.F. told LaShonda, "I want to get in bed with you," and "I want to feel your boobs," and

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66. *Davis v. Monroe County Bd. Of Educ.*, 74 F.3d 1186, 1194 (11th Cir. 1996), *rev'd*, 120 F.3d (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

67. *Id.*

68. *Id.* (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993)).

69. *Id.*

70. See Alexandra A. Bodnar, Comment, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 583 (1996) (commenting that the severity of harassment accordingly, is judged by both the fact finder and the student-victim, and demonstrates varying reactions to conduct by illustrating a situation involving a first-grader being kissed on the cheek).

71. The harasser is given anonymity, but the victim is identified. See Katie Wood, Comment, *Holding School Systems Liable for Peer Sexual Harassment*, 14 GA. ST. U. L. REV. 695, 698 (1998) (discussing the difficulties litigants experience in establishing a viable cause of action for sexual harassment and noting that because of the possible apprehension and embarrassment of being identified as a victim of sexual harassment, victims are often reluctant to file such claims).

72. *Davis*, 74 F.3d at 1188-89 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

73. *Id.* at 1189.

he attempted to grab her breasts and vaginal area.<sup>74</sup> Again in February, during gym class, G.F. put a doorstop down the front of his pants and acted in a sexually offensive manner towards LaShonda.<sup>75</sup> In April, again, G.F. confronted LaShonda in the school hallway and intentionally rubbed his body against her in a sexually explicit manner.<sup>76</sup> Furthermore, LaShonda was not the only victim of the repeated offenses; however, school officials who knew of the reported incidents failed to take disciplinary action against G.F.<sup>77</sup> Despite LaShonda reporting each incident to her teachers, and her mother contacting the principal and teachers after every incident but one to request protection for her daughter,<sup>78</sup> the school officials did nothing beyond making mere threats of punishment to G.F.<sup>79</sup>

G.F.'s sexual harassment continued to grow increasingly severe until May, when he pled guilty to a criminal charge of sexual battery concerning the school incidents.<sup>80</sup> During the three months of the alleged harassment, the only action taken by school officials was merely permitting LaShonda to move her seat away from G.F.<sup>81</sup> Moreover, throughout the duration of the events in question, school officials never provided personnel information in order to heighten awareness of peer-sexual harassment, never instructed personnel on how to respond effectively if they witnessed harassing conduct, nor developed a policy to deal with such issues.<sup>82</sup>

Consequently, Petitioner, Aurelia Davis, brought suit on behalf of her minor daughter against the Monroe County School Board, superintendent, and principal of the elementary school concerning the harassment by G.F., seeking injunctive

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74. *Id.* (citing Complaint of Petitioner ¶ 7).

75. *See Aurelia D. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 364 (M.D. Ga. 1994), *rev'd in part aff'd in part*, 74 F.3d 1186 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

76. *Davis*, 74 F.3d at 1189 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

77. *Davis*, 526 U.S. 629, 634 (1999) (citing Complaint of Petitioner ¶ 16 (alleging that the school denied access to other girls who fell victim to the conduct of G.F. by denying their requests to speak to the principal)).

78. *Davis*, 74 F.3d at 1189 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999). LaShonda told her mother that she "didn't know how much longer she could keep him off her." *Id.*

79. *Davis*, 526 U.S. at 635 (citing Complaint of Petitioner ¶ 9 (noting that several of the incidents of harassment were witnessed by students and occurred while the children were under the supervision of a classroom teacher)).

80. *Id.* (citing Complaint of Petitioner at ¶ 14).

81. *Id.* (citing Complaint of Petitioner at ¶ 13).

82. *Id.*

relief and compensatory damages.<sup>83</sup> The suit was brought on the basis of section 1681(a) of Title IX,<sup>84</sup> which prohibits discrimination in educational institutions that receive federal funding.<sup>85</sup> LaShonda's mother alleged that the persistent sexual advances created an intimidating, hostile, offensive, and abusive environment that effectively denied LaShonda her right to an education free of discrimination.<sup>86</sup> Thus, because the school knew of the harassment and failed to intervene in the situation, the school effectively permitted the harassment and should be held liable to the individual victim.<sup>87</sup>

The United States District Court for the Middle District of Georgia dismissed the Title IX claim holding that because a student's sexually harassing behavior is not part of a school program or activity, and because neither the defendant nor any school official took part in the harassment, LaShonda's harm was not "proximately caused by a federally-funded educational provider."<sup>88</sup> Petitioner appealed the District Court's decision and a Court of Appeals panel reversed, recognizing Title IX as a vehicle for relief when a school official's failure to take action against reported peer sexual harassment creates a hostile environment.<sup>89</sup> Following a motion for rehearing, the United States Court of Appeals for the Eleventh Circuit, sitting *en banc*, affirmed the District Court's dismissal.<sup>90</sup> The court determined that Title IX does not provide adequate grounds for damages in a private cause of action, even in situations where the peer harassment creates a hostile learning environment and school officials knowingly fail to act to prevent the harassment.<sup>91</sup> The primary basis for this decision was that Title IX was passed pursuant to Congress' legislative authority under the Spending Clause,<sup>92</sup> thus,

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83. See *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 636, 364 (M.D. Ga. 1994), *rev'd in part aff'd in part*, 74 F.3d 1186 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999).

84. 20 U.S.C. §§ 1681-1688 (1994). See *supra* part II-A (discussing the protections Title IX affords students under 20 U.S.C. § 1681(a) (1994)). A "program or activity" includes "all of the operations of . . . a local educational agency . . . or other school system." 20 U.S.C. § 1687 (1994).

85. *Davis*, 526 U.S. at 632-33.

86. See *id.* at 636.

87. *Id.*

88. See *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994), *rev'd in part aff'd in part*, 74 F.3d 1186 (11th Cir. 1997), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999). The trial court dismissed the Title IX claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides that a claim may be dismissed for "failure to state a claim upon which relief can be granted." *Id.* at 366. In review of the motion to dismiss, the district court viewed the factual allegations as true and made all reasonable inferences in the plaintiff's favor. *Id.* at 365. See also *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993); *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992).

89. *Davis*, 74 F.3d 1186, 1195 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629, 636 (1999).

90. See *id.* at 1188. Plaintiff appealed the dismissal of her § 1983 due process claims against all defendants. *Id.*

91. See *id.* at 1186.

92. U.S. CONST., art. I § 8, cl. 1 (providing that: "The Congress shall have [the] power to . . . provide for the . . . general welfare of the United states").

recipients must be provided adequate notice of the conditions they are assuming upon acceptance.<sup>93</sup> The court reasoned that the language of Title IX adequately notifies recipients that they must stop employees from engaging in discriminatory conduct, but does not give sufficient notice of a duty to prevent peer sexual harassment.<sup>94</sup> The United States Supreme Court granted certiorari to resolve a conflict in the circuits<sup>95</sup> over whether Title IX subjects recipients of funding to liability in a private cause of action for failure to respond to a victim's complaints of student-on-student sexual harassment.<sup>96</sup>

#### IV. ANALYSIS OF THE COURT'S OPINION

##### A. *The Majority Ruling*

Justice O'Connor's opinion<sup>97</sup> focused on the Court's prior decisions regarding claims based on anti-discrimination statutes,<sup>98</sup> the purpose of Title IX, and implications the language of the Statute places on recipients<sup>99</sup> in concluding that

93. *Davis*, 120 F.3d 1390, 1399 (1997), *rev'd and remanded*, 526 U.S. 629 (1999).

94. *Id.* at 1401.

95. *Compare Davis*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629 (1999), and *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1008 (5th Cir. 1996), *cert. denied*, 519 U.S. 861 (1996) (holding that private damages action for student-on-student harassment are available under Title IX only where funding recipient responds to these claims indifferently based on the victim's gender), *with Doe v. Univ. of Ill.*, 138 F.3d 653, 668 (7th Cir. 1998), *cert. granted, vacated and remanded sub nom.*, Bd. of Trustees of Univ. of Ill., 526 U.S. 1142 (1992) (upholding private damages action under Title IX for funding recipient's inadequate response to known student-on-student harassment); *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 132 F.3d 949, 960-61 (4th Cir. 1997) (finding a valid claim under Title IX where University's inadequate response to rape created a hostile environment), *vacated and aff'd en banc*, 169 F.3d 820 (4th Cir. 1999), *aff'd on other grounds sub nom. United States v. Morrison*, 120 S. Ct. 1740 (2000), and *Oona R.S. v. McCaffrey*, 143 F.3d 473, 478 (9th Cir. 1998) (rejecting qualified immunity claim and concluding that failure to prevent student-on-student harassment during the 1992-93 year violated clearly established Title IX rights), *cert. denied*, 526 U.S. 1154 (1999).

96. *Davis*, 526 U.S. 629 (1999).

97. Justice Stevens, Souter, Ginsburg, and Breyer joined Justice O'Connor in the majority opinion. *Id.* at 632.

98. *See id.* at 639 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283, 284-90 (1998) (establishing that teacher-on-student sexual harassment constitutes a violation of Title IX and that damages may be an appropriate remedy)). *See also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (permitting money damages under Title IX); *Guardians Ass'n v. Civil Serv. Comm'n. of N.Y. City*, 463 U.S. 582, 598-99 (1983) (permitting Title VI, private damages only when recipients had adequate notice that they could be liable for discrimination).

99. *Davis*, 526 U.S. at 633 (discussing Petitioner's argument, that as a member of the class the Statute is designed to protect, the Court should conclude that the language of Title IX has an "unmistakable focus" on the victim, (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691 (1979), rather than the perpetrator, thus compelling the conclusion that the Statute should function to protect students from discrimination.)). *See*

a recipient of federal education funding may be liable for damages for discrimination resulting from a school's unreasonable response to student-on-student sexual harassment.<sup>100</sup> After establishing the basis of her analysis for liability for peer harassment under Title IX, Justice O'Connor identified the two issues the Court's decision resolved.<sup>101</sup>

First, Justice O'Connor defined the scope of a recipient's behavior under Title IX, requiring that schools proactively attempt to cease sexual harassment against members of a protected class by a peer.<sup>102</sup> In adopting the deliberately indifferent standard the Court previously applied in *Gebser*,<sup>103</sup> Justice O'Connor asserted that imposition of liability does not stem from misconduct of the third party inflicting the harassment.<sup>104</sup> Rather, the recipient's own decision to remain idle and not remedy student-on-student sexual harassment, of which it had actual knowledge, amounts to an intentional violation of Title IX.<sup>105</sup>

Additionally, Justice O'Connor reiterated that application of the deliberately indifferent standard shall be applied narrowly to instances where the funding recipient has substantial control over the harasser<sup>106</sup> and the authority<sup>107</sup> to take remedial action.<sup>108</sup> Justice O'Connor indicated that the custodial nature of the school setting effectively demands school officials to proscribe acceptable norms of conduct that must be adhered to by students, and that adequate disciplinary measures must be taken in response to conduct that goes against these norms.<sup>109</sup>

Second, the decision establishes a private cause of action against recipients

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*also supra* Part II-A (discussing the provisions of Title IX).

100. See *Davis*, 526 U.S. at 633, 639-40.

101. See *id.* at 638.

102. *Id.* at 641.

103. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (concluding that a recipient of federal funding may be liable under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher).

104. See *Davis*, 526 U.S. at 643.

105. *Id.* (pointing out that in the Title IX context the Court has rejected the use of agency principles used in Title VII).

106. *Id.* at 644-45 (noting that the deliberate indifference of the recipient must cause or make the victim vulnerable to harassment, and the harassment must occur in a context which the school controls).

107. See *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (noting that on many occasions the Court has recognized that schools are afforded a level of comprehensive authority that permits a degree of supervision and control that could not be exercised over adults). See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985). The maintenance of discipline in the school setting requires students to be restrained from fighting and committing crimes, and additionally requires conformity to standards of conduct prescribed by school officials. See *Davis*, 526 U.S. at 646 (citing *Davis*, 74 F.3d 1186, 1193 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 526 U.S. 629, 640 (1999)). See also RESTATEMENT (SECOND) OF TORTS § 152 (1965) (supporting the common law recognition of the school's disciplinary authority).

108. See *Davis*, 526 U.S. 629, 646 (1999) (noting that in the case at bar, the misconduct occurred on school grounds and during hours of school supervision—specifically, most of the harassment took place in the classroom).

109. See *id.* at 646.

who fail to fulfill their duty under Title IX, indicating that the Statute provides adequate notice of liability for the conduct at issue.<sup>110</sup> Justice O'Connor recognized the Court's fundamental requirement in *Pennhurst State School and Hospital v. Halderman*,<sup>111</sup> that recipients of federal funds have notice of their potential liability for a monetary award.<sup>112</sup>

In her opinion, Justice O'Connor was adamant that the regulatory scheme surrounding Title IX,<sup>113</sup> coupled with the Department of Education's requirement that recipients monitor the conduct of third parties in order to prevent discrimination,<sup>114</sup> provides funding recipients adequate notice that they may be liable for failing to respond to discriminatory acts of certain non-agents.<sup>115</sup> Furthermore, she ascertained support for holding recipients liable by pointing out that in prior decisions the Court has surpassed limitations created by notice when the conduct at issue involved an intentional violation of Title IX by the recipient.<sup>116</sup>

In concluding that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment, Justice O'Connor stressed that the Court's decision should not force administrators to adhere to rigid disciplinary procedures and directed courts to "refrain from second guessing the disciplinary decisions made by school administrators."<sup>117</sup> She rejected the dissent's mischaracterization of the standard as requiring a "remedy" to victims of peer harassment, and instead clarified that a recipient's response shall only be deemed deliberately indifferent

110. See *id.* at 643-44.

111. 451 U.S. 1, 17 (1981) (interpreting language in spending legislation, insisting that Congress speak with a clear voice, and allowing suits for damages only when the recipient of funds is aware of the conditions imposed by the legislation).

112. See *Davis*, 526 U.S. at 641-42.

113. See *id.* at 641-42 (noting that at the time of the event in question, school attorneys and administrators were being warned by the National School Boards Association, that peer sexual harassment could trigger liability under Title IX). The Court did not find that the warnings constituted actual congressional notice, but found that they supported the Court's reading of Title IX. *Id.* (Citing NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, SEXUAL HARASSMENT IN THE SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS 45 (rev. ed. 1993) (warning schools of liability for student-on-student sexual harassment if they have actual knowledge or a district employee has been notified)).

114. See, e.g., 34 C.F.R. §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a)(2) (1998).

115. *Davis*, 526 U.S. 629, 643-44 (1999) (noting, additionally, that common law places schools on notice that they may be held responsible for failing to protect students from a third party's tortious conduct (citing RESTATEMENT (SECOND) OF TORTS § 320, and *cmt. a* (1965))). See, e.g., *Brahatcek v. Millard Sch. Dist.*, 273 N.W.2d 680, 688 (Neb. 1979); *McLeod v. Grant County Sch. Dist.*, 255 P.2d 360, 362-63 (Wash. Sup. Ct. 1953).

116. See *Davis*, 526 U.S. at 641-42 (citing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992) (concluding that "*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the Statute")).

117. See *id.* at 648 (stressing that courts should continue to allow schools discretion in formulating proper disciplinary measures (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43, n.9 (1985))).



if it is “clearly unreasonable in light of the known circumstances.”<sup>118</sup> Furthermore, Justice O’Connor criticized the dissent’s assumption that by providing relief under Title IX, situations will occur in which victims will demand specific actions at remedial levels and threaten suits if they are not followed.<sup>119</sup>

Last, Justice O’Connor focused on the level of severity to which the conduct in question must rise before a recipient will be held liable.<sup>120</sup> In determining this, she concentrated her analysis on the terms of Title IX in order to adhere to its objectives.<sup>121</sup> Justice O’Connor contended that the Statute functions not only to protect students from discrimination, but to ensure they are not excluded from participating in, or denied the benefits of programs or activities offered by an educational institution.<sup>122</sup> Thus, in order to trigger a claim for damages, the behavior in question must be so overt and offensive that it physically deprives, or “so undermines and detracts from the victims’ educational experience” that it effectively causes a denial of equal access to the recipient’s resources.<sup>123</sup>

Justice O’Connor did not provide a bright line demarcation of what constitutes actionable peer harassment, because in each case the surrounding circumstances must factor into determining if the acts are so severe, pervasive, and objectively offensive that they deny a victim equal access.<sup>124</sup> However, in drawing her conclusion, Justice O’Connor admonished the dissent for failing to appreciate the limits set by the majority, which should not be erroneously interpreted as providing damages for simple name-calling and playground teasing.<sup>125</sup>

After establishing the standard necessary to bring a claim for student-on-student sexual harassment under Title IX, Justice O’Connor turned to the facts at issue in *Davis*.<sup>126</sup> She determined that Petitioner sufficiently demonstrated a causal link between the misconduct of G.F. and the severe decline in LaShonda’s grades to provide the requisite showing of a potential denial of equal access to

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118. *See id.* at 648-49.

119. *See id.* at 648 (Kennedy, J., dissenting).

120. *See id.* at 650.

121. *See supra* Part II-A (noting the terms of 20 U.S.C. § 1681(a) and discussing the legislative intent).

122. *See Davis*, 526 U.S. 629, 650 (1999) (commenting that Title IX is not merely prohibitory towards the actions of the recipient, rather it also demands a recipient shield a member of the protected class from exclusion resulting from another’s discriminatory conduct).

123. *See id.* at 649-51 (noting that in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998) and *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 50, 74-75 (1992), the Court “previously determined that ‘sexual harassment’ is ‘discrimination’ in the school context under Title IX,” thus, the focus in determining liability should be on the severity).

124. *See id.* at 650-51 (citing *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 82 (1998) (determining that whether gender-oriented conduct rises to the level of actionable harassment depends on the “constellation of surrounding circumstances, expectations, and relationships,” including but not limited to, the ages of the students, the egregiousness of the conduct, and whether recipients flagrantly ignored notification)).

125. *See id.* at 652 (noting that instances rising to the level necessary to obtain relief will be rare and advising courts not to be misled by the dissent’s portrayal of the majority’s standard as one that will lead to the imposition of sweeping liability by the courts).

126. *See id.* at 653.

survive dismissal.<sup>127</sup> In remanding *Davis*, Justice O'Connor directed the court to be cautious in applying the standard set by the majority, recognizing its limits when examining whether the pervasiveness, severity of the actions, and the recipients' alleged knowledge and deliberate indifference entitled LaShonda to relief.<sup>128</sup>

### *B. The Dissent*

In the Court's only dissent, Justice Kennedy faulted the majority's decision for effectively permitting the federal government to intrude and set policy in an area traditionally controlled by states.<sup>129</sup> He painted the ruling as a threat to the safeguards erected in the federal system due to judicially imposed liability, rather than a victory for a student in a situation where she is continuously subjected to severe harassment while school officials turn a deaf ear to pleas for help.<sup>130</sup>

Justice Kennedy grounded his justification against liability on the notice requirement of Spending Clause legislation.<sup>131</sup> Unlike the majority who found constructive notice from the surrounding regulations and warnings, Justice Kennedy did not believe the recipients should have been liable because "Congress has not specifically spoken" on the issue.<sup>132</sup> After reexamining the language of Title IX, Justice Kennedy established that nowhere in the terms are recipients given clear unambiguous notice of liability for discriminatory acts of their

127. *See id.* at 654 (examining the allegations in the complaint, Justice O'Connor determined that the Court could not say without a doubt the Petitioner was entitled to relief because the case at the lower levels was dismissed before either side had a chance to present their case, thus, whether Petitioner is entitled to relief under the alleged facts must be determined on remand).

128. *See Davis*, 526 U.S. 629, 654 (1999) (noting that the Court has decided the issue whether claimant was permitted to offer evidence in support of her claim and, now that liability has been established it is important that after further proceedings the decision be consistent with the criteria set by the majority).

129. *See id.* at 655 (Kennedy, J., dissenting) (predicting that the Nation's schools will be subjected to ever-present federal regulators dictating discipline and standards of conduct in one of the most traditional areas of state affairs).

130. *See id.* (Kennedy, J., dissenting) (noting that, because the scope of potential liability would be one of the most weighty considerations for a school in deciding whether to accept funding, liability must be clearly stated not implied).

131. *See id.* (Kennedy, J., dissenting) (arguing that when the statute at issue is pursuant to the Spending Clause there must be clear and unambiguous notice (quoting *Pennhurst St. Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (holding "[t]here can, of course, be no knowing acceptance [of the terms of a putative contract] if a State is unaware of the conditions [imposed by legislation] or is unable to ascertain what is expected of it"))).

132. *See id.* at 656 (Kennedy, J., dissenting) (citing *Gebser*, 524 U.S. 274, 284 (1998)). *See also* *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (noting that a clearly established safeguard against excessive federal intrusion into state affairs is that clear notice be given of conditions attached to contracts for federal funds).

students.<sup>133</sup> He proposed that the primary intent of Title IX is to prevent the unfair disbursement of federal funds, not to provide relief to victims of discrimination.<sup>134</sup>

Next, Justice Kennedy provided a strict translation of the language of section 1681(a) of Title IX, which states that a violation occurs if one is “subjected to discrimination under any education program or activity.”<sup>135</sup> Justice Kennedy relied upon numerous dictionaries to support his translation, that to constitute “under,” authorization of an action is required.<sup>136</sup> In rejecting liability, he continued to focus on the actions of the third party, which the majority clearly stated did not create the liability, rather it was the school’s inaction in attempting to prohibit discrimination.<sup>137</sup>

Justice Kennedy’s main concern was that schools will be bombarded with lawsuits, due to what he characterized as an open-ended standard set by the majority.<sup>138</sup> He warned that although in the end a court may find for the school, the cost of defending frivolous actions will threaten and detract from the already scarce resources of school districts.<sup>139</sup> Justice Kennedy attacked the majority for setting an arbitrary line to determine when a school has a sufficient degree of control over the students in order to warrant liability.<sup>140</sup>

Justice Kennedy acknowledged that in 1972, when Title IX was enacted, the concept of sexual-harassment as discrimination was not recognized.<sup>141</sup> Despite

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133. See *id.* at 657 (Kennedy, J., dissenting) (noting that the majority also acknowledges that the language of Title IX only prohibits misconduct by grant recipients, not third parties). See also *supra* Part II-A (discussing the terms of Title IX).

134. See *Davis*, 526 U.S. at 658 (Kennedy, J., dissenting) (citing *Gebser*, 524 U.S. at 292). See also *supra* Part II-A and B (discussing the developments of Title IX causes of action premised on liability imposed by Title VI and VII).

135. *Davis*, 526 U.S. at 659 (Kennedy, J., dissenting).

136. *Id.* (Kennedy, J., dissenting) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1981) (defining “under” as “required by, in accordance with, bound by”); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1395 (1981) (defining “under” as “[w]ith the authorization of, attested by, by virtue of”); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2059 (2d ed. 1987) (defining “under” as “authorized, warranted, or attested by” or “in accordance with”); 43 WORDS AND PHRASES 149-52 (1969) (defining “under” as, “in accordance with” or “in conformity with”)). See *id.* at 659-60 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991)).

137. See *id.* at 658-59 (arguing that the school “subjects” its students to discrimination when the school knows of harassment and fails to respond in a manner that is clearly inappropriate).

138. See *id.* at 657 (Kennedy, J., dissenting) (criticizing the standard set by the majority and analogizing its actions to the building of a fence made of little sticks when one is aware of an impending avalanche).

139. *Id.* at 657-58 (Kennedy, J., dissenting).

140. See *Davis*, 526 U.S. 629, 657 (1999) (Kennedy, J., dissenting). See also Jeff Millar, *Sexual Harassment Case Muddies Waters For School Boards*, HOUSTON CHRON., May 27, 1999, at 2 (criticizing Justice O’Connor’s criterion for actionable harassment for lacking a clear unit of measure, and characterizing G.F.’s behavior as outright cruel and overt teasing that should have been stopped by a school official, not transformed into a matter of sexual harassment).

141. See *id.* at 664 (Kennedy, J., dissenting) (noting that under Title IX sexual harassment had not been considered by the courts, but argues that despite recognition, there is no basis in law or fact for holding a school liable for student-on-student sexual harassment because the school lacks the necessary control over students to justify liability). See generally C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*:

this, he found no basis for extending Title IX coverage by recognizing a causal link between a school's inaction in disciplinary measures and the misconduct of a third-party that is so severe that it effectively denies one equal access to a school's programs.<sup>142</sup> Justice Kennedy supported his position by determining that, although schools are rife with inappropriate social behavior, they are not granted the amount of control necessary to remedy a victim's complaints because their disciplinary actions are too constrained by state and federal laws.<sup>143</sup> Additionally, he found no justification in holding schools liable for behavior he contended cannot be labeled as sexual harassment.<sup>144</sup> Rather, Justice Kennedy believed the conduct the majority referred to as actionable peer harassment should have been seen for what he viewed it: a normal adolescent process where minors struggle to express emerging sexual identities.<sup>145</sup>

Justice Kennedy's dissent concluded by focusing on the impracticability of forcing schools to control the acts of thousands of immature students,<sup>146</sup> and he stressed conservation because schools "lack the resources even to deal with serious problems of violence and are already overwhelmed with disciplinary problems of all kinds."<sup>147</sup> From this statement and the dissent's overall tone, logically, one may infer that Justice Kennedy does not believe sexual harassment is a serious problem in society. The reason for this, possibly, may be that he has never been placed in a situation in which he is the target of sexual harassment, thus making it difficult for him to understand why a school's deliberate indifference constitutes an egregious discriminatory act against a victim.

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A CASE OF SEX DISCRIMINATION 59-72 (1979).

142. See *Davis*, 526 U.S. at 665 (Kennedy, J., dissenting).

143. See *id.* at 664-66 (Kennedy, J., dissenting). Justice Kennedy claimed that schools are too limited in their disciplinary actions to justify liability because, while attempting to remedy harassment, they also have an obligation to fulfill the harasser's fundamental right to education by providing alternative programs if suspension is necessary. *Id.* at 664 (Kennedy, J., dissenting) (citing *Phillip Leon M. v. Greenbrier County Bd. Of Educ.*, 484 S.E.2d 909 (W. Va. 1996)). Further, the dissent demands that the notice and hearing requirements under the due process clause constrict the disciplinary actions. *Id.* at 665 (Kennedy, J., dissenting) (quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975)). Lastly, he asserts that the liability is impractical because of the requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-91 (1994), which places strict limits on schools when disciplining a student with behavioral disorders. *Davis*, 526 U.S. at 665 (Kennedy, J., dissenting).

144. *Id.* at 674 (Kennedy, J., dissenting).

145. See *id.* at 675 (Kennedy, J., dissenting). For example, Justice Kennedy noted, "a teenager's romantic overtures to a classmate (even when persistent and unwelcome) are an inescapable part of adolescence." *Id.* (Kennedy, J., dissenting).

146. See *id.* at 680-81 (Kennedy, J., dissenting) (discussing the possibility of "limitless liability" facing schools).

147. *Id.* at 666 (Kennedy, J., dissenting).

## V. IMPACT OF THE COURT'S DECISION

### A. *Judicial Impact: Responsibly Maintaining The High Standard Set In Davis*

#### 1. Applying the Standard to the Case at Bar

It is important to reiterate that the instances of peer harassment the Court referenced from the *Davis* Complaint, as illustrations to assist in developing the boundaries for the deliberately indifferent standard, remain as mere allegations.<sup>148</sup> On remand, the merits of *Davis*' case will be examined for the first time. This will require *Davis* to offer proof to substantiate her claims, and for the first time, the school will have the opportunity to air its version of the events to a jury,<sup>149</sup> providing that the Monroe County School Board does not enter into a settlement agreement following its loss in the battle over the claim's permissibility.

The allegations in the Complaint<sup>150</sup> are egregious and, if accurate, many school administrators across the Nation hope the parties settle. A settlement will prevent establishing a precedent for the new cause of action through a suit that negatively implicates a school board.<sup>151</sup> Ideally, administrators would favor the precedent-setting case to be one in which a court has the opportunity, based on the facts presented, to rule in favor of a school and find that the actions taken by the administrators involved, however slight, adequately fulfill the deliberately indifferent standard.<sup>152</sup>

Assuming the parties will proceed, based on the fact that neither conceded to

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148. See *id.* at 650-54 (remanding the case to the Eleventh Circuit after determining that Petitioner's claim was actionable).

149. See Jonathan Ringel, *Little Girl's Case Hits the Big Time*, FULTON COUNTY DAILY REPORT, Jan. 11, 1999, at 1 (noting that few facts have been established in the case, due to its dismissal for failure to state a claim before the school filed a response, and quoting *Davis*' lawyer's statement that schools "aren't expected to be magicians" in ceasing sexual harassment).

150. See *supra* Part III (recounting the facts asserted in *Davis*' Complaint).

151. See Larry Copeland, *Court Tackles Harassment in Schools*, USA TODAY, Jan. 11, 1999, at 1A (noting the Monroe County School Superintendent's comments disputing *Davis*' claim that she repeatedly complained to the teacher, principal, and board, and his statement that the school has not had a chance to tell its version of the events).

152. E.g., *Brzonkala v. Va. Polytechnic Inst. & State Univ.* 132 F.3d 949 (4th Cir. 1997), *aff'd*, 1200 S. Ct. 1740 (2000). In this case, petitioner filed suit against the University based on a hostile environment claim due to its handling of her sexual assault claim against two football players. *Id.* at 953. After reviewing her claim, the University's judicial panel suspended one of the men for a summer for using abusive language and never brought the second individual up on formal charges. *Id.* at 955. Following the Court's ruling in *Davis*, an attorney for *Brzonkala* said she would file an amended complaint in district court. Sara Hebel, *Supreme Court Says Colleges May Be Liable for Student-on-Student Harassment*, CHRON. OF HIGHER EDUC., June 4, 1999, at A40.

a settlement while on the long road to the Supreme Court, the court must act cautiously to ensure that “in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victim the equal access to education that Title IX is designed to protect.”<sup>153</sup>

## 2. Cautious Development of Standards of School Liability for Peer Sexual Harassment

Undoubtedly, the most immediate impact of *Davis* will be upon the efforts of schools to prevent sexual harassment by adopting written policies.<sup>154</sup> The daunting challenge educators will face in creating policies will be developing a clear and functional definition that determines, beyond the facts presented in *Davis*, what constitutes peer sexual harassment. By doing so, educators will be able to provide the courts with a reference point for determining liability, rather than the definition being developed by juries on an ad hoc basis.

Despite school officials making concerted efforts to prevent peer sexual harassment, it is inevitable in our litigious society that numerous instances will arise in which a victim’s parents will seek legal redress due to their disagreement with the disciplinary actions of the school.<sup>155</sup> Thus, the dissent’s concerns<sup>156</sup> are legitimately worrisome. In setting the boundaries for violations under the new Title IX cause of action, it is important for all courts to strongly convey that the threshold for proving deliberate indifference is extremely high, and liability should be limited to instances in which a school administrator wholly fails to address repeated complaints of harassment, not when a targeted individual’s parents are unsatisfied with the administrator’s disciplinary decision.<sup>157</sup>

153. *Davis*, 526 U.S. 629, 652 (1999) (noting that it is important that courts adhere to the majority’s instructions and dismiss all but the most egregious claims).

154. See Emmalena K. Quesada, Note, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1059-62 (1998) (noting that written policies are important in preventing liability because, in determining whether a school’s response is adequate, courts look for evidence of an effective, publicized policy and a complaint procedure (quoting JOHN F. LEWIS & SUSAN C. HASTINGS, *SEXUAL HARASSMENT IN EDUCATION* 20 (2d ed. 1994))).

155. See Christopher T. Nixon, Note, *Civil Rights Law-Title IX-School Liability for Student-to-Student Sexual Harassment*, *Davis v. Monroe County Board of Education*, 74 F.3d 1186 (11th Cir. 1996), 64 TENN. L. REV. 237, 257 (1996) (noting that although the holding significantly increases school liability, it will also have positive effects by helping to reduce the occurrences of sexual harassment because victims will more likely come forward and report unacceptable harassment to school officials).

156. See *Davis*, 526 U.S. at 654-86 (1999) (Kennedy, J., dissenting).

157. See *id.* at 650-52. See also *supra*, Part IV-A (discussing the majority’s contemplations for the applicability of liability under Title IX).

Courts face the difficult task of setting a meaningful framework that allows for immediate dismissal, short of placing an unnecessary burden on a school, when a claim fails to reach the requisite level of severity.<sup>158</sup> The majority did not mandate prevention; however, it emphasized merely that the school's response not be deliberately indifferent. Thus, the requisite response is lesser than the common legal standard of reasonableness.<sup>159</sup> This lower standard allows for flexibility. Therefore, courts should strive to prohibit misapplication of the standard which could lead to circumventing an administrator's sound professional judgment when resolving disputes.<sup>160</sup>

Furthermore, the majority repeatedly referred to the conduct of "administrators" and the "school board" as the source of potential liability.<sup>161</sup> Thus, in determining whether a school had the requisite "actual knowledge" of the harassment, courts should place the burden on the proponent to prove a school administrator had actual knowledge; not merely a teacher, bus driver, or schoolyard supervisor.<sup>162</sup>

### B. *The Immediate Impact Of Davis On Schools*

In the past, many schools responded to complaints of harassment by suggesting that the victim "did something" to provoke the unacceptable behavior, or shrugged off the complaint as evidence that "boys will be boys."<sup>163</sup> The decision in *Davis* forces schools to proactively respond to the problem of peer sexual harassment in American schools.<sup>164</sup> Under the threat of monetary damages, schools will expand their harassment-prevention policies to specifically include training programs for teachers on how to recognize peer harassment, counsel

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158. See Ringel, *supra* note 149, at 1 (noting criticisms of Phillip Hartley, whose law firm represents about 100 school boards in Georgia, which state that "[i]f the school loses . . . '[i]t could have a profound impact on school systems,' and on state budgets, since 'obviously we're talking about taxpayers being liable.'").

159. See Savage, *supra* note 63, at A1 (noting comments by a California Department of Education spokesman, conveying his view that California does not have to worry about the floodgates of litigation opening because procedures are already in place in its schools; rather, the decision merely sends a message to schools lacking policies, that no longer will they be permitted to ignore sexual harassment).

160. See Quesada, *supra* note 154, at 1060-62 (noting that appropriate policies are those that are clear and understandable by students and school officials in explaining what constitutes sexual harassment, dictating how the conduct should be addressed, and establishing an open forum for complaints).

161. *Davis*, 526 U.S. 629 *passim* (1999).

162. Lisa A. Brown, *New Harassment Ruling Can Work*, NAT'L L.J., June 14, 1999, at A23 (noting that drawing the line and requiring actual knowledge by school administrators will minimize the liability risks the dissent is concerned with, while furthering the majority's goal of protecting victims subjected to severe harassment when a school fails to offer any solutions).

163. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1565 (N.D. Cal. 1993), *reconsidered*, 949 F. Supp. 1415 (N.D. Cal. 1996).

164. See Lisa A. Brown, *The School of Deliberate Indifference a Look at Student-on-Student Sexual Harassment*, 15 TEX. LAW. 22, Aug. 9, 1999, at 30 (noting that the familiar strategies for preventing disputes are educating and counseling students on proper behavior, involving parents, documenting communications and discipline attempts, and consequentially increasing punishments for repeat offenders).

victims, and develop grievance procedures that are sensitive to the situation.<sup>165</sup>

The Court's express recognition that there is a need to combat peer harassment because it is a serious problem will function to help eradicate the perpetuation of harassment through education and by heightening awareness.<sup>166</sup> At some period in a student's schooling one experiences peer sexual harassment, either through passive observation, active participation, or as the unfortunate target.<sup>167</sup> Eventually, these students become tomorrow's employees, entering workplaces where employers have begun to actively address the issue due to potential liabilities.<sup>168</sup>

Logically, the decision in *Davis*, holding schools to a standard of liability similar to employers who fail to address sexual harassment, will help to lessen harassment in higher education, the workforce, and more importantly, in society as a whole.<sup>169</sup> Socializing young children to view sexual harassment as unacceptable conduct, rather than participating in it or passively observing it, will cause victims to be less reluctant to report incidents because the negative stigma it carries will slowly, and rightfully, shift to the instigator and not the victim. Addressing sexual harassment in schools when individuals are in the early stages of behavioral development helps create environments that promote respect for the sexuality of others and a more equal society.

### C. Legislative Impact

The Supreme Court's adoption of the deliberately indifferent standard sets an extremely high benchmark for victims to meet and offers less protection than the negligence standard applicable in cases addressing co-worker harassment under

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165. Interview with Bernard James, Professor of Law at Pepperdine University School of Law and Education Law and Policy Consultant, in Malibu, Cal. (Dec. 2, 1999) (commenting on the changing focus in preparing future teachers which incorporates much more than traditional academic curriculum, including how to recognize and address signs of depression, abuse, violence, and harassment).

166. See Braceras, *supra* note 60, at A26 (noting that prior to the decision in *Davis*, a victim had an array of other state administrative, civil, and criminal remedies, however, by determining inappropriate sexual behavior constitutes a federal cause of action for sex discrimination, the Court elevated such behavior above other forms of student misconduct).

167. See generally Am. Ass'n of Univ. Women Found., *supra* note 1.

168. See 42 U.S.C. §§ 2000e-2000e-17 (1994). See also *supra* Part II-A, note 39, and accompanying text (discussing the provisions of Title VII that outlaw harassment in the employment sector).

169. See Arval A. Morris, *School Board Responsibility For Student On Student Sexual Harassment: Comment On Davis v. Monroe County Board of Education*, 137 WEST'S EDUC. L. RPT. 441, 446 (October 1999) (commenting on the far reaching implications the decision in *Davis* will have in grade schools, and even more in the context of higher education where such behavior is most prevalent, reportedly accounting for 90% of all harassment claims on college and university campuses).



Title VII.<sup>170</sup> In determining that schools should be held liable for peer sexual harassment under Title IX, the Court relied upon its interpretation of the actual language of the Statute.<sup>171</sup> This interpretation substantially impacts the qualified immunity that schools historically have been afforded, because federal civil rights preempt state sovereign immunity, which protected schools in the past.<sup>172</sup>

Many, including the dissent in *Davis*, fear the Court's policy determination will cause courts to be the final arbiters of school policy in virtually any disagreement arising between students.<sup>173</sup> Yet, regulations on peer sexual harassment adopted by the Department of Education's Office of Civil Rights, while the parties were arguing *Davis* in the courts, reflect agreement with the *Davis* decision, and it is inevitable that Congress will continue to advance its policy concerns the Court's decision in *Davis* supports.<sup>174</sup> As time passes, if educators are unable to produce a functional definition for peer sexual harassment and schools and courts are left to rely on ad hoc jury decisions to define peer sexual harassment, the burden placed upon schools may unreasonably outweigh the positive protections allowed for in the *Davis* decision. Thus, it will be necessary for Congress to provide a clear definition of what actions constitute peer sexual harassment in order to reasonably restrain school liability in the court system and to assist educators in identifying and attempting to prevent peer sexual harassment.

## VI. CONCLUSION

Calling upon courts to police the behavior of students may appear drastic. Yet, the decision in *Davis* will effectively punish a school, not the harasser, for failing to take actions that promote proper behavior and work to rid schools of sexual harassment. Peer harassment is a reality to which numerous students at all levels of education are subjected, and when not confronted effectively, denies the victim equal access to education. Prior to the decision in *Davis*, many schools

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170. See, e.g., *Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 551 (5th Cir. 1997) (describing deliberate indifference as decisions or omissions that rise to the level of "intentional choice"); *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) (excluding decisions that are "merely inept, erroneous, ineffective, or negligent").

171. See *supra* Part II-A and B (comparing the two standards and discussing how peer harassment claims under Title IX, evolved from cases dealing with co-worker harassment under Title VII).

172. See Verna L. Williams & Deborah L. Brake, *When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423, 424-25 (1997) (discussing the disarray of liability in the courts prior to *Davis*, and how schools found it difficult to determine their liability for harassment because of the contradictions between emerging laws, court rulings, and the immunity schools historically were afforded in this area of the law).

173. See Lynne Bernabei, *Judicial Legislation Run Amok Court Adopts Strict Test For Harassment Liability*, LEGAL TIMES, July 12, 1999, at S31 (criticizing the Court for engaging "in the very judicial activism it has long criticized in lower courts that vigorously enforce the civil rights laws").

174. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12304 (Mar. 1997).

responsibly initiated sexual harassment policies, not waiting for the Court to mandate programs through a threat of liability.

For those schools that failed to implement harassment policies, the decision in *Davis* should not be taken lightly, as the time has come for educational institutions in our society to be pressured, if necessary, into making every effort to create atmospheres that strive to place women and men upon equal footing. Although it is unfortunate that some schools waited until they were faced with monetary liability before recognizing prevention of sexual harassment as their duty, they will no longer be allowed to lay dormant and ignore this matter.

*Davis* provides clear and unambiguous notice to schools that their duty, to strive to create an atmosphere conducive to learning, includes responding to complaints of sexual harassment and implementing preventative policies that offer solutions before damages accrue. In the immediate future, the extent of school liability will be tested in the courts. Hopefully, the concerns of the dissent will not outweigh the benefits *Davis* will produce and only schools that act deliberately indifferent will be made to suffer the consequences of liability for the serious harm they choose to inflict upon the victim.

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175. J.D. Candidate, 2001.

