Missouri Law Review

Volume 63
Issue 4 *Fall 1998*

Article 7

Fall 1998

Are Schools Liable for Student-on-Student Sexual Harassment under Title IX

Meredith M. Todd

Are Schools Liable for Student-on-Student Sexual Harassment Under Title IX?

Davis v. Monroe County Board of Education[1]

I. INTRODUCTION

Statistics show that sixty-five percent of students in grades eight through eleven believe that they are victims of peer sexual harassment.[2] Even more astonishing is that recent complaints of sexual harassment include a male high school student exposing himself to a female student[3] and students engaging in unwanted touching.[4]

These recent acts have contributed to the ongoing debate throughout the federal courts about whether a school may be held liable for monetary damages if a student sexually harasses another student while at school.[5] The majority of trial courts which have heard peer sexual harassment cases have held that a school may be liable under Title IX for failing to respond to complaints of harassment.[6] On the other hand, the Fifth Circuit has ruled that schools cannot be liable under Title IX.[7] This continuing controversy has left schools uncertain regarding their obligations to students when faced with incidents of peer sexual

---

1. 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843).

2. *Id.* at 1405 (citing American Ass'n of Univ. Women Educ. Found., *Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools* 11 (1993)).

3. Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998).

4. Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996).

5. *Compare* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir.) (holding that school district was not liable under Title IX for peer sexual harassment), *cert. denied*, 117 S. Ct. 165 (1996), *with* Doe v. Londonberry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997); *Nicole M.*, 964 F. Supp. at 1373; Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1212 (E.D. Pa. 1997); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996); *Bruneau*, 935 F. Supp. at 172; Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1199 (N.D. Iowa 1996); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (W.D. Mo. 1995); Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1460 (N.D. Cal. 1995); Davis v. Monroe County Bd. of Educ., 862 F. Supp. 363, 365 (M.D. Ga. 1994); Doe v. Petuluma City Sch. Dist., 830 F. Supp. 1560, 1563 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995), *and* Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) (holding that the school district may be liable under Title IX for peer sexual harassment).

6. *Doe*, 970 F. Supp. at 74; *Nicole M.*, 964 F. Supp. at 1373; *Collier*, 956 F. Supp. at 1212; *Wright*, 940 F. Supp. at 1419; *Bruneau*, 935 F. Supp. at 172; *Burrow*, 929 F. Supp. at 1199; *Bosley*, 904 F. Supp. at 1020; *Oona R.-S.*, 890 F. Supp. at 1460; *Davis*, 862 F. Supp at 365; *Doe*, 830 F. Supp. at 1563; *Patricia H.*, 830 F. Supp. at 1293.

7. *Rowinsky*, 80 F.3d at 1015.

harassment. The result is that some schools have even gone to the extreme of suspending six and seven year olds for kissing other students in order to avoid Title IX liability.[8]

One of the most recent decisions adding to the confusion of peer sexual harassment cases was that in *Davis v. Monroe County Board of Education*.[9] In conflict with many other courts and regulations, the Eleventh Circuit ruled in *Davis* that a school could not be held liable for failure to remedy peer sexual harassment under Title IX.[10]

II. FACTS AND HOLDING

During the 1992-1993 school year, LaShonda Davis was a fifth grade student at Hubbard Elementary School in Georgia.[11] On several occasions between December 1992 and May 1993, "G.F.," a male classmate of LaShonda's, physically and verbally sexually harassed LaShonda at school.[12] The first incident of harassment occurred on December 17, 1992 when G.F. directed vulgar language towards LaShonda while in class,[13] and then attempted to touch her breasts and genital area.[14] G.F. engaged again in similar conduct twice in January.[15] After each incident, LaShonda reported the acts to Diane Fort, her classroom teacher, and Aurelia Davis, LaShonda's mother.[16] After one of these occurrences, LaShonda's mother contacted Fort who assured her that the principal of the school, Bill Querry, had been notified of G.F.'s conduct.[17] However, no other action was taken at that time, and G.F. continued his behavior.[18]

From February through April of 1993, five additional incidents of harassment occurred while LaShonda was in school, and she reported each incident to a teacher after it occurred.[19] Overall, there were eight incidents of

---

8. *See* Katha Pollitt, *Kissing & Telling*, THE NATION, Nov. 4, 1996, at 9. School administrators suspended six year old Johnathan Prevette of North Carolina for "sexual harassment" when he kissed a girl in his class, and administrators suspended seven year old De'Andre Dearinge of New York for "sexual harassment" when he kissed a girl and tore a button off her skirt. *Id.*

9. 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843).

10. *Id.* at 1406.

11. *Id.* at 1393.

12. *Id.*

13. *Id.* G.F. allegedly told LaShonda, "I want to get in bed with you" and "I want to feel your boobs." *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Davis*, 120 F.3d at 1393. On February 3, 1993, G.F. placed a doorstop in his

alleged sexual harassment, four of which LaShonda reported to Fort, two to her gym teacher, Whit Maples, and two to her teacher Joyce Pippin.[20] Despite LaShonda notifying her teachers of the conduct, the school did little to respond to the problem.[21] For example, G.F. and LaShonda were assigned seats next to each other in Fort's classroom, and Fort did not move him away from LaShonda until three months after she was notified of G.F.'s misconduct.[22]

On May 19, 1993, LaShonda complained to her mother that she did not know how much longer she could tolerate G.F.'s behavior.[23] Davis then contacted Principal Querry who, in turn, asked Davis why LaShonda "was the only one complaining."[24] Querry also told Davis that he would "threaten the boy [G.F.] a little bit harder."[25] On the same day, G.F. was charged with sexual battery concerning these incidents, and later pled guilty to the charge.[26]

Aurelia Davis then filed suit against the Board of Education of Monroe County, Georgia (the "Board"), Charles Dumas, the superintendent of the school, and Principal Bill Querry on behalf of her daughter, LaShonda.[27] The complaint alleged that the defendants violated Section 901 of the Educational Amendments of 1972 ("Title IX")[28] by failing to prevent G.F. from sexually harassing LaShonda while they were both students at Hubbard Elementary.[29]

The United States District Court for the Middle District of Georgia dismissed the complaint for failure to state a claim upon which relief could be granted.[30] Davis then appealed the dismissal of her Title IX claim against the

---

pants and behaved in a sexually suggestive manner toward LaShonda in gym class, and LaShonda reported this to her gym teacher Whit Maples. *Id.* On February 10, 1993, and on March 1, 1993, G.F. engaged in unspecified conduct toward LaShonda again, and LaShonda reported this to Joyce Pippin and Maples, both teachers at Hubbard. *Id.* Then on April 12, 1993, while in a school hallway, G.F. rubbed his body against LaShonda in a suggestive manner and she complained to Fort about G.F.'s conduct. *Id.* The last incident occurred on May 19, 1993, when G.F. again behaved sexually toward LaShonda, and this was reported to the principal, Querry. *Id.*

20. *Id.* at 1394.

21. *Id.* at 1393.

22. *Id.*

23. Davis v. Monroe County Bd. of Educ., 862 F. Supp. 363, 365 (M.D. Ga. 1994).

24. *Id.*

25. *Id.*

26. *Id.*

27. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1392 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843).

28. 20 U.S.C. § 1681 (1994).

29. *Davis*, 120 F. 3d at 1392. The original complaint also alleges that the school violated LaShonda's due process rights under 42 U.S.C. § 1983 (1994), and that the school discriminated against LaShonda on the basis of race under 42 U.S.C. § 1981 (1994). However, the court dismissed both of these claims, and Davis did not petition the court to rehear these rulings en banc. *Davis*, 120 F.3d at 1392.

30. *Davis*, 120 F.3d at 1392.

Board.[31] A three-judge panel of the Eleventh Circuit reversed and reinstated her claim.[32] The Eleventh Circuit granted a rehearing of the panel opinion and ultimately affirmed the district court's dismissal.[33] Specifically, the court, sitting en banc, held that Title IX does not give rise to liability of school officials who fail to adequately respond to complaints of peer sexual harassment.[34]

III. LEGAL BACKGROUND

A. The Legislative History of Title IX

In 1972, Congress passed Title IX, which states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[35] The legislative history indicates Congress intended for this language to be read broadly in order to eliminate all aspects of sex discrimination in education. First, the purpose of the bill was to bridge the gap between Title VII,[36] which eliminated gender discrimination in employment, and Title VI,[37] which prohibited discrimination based on race or national origin in education but did not prohibit discrimination based on sex.[38] Like Title VI, Congress intended Title IX to "reach into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."[39] In addition, Title IX extended to the prohibition of "teachers who favor male students, and guidance counselors who discourage [students] from many careers that have limited numbers of women in higher levels of administration."[40]

---

31. *Id.* at 1392 n.3. Davis did not appeal her Title IX claim with regard to Superintendent Dumas and Principal Querry. *Id.* at 1392 n.3.

32. *Id.*

33. *Id.*

34. *Id.* at 1406.

35. 20 U.S.C. § 1681(a) (1994).

36. 42 U.S.C. § 2000e-2(a) (1994). Title VII states: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

37. 42 U.S.C. § 2000(d) (1994). Title VI states: "[N]o 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." *Id.*

38. Davis v. Monroe County Board of Education, 120 F.3d 1390, 1396 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843).

39. 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh).

40. 117 CONG. REC. 25507 (1971) (remarks of Rep. Abzug).

Second, the comments of several congressmen who favored the proposed legislation indicate the bill was to have an expansive reach.[41] Senator Bayh, the sponsor of Title IX, stated that "[Title IX] is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education,"[42] and that the impact of Title IX was to be "far reaching."[43] Because Title IX's legislative history is sparse, the Supreme Court has noted that "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."[44]

Though Congress intended Title IX to be an expansive piece of legislation, it never discussed peer sexual harassment, and it was unclear at the time Title IX was enacted whether the statute covered any other type of sexual harassment claim in the education context. [45]

B. Sexual Harassment and Title IX

In *Alexander v. Yale University,*[46] the federal courts first recognized that sexual harassment in education violated Title IX.[47] In that case, the district court stated that "it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sexual discrimination in education," and therefore, violates Title IX.[48]

Two years later, in *Cannon v. University of Chicago,*[49] the Supreme Court strengthened the district court's opinion by ruling that Title IX contains an implied private right of action despite the absence of specific language in the

---

41. *See* 117 CONG. REC. 39,526 (1971) (debate between Reps. Green & Steiger); 117 CONG. REC. 30,158-59 (1971) (remarks of Sen. McGovern).

42. Andrea Giampetro-Meyer, Shannon Browne, & Carrie Williamson, *Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in Title IX Peer Sexual Harassment Cases*, 12 WIS. WOMEN'S L.J. 301, 312 (1997) (citing 118 CONG. REC. 5806-07 (1972)).

43. 118 CONG. REC. 5808 (1972).

44. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982).

45. *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 (1997).

> When Congress enacted Title IX in 1972, sexual harassment was not yet recognized as a form of sex discrimination under Title VII . . ., which also broadly proscribes sex discrimination. The first case to recognize that sexual harassment constitutes sex discrimination under Title VII was . . . twelve years after the statute was enacted . . . . It is now axiomatic that sexual harassment violates the mandate of Title VII and Title IX.

Id. at 456 n.107.

46. 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

47. *Id.* at 4.

48. *Id.*

49. 441 U.S. 677 (1979).

statute to that effect.[50] The Court stated that the private cause of action under Title IX was "to provide individual citizens effective protection against [discriminatory] practices."[51] In *North Haven Board of Education v. Bell*,[52] the Court, as in *Cannon*,[53] noted that Title IX was patterned after Title VI, thus making it helpful to use prior interpretations of Title VI in examining Title IX claims.[54] Using this logic, in November of 1982 the Court ruled that Title IX prohibits employment discrimination in education.[55] However, neither of these cases were sexual harassment cases.

The Supreme Court heard its first case dealing with sexual harassment in education in *Franklin v. Gwinnett County Public School*.[56] In that case, the Court held that a student sexually harassed by her coach at school was entitled to monetary damages from the school district under Title IX.[57] Justice White stated that "Title IX placed on the Gwinnett County Public Schools the 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 discriminate[s] on the basis of sex.'"[58] He concluded by stating that "[this Title VII] rule should apply when a teacher sexually harasses and abuses a student."[59] With this decision, the Supreme Court verified that sexual harassment by a teacher is a viable claim under Title IX.[60] But the Court has yet to determine whether schools are liable for peer sexual harassment under the statute.

In the absence of a Supreme Court ruling, courts faced with the issue of peer sexual harassment have reached differing conclusions. Numerous district courts have ruled that schools are liable under Title IX if they fail to prevent the sexual harassment of a student by another student.[61] However, the Fifth Circuit

---

50. *Id.* at 677-78.
51. *Id.* at 704.
52. 456 U.S. 512 (1982).
53. *Cannon*, 441 U.S. at 694.
54. *See North Haven*, 456 U.S. at 529.
55. *Id.* at 530.
56. 503 U.S. 60 (1992).
57. *Id.*
58. *Id.* at 75.
59. *Id.*
60. *Id.*
61. Doe v. Londonberry Sch. Dist., 970 F. Supp. 64, 74 (D.N.H. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1373 (N.D. Cal. 1997); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1212 (E.D. Pa. 1997); Wright v. Mason City Community Sch. Dist. 940 F. Supp. 1412, 1419 (N.D. Iowa 1996); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 172 (N.D.N.Y. 1996); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1199 (N.D. Iowa 1996); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (W.D. Mo. 1995); Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1460 (N.D. Cal. 1995); Doe v. Petuluma City Sch. Dist., 830 F. Supp. 1560, 1563 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal.

and now the Eleventh Circuit have both ruled that plaintiffs have no cause of action against a school under Title IX.[62]

In *Rowinsky v. Bryan Independent School District*,[63] the mother of two children filed suit against the school district when other students continually sexually harassed her two daughters on a school bus.[64] The Fifth Circuit held that the school district could not be liable for peer sexual harassment under Title IX, unless

> [the] plaintiff [can] demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.[65]

In other words, the school district could be liable under Title IX only if the school itself discriminated on the basis of sex, and it could not be held liable for third party sexual harassment.[66]

On the other hand, some district courts have taken a more lenient approach to determining liability under Title IX. In *Bosley v. Kearney R-1 School District*,[67] the District Court for the Western District of Missouri developed the

---

1993).

62. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1401 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

63. *Rowinsky*, 80 F.3d 1006.

64. *Id.* at 1008-09.

65. *Id.* at 1016.

66. *Id.* at 1016.

67. 904 F. Supp. 1006 (W.D. Mo. 1995). Following a jury verdict for the plaintiff, the court granted judgment as a matter of law to the district because there was insufficient evidence to support the jury's finding that the school "intentionally treated [the plaintiff] differently than other students because of her sex . . . ." Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 780 (8th Cir. 1998). On appeal, the Eighth Circuit affirmed the district court's decision, but stated:

> We need not and do not determine whether public school districts or public school officials may be held liable pursuant to Title IX for their failure to prevent or remedy student-on-student sexual harassment. We assume without deciding, for the purposes of this case only, that a school district may be held liable under Title IX for such harassment. We therefore need not and do not determine what elements a plaintiff must prove in order to hold a school district liable in a Title IX student-on-student sexual harassment claim.

Id. at 779.

following test:

> The elements of a claim against a school district for student-on-student sexual harassment in any educational program or activity receiving federal financial assistance are: (1) the plaintiff was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment occurred during the plaintiff's participation in an educational program or activity receiving federal financial assistance; and (4) the school district knew of the harassment and intentionally failed to take remedial action.[68]

The court developed this test by following Title VII standards already perfected by the Supreme Court.[69] The district court held that the "standards developed under Title VII to protect employees from sex discrimination by employers are adaptable to protect persons participating in federally supported educational programs from sex discrimination by the educational institution receiving federal financial aid."[70] The court reasoned that the Supreme Court's decision in *Franklin* supported the use of Title VII standards in enforcing the anti-discrimination provisions of Title IX.[71] Therefore, based on the test above, the court denied the school's motion for summary judgment and held that a victim of peer sexual harassment had a valid claim against the school under Title IX.[72]

The District Court for the Northern District of California also adopted a similar test in *Doe v. Petaluma*.[73] However, this court constructed its elements based strictly on Title VII standards,[74] determining that the school could be held liable not only if the school knew of the harassment, but also if it should have known of the harassment.[75]

---

68. *Bosley*, 904 F. Supp. at 1023.

69. *Id.* at 1022. The elements of a Title VII hostile environment claim are: (1) the plaintiff belongs to a protected group; (2) the plaintiff was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) defendant knew or should have known of the harassment and failed to take proper remedial action. *Id.*

70. *Id.*

71. *Id.* at 1021 (citing Franklin v. Gwinnett County Public Sch., 503 U.S. 60 (1992)).

72. *See id.*

73. 949 F. Supp. 1415 (N.D. Cal. 1996).

> [T]he elements which Plaintiff must prove are that Plaintiff was subjected to unwelcome harassment based on her gender, that the harassment was so severe or pervasive as to create a hostile educational environment, and that the Defendants knew, or should in the exercise of their duties have known, of the hostile environment and failed to take prompt and appropriate remedial action.

Id. at 1427.

74. *Id.*

75. *Id.*

Not all courts have looked to case law to assist them in their rulings on peer sexual harassment. Some courts faced with the issue have looked to the policy of the Office for Civil Rights of the U.S. Department of Education (OCR) for guidance.[76]

C. Department of Education Interpretation of Title IX and Peer Sexual Harassment

The OCR is the primary administrative agency with the power to enforce the provisions of Title IX.[77] Prior to 1996, the OCR had no official guidelines regarding peer sexual harassment. However, due to the increased debate over peer sexual harassment, it recently issued guidelines for schools to follow.[78]

In 1996, the OCR created guidelines entitled "Sexual Harassment Guidance: Peer Sexual Harassment" (Guidance) to assist educational institutions in investigating and resolving claims of sexual harassment.[79] The Guidance was issued as a temporary policy outline after a finding that "[p]eer sexual harassment is a form of prohibited sex discrimination where the harassing

---

76. *See* Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1381 (N.D. Cal. 1997); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1213 (E.D. Pa. 1998).

77. The OCR's jurisdiction over sexual harassment is established by Section 106.31(b) of the Title IX regulations, which provides in relevant part:

> (b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> Provide different aid, benefits, or services or provide aid, benefits or services in a different manner;
>
> Deny any person any such aid, benefit, or service;
>
> Subject any person to separate or different rules of behavior, sanctions, or other treatment;
>
> Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;
>
> Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
>
> Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b) (1997).

78. Williams & Brake, *supra* note 44, at 439.

79. 61 Fed. Reg. 52,175 (1996).

conduct creates a hostile environment."[80] The Guidance also stated:

> A school will be liable for the conduct of its students that creates a sexually hostile environment where (i) a hostile environment exists, (ii) the school knows ("has notice") of the harassment, and (iii) the school fails to take immediate and appropriate steps to remedy it. Under such circumstances, a school's failure to respond to the existence of a hostile environment within it's own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.[81]

After receiving numerous comments regarding this policy outline, the OCR essentially adopted this same language in its final policy guidelines on March 13, 1997.[82] One significant change that the OCR made to the policy was to change the standard that the school "knows" of the harassment to "the school knows or should have known of the harassment."[83]

Although the OCR now clarifies that schools are liable for peer sexual harassment, the Eleventh Circuit's decision in the instant case shows that courts continue to be divided about whether schools may be held liable under Title IX.

IV. INSTANT DECISION

A. The Majority

In *Davis v. Monroe County Board of Education*,[84] the majority concluded that Title IX does not cover claims against school boards based on school officials' failure to stop peer sexual harassment.[85] The court based this finding

---

80. *Id.*

81. *Id.* at 52,176.

82. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Final Policy Guidance March 13, 1997). The exact language of the final policy is that a school will be liable for peer sexual harassment if: "(i) a hostile environment exists in the school's programs or activities; (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action." *Id.* at 12,039.

83. *Id.* Prior to the adoption of this policy in 1996, only OCR Letters of Finding were issued regarding the OCR's position on peer sexual harassment, and some courts were able to ignore the letters by finding that they "should be accorded little weight." Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996).

84. 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843).

85. *Id.* at 1406.

on the conclusion that Congress did not clearly condition the receipt of federal funding on the school's acceptance of the responsibility of remedying peer sexual harassment.[86]

The court first looked at the legislative history of Title IX and determined that Congress did not discuss peer sexual harassment when they enacted the statute.[87] It further determined that Congress enacted Title IX under the power of the Spending Clause of Article I.[88] Therefore, based on a previous Supreme Court ruling,[89] the court found that Congress is required to "give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding."[90]

The court continued its analysis by considering whether or not the school was given unambiguous notice that it could be held liable for failing to stop G.F. from harassing LaShonda.[91] The court first noted that neither the Supreme Court nor Congress have taken any action that would place schools on notice of the potential liability they may face for failing to prevent peer sexual harassment.[92] The court then mentioned the OCR policy guidelines, but quickly determined that they were issued after the alleged incident with LaShonda and consequently provided no notice to the school.[93]

The court also showed some concern that LaShonda's complaint suggested the only way a school may avoid liability is to immediately expel or suspend the accused student.[94] The court noted that this would create a "Hobson's Choice" where if the school does not suspend the student, the alleged victim may sue them under Title IX.[95] On the other hand, if the school suspends the student, the suspended student may sue, "alleging that the official acted out of bias—out of fear of a lawsuit."[96] Based on statistics, the court noted that a substantial number of lawsuits could be brought if schools were exposed to liability under Title IX for peer sexual harassment.[97] Because this liability may substantially affect the school's decision to accept federal funding or not, the court concluded that without clear unambiguous notice, the school cannot be held liable for peer sexual harassment under Title IX.[98]

---

86. *Id.*
87. *Id.* at 1396-97.
88. *Id.* at 1398.
89. Pennhurst v. Halderman, 451 U.S. 1, 17 (1981).
90. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1399 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843).
91. *Id.*
92. *Id.* at 1400-01.
93. *Id.* at 1404 n.23.
94. *Id.* at 1402.
95. *Id.*
96. *Id.*
97. *Id.* at 1405.
98. *Id.*

B. The Dissent

The dissent criticized the majority's opinion because "the majority ignores the plain meaning of Title IX, as well as its spirit and purpose."[99] The dissent argued there was no ambiguity in the language of Title IX and that, based on the plain meaning of the statute, a school could be liable for failure to prevent peer sexual harassment.[100] The dissent determined that sexual harassment is a form of sex discrimination and that the identity of the perpetrator, whether it was a school employee or a student, is immaterial based on the language of the statute. Thus, Monroe County Schools could be held liable for peer sexual harassment under Title IX.[101]

The dissent then turned its attention to the legislative history of the statute, finding that the lack of peer sexual harassment discussions in congressional debates does not mean it was not within the broad intent of Congress to include it in the statute.[102] The dissent pointed out that actions such as teacher-student sexual harassment are valid Title IX claims after the Supreme Court's decision in *Franklin*, and like peer sexual harassment, Congress never debated this issue prior to the enactment of the statute.[103]

Furthermore, the dissent argued the school had sufficient notice of liability under *Franklin*,[104] where the Supreme Court ruled that "the notice requirement for damages actions under the Spending Clause in Title IX cases is satisfied where the alleged violation was intentional."[105] The dissent further noted that Monroe County Schools intentionally discriminated against LaShonda when it knowingly allowed G.F. to continue his behavior.[106] In addition, the dissent advocated that Title VII standards should be applied to Title IX claims, thus extending sexual harassment liability for schools.[107]

Based on the arguments above, the dissent concluded that LaShonda had a valid Title IX claim against the Monroe County School Board because of the school's failure to remedy a sexually hostile environment.[108]

V. COMMENT

The majority's decision in *Davis*, finding that schools are not liable for peer sexual harassment under Title IX, is flawed because the majority fails to take

---

99. *Id.* at 1412 (Barkett, J., dissenting).
100. *Id.*
101. *Id.*
102. *Davis*, 120 F.3d at 1413 (Barkett, J., dissenting).
103. *Id.* at 1413-14.
104. *Id.* at 1414.
105. *Id.*
106. *Id.*
107. *Id.* at 1415-19.
108. *Id.* at 1419.

proper account of the Supreme Court's decision in *Franklin* and the Guidance recently issued by the OCR.[109]

The majority's main argument to restrict liability was that schools were not unambiguously informed of the potential liability.[110] The majority argued that the schools were not given the opportunity to choose between accepting federal funding and potential liability or not accepting federal funds and avoiding potential Title IX liability.[111] Therefore, the court found that the school could not be held liable.[112] However, the court failed to look properly at *Franklin* as giving notice to schools of potential liability.[113]

In *Franklin*, the Supreme Court held that where the discrimination alleged to have violated Title IX is intentional, the "notice problem does not arise."[114] The majority concedes this point, but states that the school's failure to remedy peer sexual harassment is not intentional discrimination under Title IX.[115] In so concluding, the court refused to use Title VII standards to assist in the interpretation of Title IX cases as the Supreme Court did in *Franklin*.[116] If the court had followed the Supreme Court's lead and recognized the use of Title VII standards, it would have concluded, as many Title VII employment discrimination cases have, that failure to take prompt action after being notified of sexual harassment by peers is intentional discrimination.[117] Thus, the school was sufficiently notified of the potential liability for peer sexual harassment.

The court's decision is also flawed because it failed to consider the effect the OCR regulations will have on schools which are currently faced with sexual harassment issues. Since March 13, 1997, when the OCR issued its final guidelines concerning peer sexual harassment, schools have been unambiguously notified of their potential liability under Title IX.[118]

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[119] the Supreme Court held that agency interpretations of statutes deserve a certain degree of deference from the court.[120] The justices held that when a court is interpreting a statute and Congress' intent is ambiguous,[121] then the courts

---

109. *Id.* at 1399-1404.
110. *Id.* at 1406.
111. *Id.*
112. *Id.*
113. *Davis*, 120 F.3d at 1399-1401.
114. *Id.* at 1399.
115. *Id.* at 1401.
116. *Id.* at 1400 n.13.
117. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n., 51 F.3d 591, 593 (5th Cir. 1995); Nichols v. Frank, 42 F.3d 503, 508 (9th Cir. 1994); Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1009 (7th Cir. 1994); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988).
118. *See supra* note 83.
119. 467 U.S. 837 (1984).
120. *Id.* at 844.
121. *Id.* at 842-43.

should defer to agency regulations "unless they are arbitrary, capricious, or manifestly contrary to the statute."[122]

Given this ruling, a court would have to determine that the plain meaning of Title IX answers the question of a school's liability for peer sexual harassment to avoid the use of the OCR's guidelines. As stated in the dissenting opinion, the plain meaning of the statute favors the interpretation that would hold a school liable for student to student sexual harassment.[123]

Furthermore, if a court ruled that the plain meaning of the statute does not indicate Congress' intent with respect to peer sexual harassment, the court would need to look to the legislative history to determine that intent. As both the majority and dissent discuss, Congress left no clear directive on the issue of peer sexual harassment when enacting Title IX.[124] Therefore, the *Chevron* standard applies in peer sexual harassment cases, and a court must rule that the OCR guidelines are "manifestly contrary" to Title IX in order to avoid finding a school liable.[125]

Given the Supreme Court decisions regarding Title IX, it would be difficult to find that peer sexual harassment is contrary to the statute. In *Franklin v. Gwinnett County Public Schools*,[126] the Court used Title VII principles to resolve a Title IX claim,[127] and found that the Title VII principle expressed in *Meritor Savings Bank v. Vinson*[128] should be extended to Title IX cases when a teacher sexually harasses a student.[129] It follows naturally then that applying Title VII interpretations to Title IX cases cannot be "manifestly contrary" to the intent of Congress. Therefore, when courts find that employer liability for failing to remedy a hostile environment created by co-workers is not contrary to the intent of Congress,[130] courts should then decide Title IX cases in a consistent manner.

---

122. *Id.* at 844.

123. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1412 (11th Cir. 1997) (Barkett, J., dissenting), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843). Judge Barkett recognized: "It is undisputed that the Monroe County School System is a recipient of federal financial assistance . . ., [and] that hostile environment sexual harassment is a form of intentional discrimination which exposes one sex to disadvantageous terms or conditions to which members of the other sex are not exposed." *Id.*

124. *Id.* at 1397, 1413.

125. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

126. 503 U.S. 60 (1992).

127. *Id.* at 75.

128. 477 U.S. 57, 64 (1986).

129. *Franklin*, 503 U.S. at 75.

130. Harris v. L & L Wings, Inc., 132 F. 3d 978, 981-82 (4th Cir. 1997) (holding employer liable for monetary damages under Title VII for failure to remedy sexual harassment by co-workers). *See also* Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340, 343 (8th Cir. 1992) (holding that an employer must remedy co-worker sexual harassment to avoid Title VII liability).

Because peer sexual harassment cannot be contrary to the intent of Congress, a court faced with this issue should defer to the OCR policy guidelines for guidance.[131] Courts will find that the OCR has provided "clear and unambiguous notice" to schools regarding their potential liability under Title IX.[132] The OCR clearly sets out factors for the school to consider when a student harasses another student.[133] These factors specify what types of conduct are considered harassment under the guidelines.[134] Moreover, the OCR states that the school is not responsible for the actions of the harassing student, but rather for its own discrimination for failing to remedy the harassment when it knows or should have known of the harassment.[135]

Since the OCR adopted its final policy in the spring of 1997, school officials have been clearly notified of their potential liability under Title IX for failure to remedy peer sexual harassment in their schools. Because of this policy, schools should be prepared to make the decision between accepting federal funds and following the guidelines, or rejecting the funds in order to avoid peer sexual harassment liability under Title IX.

VI. CONCLUSION

Due to recent court decisions regarding peer sexual harassment, there is currently an equal circuit split regarding a school's liability under Title IX.[136] Most recently, the Seventh Circuit refused to take the position of the *Davis* court and held that a school may be liable for peer sexual harassment if it had "actual knowledge" of the harassment.[137] Additionally, to add to the confusion, the Eighth Circuit recently declined to decide the issue of a school's liability under

---

131. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Final Policy Guidance March 13, 1997).

132. *Id.*

133. Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52172, 52175-77 (1996). Some of these factors are the age of the harasser and victim, the relationship between the parties, if the conduct was welcomed by the victim and by what degree, the frequency and duration of the conduct, the conduct's affect on the victim, and the sexual nature of the conduct. *Id.*

134. *Id.* at 52175. The OCR notes that sexual harassment does not extend to non-sexual touching or other non-sexual contact. *Id.*

135. *Id.* at 52176.

136. *Compare* Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998), *and* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997) (holding that students have Title XI claims against schools for peer sexual harassment), *with* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387 (U.S. Sept. 29, 1998) (No. 97-843), *and* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir.), *cert denied*, 117 S. Ct. 165 (1996) (holding that schools are not liable for peer sexual harassment under Title IX).

137. *Doe*, 138 F.3d at 661.

Title IX.[138] Given these recent cases and the inadequate discussion of the OCR Guidance in *Davis*,[139] schools should continue to be cautious of possible liability under Title IX until Congress or the Supreme Court takes steps to clarify their obligations.

MEREDITH M. TODD

138. Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 779 (8th Cir. 1998).
139. *Davis*, 120 F.3d at 1404 n.23.