Responding to Students’ Pleas for Relief: 
The Need for a Consistent Approach to Peer 
Sexual Harassment Claims

I. INTRODUCTION

One day a senior high school student stopped sophomore Katy Lyle in the hall and said, “You’re such a nice girl . . . Do you know what they’re writing about you in the boys bathroom?” Graffiti, scratched in with a knife or written in permanent ink, covered two walls of the bathroom. Dubbed the “Katy stall” by the guys, obscenities such as “Katie Lyle is a slut,” “Katie Lyle sucked my d--- after she sucked my dog’s d---,” or “Katie Lyle gives good head” were written on the walls of the boys’ bathroom at the Duluth Central High School. Katy never found out who wrote the obscenities or why they decided to pick on her. Then the comments followed, such as “oh, Katy, do me” as the morning hello or “are you as good as everyone says?” for the hour bus ride home. When Katy sought help from the principal, his response was “boys will be boys [and] graffiti is a fact of life.” The principal promised to remove the graffiti but did not for nearly two years.

In the beginning of the 1992 school year, two sisters feared the daily bus ride to school. A boy identified by his initials as “G.S.” regularly swatted the girls’ bottoms as they walked down the aisle to their seats while exclaiming such comments as “when are you going to let me f--- you?” or “what size panties are you wearing?” At one point, G.S. grabbed one of the girl’s genital area and then her breasts. Afterwards, another student, whose initials were “L.H.,” also imitated the conduct of G.S. and reached

2. Id.
4. Lyle, supra note 1.
5. LeBlanc, supra note 3.
7. Id.
10. Id.
up the other sister's skirt, made a crude remark, and then grabbed her genital area. Mrs. Rowinsky, the mother of the girls, complained to the superintendent about the school's failure to take sufficient action against G.S. and L.H. The superintendent informed Mrs. Rowinsky that she did not deem what had happened to the two sisters to be assaults.

Such actual reports describe a type of conduct called peer or student-to-student sexual harassment. Student-to-student sexual harassment is a relatively new term for a behavior that has constantly been plaguing our children's environment throughout their elementary and high school education. Leading researcher Nan Stein defines peer sexual harassment as "unwanted and unwelcome sexual behavior which interferes with your right to get an education or to participate in school activities. It may result from words or conduct that offend, stigmatize or demean a student on the basis of sex. . . . Harassment can be a one-time or multiple occurrence."

In a 1993 survey researchers found an alarming 81% of students reported some experience of sexual harassment and that nearly four in five of those students had been the target of peer sexual harassment. The most common forms of reported sexual harassment were comments, jokes, gestures, or looks. At the other extreme, 11% of students reported being forced to do something sexual other than kissing. In between these two points were various other sexual harassment experiences, both physical and non-physical. Students also reported that sexual harassment overwhelmingly occurs in the hallways and classrooms, places that are generally viewed as open and safe.

Since peer sexual harassment has been discovered as a problem affecting the educational environment of our children, more lawsuits are being filed.

11. Id. at 1009.
12. Id.
13. Id.
15. American Ass'n of Univ. Women Found., Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools, June 1993. The AAUW commissioned Louis Harris and Associates who conducted a total of 1,632 field survey that were completed by public school students in grades 8 through 11, from 79 schools across the country. Id. at 5.
16. 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 surveyed say they have experienced unwanted and unwelcome sexual behavior that interferes with their lives." Id.
17. Id. at 8.
18. Id.
19. Id.
20. Id. at 13.
by students seeking to hold school districts and school officials liable for ongoing sexual harassment by their classmates.\textsuperscript{21} Although the introduction stories of Katy Lyle and the two sisters are similar, the legal outcome of their peer sexual harassment claims illustrates the "split\textsuperscript{22}" among the courts in acknowledging the issue. On the one hand, Katy Lyle's suit against the school district was settled for $15,000 before it went to court.\textsuperscript{23} On the other, the Fifth Circuit Appellate Court entered a summary judgment against the two sisters after the court narrowly interpreted Title IX,\textsuperscript{24} the federal statute which prohibits discrimination based on sex in educational programs.\textsuperscript{25}

Dealing with peer sexual harassment is an issue that is considerably difficult for schools to handle, let alone the courts. While a number of school districts develop sexual harassment policies, some school districts continue to treat harassment as just another form of bullying or teasing among classmates. For those students who have been repeatedly sexually harassed and whose cries to stop the harassment are not heard by their teachers, school officials, or peers, the courts are the last resort for them to seek a remedy. Armed with federal anti-discrimination statutes, such as Section 1983\textsuperscript{26} and Title IX,\textsuperscript{27} students who choose to enter the legal arena are finding that the courts are split across the country in their interpretation and application of these federal statutes to peer sexual harassment claims.

The goal of this article is to illustrate the need for courts to develop a uniform approach in remediying claims of student-to-student sexual harassment occuring in the primary and secondary school environment. This comment describes the courts' inconsistent application of Section 1983 and

\textsuperscript{21} See Tamara Henry, \textit{More Kids Sue School Over Peer Sex Harassment}, USA TODAY, Oct. 1, 1996, § D at 1 (reporting 11 sexual harassment complaints filed with the U.S. Department of Education in 1991 by elementary and high school students and a jump to 79 complaints filed by school children in 1995.)

\textsuperscript{22} The "split" among the courts was originally recognized in West Legal News. \textit{See Courts Split on School District's Liability for Student-to-Student Sexual Harassment}, West's Legal News, Aug. 15, 1996, \textit{available in} 1996 WL 456792.

\textsuperscript{23} LeBlanc, \textit{supra} note 3 at 92. Even though Katy Lyle was fortunate enough to receive a settlement for the harassment she endured, a new problem emerged where some members of the community became outraged when their tax dollars were spent through the school district's settlement. \textit{Id}. Recently, a 14-year-old girl won a $500,000 award from a jury that found school officials disregarded her complaints of peer sexual harassment. \textit{See Teen Girl Wins $500,000 Award Over Harassment in 6th Grade}, CHICAGO TRIBUNE, Oct. 3, 1996 at 13. Undoubtedly, where 93.4% of the award is to be paid by the school district, such an award will cause a much larger outrage among taxpayers in that community than in Katy Lyle's case.


\textsuperscript{25} \textit{See Rowinsky}, 80 F.3d at 1016.


Title IX to claims of students who have been sexually harassed by their classmates. Part I introduces the problem of peer sexual harassment. Part II discusses Section 1983 claims and contends that courts should maintain Section 1983 as an avenue of relief by which a student may sue the school officials instead of just the school district, or as a way to force the schools to recognize same gender sexual harassment. Part III provides a background to the recent emergence of Title IX for student-to-student sexual harassment claims. Part IV discusses the fluctuation among courts in applying Title IX to peer sexual harassment claims. Additionally, in part IV this comment encourages the courts to expand the liability of school districts to include school officials. This comment recommends also that a uniform standard of liability be applied by all the courts and that the "deliberate indifference" test is the most appropriate standard. Further, the courts are urged to follow the Eleventh Circuit's proposed standard for determining when sexual harassment is so severe as to require a remedy by the courts. Part V concludes that the courts must be uniform in their approach to peer sexual harassment claims so that the courts can provide relief when the schools disregard students' pleas to stop peer sexual harassment.

II. THE USE OF SECTION 1983 IN PEER SEXUAL HARASSMENT CLAIMS

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

The purpose of federal Section 1983 is to protect persons from a deprivation of their constitutional rights by others who are acting under any law. Pagano v. Massapequa Public Schools was the first case to successfully bring a Section 1983 cause of action against school officials when they failed to prevent continuing abuse between students. The

29. Id.
31. Id. at 644. The student-victim alleged that during his fifth and sixth grade year, he was physically and verbally abused by other students. School officials were reportedly aware of the attacks and had expressly said they would take steps to prevent the abuse, but the officials failed to prevent the continuing attacks. Id. at 642. Although the abuse in Pagano was not specifically referred to as "sexual harassment," this comment notes a similar comparison between physical and verbal abuse between students and peer sexual harassment.
claim against the school officials was successful because Section 1983 allows an individual to avoid state law immunity for public institutions such as school districts and to bring a suit against school officials in their individual capacity.\textsuperscript{32} This success, however, was not repeated in later peer sexual harassment cases.\textsuperscript{33} The handful of cases after \textit{Pagano} which alleged a Section 1983 claim usually failed for either of two reasons: that no duty exists for officials to protect students from sexual abuse\textsuperscript{34} or that a valid Section 1983 claim cannot be upheld when the alleged injurious conduct is by students, not school officials.\textsuperscript{35}

However, two recent cases have maintained unique causes of action for Section 1983 peer sexual harassment claims.\textsuperscript{36} In light of these two cases, this comment urges the courts to support the use of Section 1983 for peer sexual harassment claims where it provides a claim against school officials in addition to school districts, and where it allows a victim to bring a claim for same gender peer sexual harassment.

A. GENERAL BASIS FOR FAILURE OF SECTION 1983 CAUSES OF ACTION

To state a valid Section 1983 claim the student must show that a school district or official deprived the student of his or her constitutional or federal rights while acting under color of state law.\textsuperscript{37} The Supreme Court has implicitly established a protected Section 1983 federal right for students to be free from teacher sexual abuse.\textsuperscript{38} However, in the context of student-to-student sexual harassment, the alleged constitutional deprivation occurs

\begin{quote}
where both types of conduct are unwelcomed by the victim.
\end{quote}


\textsuperscript{34} See, e.g., Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993), aff'g 794 F. Supp. 1405 (E.D. Ark 1992).


\textsuperscript{36} See Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Oona R. -S. by Kate S. v. Santa Rosa City Schs., 890 F. Supp. 1452 (N.D. Cal. 1995).

\textsuperscript{37} See, e.g., Elliott, 799 F. Supp. at 820.

\textsuperscript{38} The Supreme Court found that 14th amendment liberty interests are implicated when school authorities, acting under color of state law, deliberately punish a child for misconduct by inflicting physical pain in \textit{Ingraham v. Wright}, 430 U.S. 651, 674 (1977). The Supreme Court's recognition of a student's constitutional right to be free from physical abuse by a teacher would include the right to be free from teacher sexual abuse. See Valante, \textit{supra} note 32 at 646 n.7.
when a school district or official fails to prevent sexual harassment inflicted by other students. Since the conduct of the harassing student deprives the other student's constitutional rights, Section 1983 claims are difficult to bring against the school district or official where they are not the source of the actual deprivation. The courts have considered and for the most part rejected two theories for imposing Section 1983 liability for an official's failure to protect a student from the harassing conduct of a third party: (1) school officials have a constitutional duty to protect students from peer harassment; (2) school officials act with such deliberate or reckless indifference to known or reasonably discoverable harm occurring to students as to project a policy, practice, or custom that encouraged the abuse of a student.

Under the first argument, the courts have repeatedly considered whether school districts have a constitutional duty to protect students from peer sexual harassment arising out of mandatory school attendance laws. So far, Pagano is the only case where a court found that school officials owed a duty to protect students from abusive conduct by other students because of truancy laws. Otherwise, students have unsuccessfully argued that compulsory school attendance laws restrain a student's liberty to the extent that the student should be owed a duty of care by the state, just as the state is under a duty to protect prisoners from violence by other prison inmates. For example, in Dorothy J. v. Little Rock School District the court acknowledged that a constitutional duty of care arises only when the State exercises an affirmative power to restrain someone to the extent that he or she is unable to care or provide for their basic human needs. Therefore, because the State-mandated school attendance law does not prohibit a child's parents from providing for the child's basic needs, the court held that the attendance law does not entail so restrictive a custodial

39. The original identification of the difficulty in showing a failure to act by a school official which infringes on a protected § 1983 right is by Valente, supra note 32 at 648.
40. See, e.g., Elliot, 799 F. Supp. at 820.
42. See Pagano, 714 F. Supp at 643.
43. See, e.g., Elliot, 799 F. Supp. at 821. The court reasoned that students, like the institutionalized, can complain to officials, but, unlike the institutionalized, students may also turn on a daily basis to their guardians for help. Mandatory school attendance laws do not cut off all help from outside sources for school children. Id. at 821.
44. 7 F.3d 729 (8th Cir. 1993).
45. Id. at 732. (quoting DeShaney v. Winnebago County Dpt. of Soc. Servs., 489 U.S. 189 (1989)).
relationship as to impose upon the State the same duty it owes to prison inmates.46

As to the second theory for Section 1983 liability for official inaction, a school official can be liable if the inaction was part of a policy, custom or practice by the school district.47 This theory works well only in teacher-student harassment cases where courts have imposed Section 1983 liability when the State has a policy, custom, or practice of ignoring the violative acts by a state agent, such as a teacher.48 In peer harassment cases, however, the courts have refused to impose Section 1983 liability under this second theory because the underlying harassment has not been committed by a state agent but by a fellow classmate.49 Since the perpetrating students in peer sexual harassment suits are private actors and are not in any way connected with the State, the courts have found that there can be no imposition of Section 1983 liability under this second theory.50

B. POTENTIAL USE OF SECTION 1983 CLAIMS FOR PEER SEXUAL HARASSMENT

Even though the majority of courts have considered and rejected a cause of action for student-to-student sexual harassment under Section 1983, two cases have emerged in the area which might lead to a future reliance on Section 1983. The first case, Oona R.-S. by Kate S. v. Santa Rosa City Schools,51 is the leading case to address the question of whether a cause of action exists under Section 1983 for a violation of Title IX,52 the federal statute which prohibits discrimination based on sex in educational programs, when a teacher or school official allegedly permitted the peer sexual harassment.53 The importance of the Oona v. Santa Rosa decision is that using Section 1983 as an enforcement mechanism of Title IX may provide an avenue of relief for students that wish to sue the school officials who intentionally discriminated against the student, rather than choosing to sue a faceless school district. The second case to bring an exceptional

47. See Elliot, 799 F. Supp at 823.
48. Id.
49. Id.
50. Id.
53. Id. at 1459.
Section 1983 claim is Nabozny v. Podlesny where the court acknowledged a claim for same-gender peer sexual harassment. An overview of these two cases is necessary to demonstrate the significance of the Section 1983 allegations.

In Oona v. Santa Rosa, the sixth-grade plaintiff charged the school district and school officials with permitting a sexually hostile environment because of their failure to prevent Oona's male peers from harassing her and other girls in her class. For example, after Oona reported one of the boy's harassing conduct in the class log book, the boy struck Oona in the face, and told her to "get used to it." Oona's mother then complained about the harassing conduct to the principal, and the principal's response was that Oona could transfer to any other elementary school in the district. After such a response, Oona's mother formally filed a complaint against the school officials with the Office for Civil Rights. Surprisingly, the complaints from Oona and her parents irritated Oona's teacher so much that the teacher practically retaliated against Oona. In the end Oona was withdrawn from school by her mother.

In regards to Oona's complaint, the Northern District Court of California held that a Section 1983 action may properly be based on alleged violations of Title IX. The court based its holding on two reasons. First, Title IX creates an enforceable right to not be discriminated against on the basis of sex in educational programs. Second, the remedial scheme under Title IX creates an enforceable right to not be discriminated against on the basis of sex in educational programs.
IX is not sufficiently comprehensive to preclude students from enforcing that right by way of Section 1983. 64

The court then questioned whether the conduct alleged by Oona amounted to a deprivation of a right secured by Title IX. 65 First, the court inquired into the nature of the right created by Title IX in this context. 66 After reviewing relevant precedent and the language of the statute itself, the court held that Title IX secures for individuals a firm right not to be discriminated against on the basis of gender in all aspects of federally-funded educational programs. 67 Since Oona secured a right by Title IX, the court then questioned what type of conduct by a defendant amounts to a deprivation of that right. 68 In answer, the court found that the right created by Title IX may be violated when students are subjected to sexual harassment by their peers and school officials discriminate against the student-victims by failing to appropriately respond to such harassment. 69 Under this standard, Oona was able to state a sufficient Section 1983 claim against school officials where her principal refused to take sufficient action to counter persistent harassment by Oona’s peers and where her teacher retaliated against her on more than one occasion because Oona complained about the harassment. 70

Although one district court has held to the contrary of the Oona v. Santa Rosa decision, 71 since then, two different appellate courts have agreed that

---

64. Id. at 1461. The court predicted that the Supreme Court would not consider the enforcement structure of Title IX to preclude enforcement by Section 1983. The prediction was supported by the Supreme Court reasoning in Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 71, 112 S.Ct. 1028, 1036 (1992) that Congress did not intend to limit the remedies available in a suit brought under Title IX. Id.


66. Id.

67. Id.

68. Id. at 1466.

69. Id. at 1469.

70. Id. The court rejected the defendant’s qualified immunity defense where it found that a “reasonable school official would have known in 1992 or 1993 that the actions alleged by plaintiffs here ... would unquestionably violate Oona’s federal statutory and constitutional rights.” Id. at 1472.

71. Mennone v. Gordon, 889 F. Supp. 53, 59 (D. Conn. 1995) (one month after the Oona v. Santa Rosa court's decision, the District Court of Connecticut held that Title IX has a sufficiently comprehensive enforcement scheme to demonstrate that Congress intended to foreclose enforcement through Section 1983. In determining the relationship between Title IX and § 1983, the Mennone court reasoned that a student can already seek equitable and compensatory remedies for violations of Title IX because of the holding in Franklin v. Gwinnett County Public Sch., 503 U.S. 60 (1992), in addition to attorney's fees under 42 U.S.C. § 1988).
Section 1983 can be an enforcement mechanism of Title IX.\textsuperscript{72} \textbf{Oona v. Santa Rosa} is a unique case because it allowed a student to bring a claim through Section 1983 against the individual school officials who repeatedly refused to respond to the complaints of peer sexual harassment. If the courts continue to find that a Section 1983 Civil Right claim is not barred by Title IX, then future plaintiffs may be able to sue principals or teachers, rather than just the school district. As will be discussed later in this comment, the majority of courts allow a Title IX claim only against school districts. A plaintiff-student may find it more appealing to see the redress for his or her injury come from the school officials individually rather than the school district which is supported by the taxpayers of the community. Enforcing a Title IX violation through a Section 1983 claim allows student-plaintiffs an optional avenue of suing the school officials for their injuries.

The other noticeable case brought pursuant to Section 1983 is \textbf{Nabozny v. Podlesny},\textsuperscript{73} where the sexually harassing conduct came from students of the same gender as the victim.\textsuperscript{74} Nabozny, an openly male gay student, had to endure considerable harassment from his peers since the seventh grade.\textsuperscript{75} Nabozny's classmates regularly called him a "faggot," and subjected him to a variety of physical abuses, such as striking, urinating, and spitting on him.\textsuperscript{76} After Nabozny reported to a school administrator the increasing harassment by two male students, Jason Welty and Roy Grande, the harassment by the two male students only intensified. In a science classroom with twenty other students present, Welty grabbed Nabozny and pushed him to the floor.\textsuperscript{77} Welty and Grande continued to hold Nabozny down and performed a mock rape on him while telling him he should enjoy it.\textsuperscript{78} Nabozny then ran to principal Podlesny's office where Podlesny's alleged response was that "boys will be boys" and that if he was "going to be so openly gay," he should expect such behavior from his classmates.\textsuperscript{79}

\textsuperscript{72} Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 722-24 (6th Cir. 1996) (holding that section 1983 claims are not replaced by the private right of action under Title IX); Seamons v. Snow, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (holding that the Section 1983 claim is not barred by Title IX).
\textsuperscript{73} 92 F.3d 446 (7th Cir. 1996).
\textsuperscript{74} See Nabozny, 92 F.3d at 451-52. Although same-gender harassment is not an issue considered in the court's opinion, the bulk of the alleged conduct was male-on-male harassment. Additionally, the harassing conduct could be considered sexual in nature where the discrimination occurred because of the student-victim's gender and sexual orientation.
\textsuperscript{75} Id. at 451-452.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
Up to his eleventh grade year, Nabozny endured continuing harassment: one classmate urinated on him, objects were pelted at him while he rode the school bus, and, on one occasion, he was kicked in the stomach repeatedly until he suffered internal bleeding. Each time he was assaulted school officials either promised help with no action taken or told Nabozny that he deserved such treatment because he is gay.

After several attempts at suicide, Nabozny left his hometown and sought medical help as well as legal advice. In his claim Nabozny filed suit pursuant to Section 1983 and alleged that he was denied equal protection of the law where the school officials denied him the protection extended to other students, because of his gender and sexual orientation. The Seventh Circuit held that the school officials intentionally discriminated against Nabozny based on his gender and sexual orientation, in violation of Section 1983 and the Equal Protection Clause, where the school otherwise enforced their anti-harassment policies for other students, but made an exception to their normal practice for Nabozny.

Astonishingly, Nabozny was able to bring a cause of action for implicitly alleged male-on-male sexual harassment. Plaintiffs who suffer same gender sexual harassment, whether in school or in the work setting, have generally not been allowed by the courts to bring a cause of action. An extensive disagreement among the courts persists about the cognizability of same-gender harassment as a form of sex discrimination. Nonetheless, the opinion in Nabozny is unique because the Seventh Circuit implied that male-on-male harassment is a form of sexual discrimination when it is treated differently from male-on-female harassment.

80. Id.
81. Id.
82. Id. at 452-53.
83. Id. at 453.
84. Id. at 454-55. The school officials did not deny that they aggressively punished male-on-female battery and harassment. The court reasoned that if Nabozny’s evidence is considered credible the record demonstrates that the school officials treated male and female sexual harassment victims differently. Id.
85. See Seamons v. Snow, 864 F. Supp. 1111 (D. Utah 1994), aff’d, 84 F.3d 1226, 1232-1233 (10th Cir. 1996). (holding that the male plaintiff, who was taped naked to a towel rack by other male peers and then shown to his homecoming date, was not sexually harassed where the same gender harassment was not “sexual” in nature).
86. See, e.g., Schoiber v. Emro Marketing Co., 941 F. Supp. 730, 732 (N.D. Ill. 1996) (holding that Title VII does not allow plaintiffs to sue a member of the same gender for sexual harassment in the workplace setting).
87. See id. The Northern District Court of Illinois noted the debate over same-gender sexual harassment actionability was escalating and was ripe for circuit precedent. The court’s opinion provides an extensive analysis about the murky area of law relating to same-gender sexual harassment claims in the work setting. Id.
The result of this opinion is that schools must now recognize that same-gender harassment can be a form of sex discrimination. If a school does not appropriately respond to same gender harassment, then the school or school officials will be liable if the school enforces only male-on-female anti-harassment policies. In the future, a student suffering from male-on-male sexual harassment, such as being taped naked to a towel rack, could find relief through a Section 1983 Equal Protection violation if the school provides no assistance for the student's grievance when the school normally assists male-on-female sexual harassment.

Section 1983 should be recognized as a vehicle by which to bring a peer sexual harassment claim because it provides at least two additional opportunities for relief. First, the Section 1983 claim gives student-victims the ability to sue school officials in their individual capacities for violations of Title IX, rather than suing only the school district. Second, it provides the only window of opportunity for a victim to combat same-gender sexual harassment which is usually not recognized by the courts as a type of sex discrimination. Although peer sexual harassment claims are now frequently litigated by way of Title IX of the educational amendments, the Section 1983 claim should remain as an additional avenue of relief for victims of peer sexual harassment.

III. ORIGINS FOR A CAUSE OF ACTION FOR STUDENT TO 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 under any education program or activity receiving Federal financial assistance...

Title IX suits for peer sexual harassment is a new area of litigation—the first case to successfully argue that a cause of action exists for peer sexual harassment was brought in August of 1993. Although the Section 1983 claim may or may not have adequately served student-victims in the past, recent legal developments have made Title IX an attractive avenue for relief. A brief history will illustrate how Title IX has emerged as the governing statute for peer sexual harassment claims.

88. E.g., Seamons, 864 F. Supp at 1111.
Title IX was passed in 1972 to abolish sexual discrimination in federally funded educational programs and activities. The purpose of enacting Title IX, according to the bill sponsor, Senator Bayh, was to provide women an equal chance to attain an education. Discrimination based on race or national origin was already proscribed in federally funded activities through Title VI of the Civil Rights Act of 1964, but Title VI did not contain sexual discrimination type prohibitions. At the same time, employer discrimination based on sex was eradicated under Title VII provisions. Senator Bayh consequently identified the lack of a statutory remedy for sexual discrimination in federally funded educational activities and closed the loophole between Title VI and Title VII through the enactment of Title IX. Since then, Title IX has emerged as the primary vehicle in which to bring a sexual harassment suit in the educational setting.

The language of Title IX on its face, however, does not specifically include a statutory remedy for sexual harassment. Neither did Title VII, but the resulting case law and regulations for Title VII provided that sexual harassment in the workplace is a type of sex discrimination. By definition, there are two types of sexual harassment prohibited by Title VII: quid pro quo and hostile environment sexual harassment. Quid pro quo harassment is the grant or denial of certain benefits conditioned upon the receipt of sexual favors. Hostile environment harassment occurs when the nature of the employee's workplace is filled with sexually discriminatory intimidation, ridicule, and insult. Peer sexual harassment commonly

92. S. Res. 874, 92d Cong., 118 Cong. Rec. 5803 (1972) (enacted). Senator Bayh stated during the floor debate: "[Title IX] is to provide for the women of America something that is rightfully theirs -- an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." Id.


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

95. 42 U.S.C. § 2000e to 2000e-17 (1994). 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).


97. See 29 C.F.R. § 1604.11 (1991). The regulation sets forth in pertinent part: "Harassment on the basis of sex is a violation of sec. 703 of Title VII. [footnote omitted] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment ...." Id.


99. See Meritor, 477 U.S. at 65

100. See id.
occurs as hostile environment harassment because the sexually offensive conduct is between students, whereas teacher-to-student sexual harassment can be characterized as either quid pro quo or hostile environment harassment, depending on the situation. Some courts have regarded Title VII hostile environment harassment standards for sex discrimination in the employment context as applicable to Title IX.\(^\text{101}\)

The Supreme Court then acknowledged, in the landmark case of Franklin v. Gwinnet County Public Schools,\(^\text{102}\) that students should be afforded the same protection in school that an employee has in the workplace. Even though the Court did not address whether a relationship existed between Title VII standards for sexual harassment in the workplace and Title IX, the Supreme Court relied on the Title VII model to allow Franklin a Title IX sexual harassment claim against her teacher.\(^\text{103}\) While citing Meritor Savings Bank v. Vinson,\(^\text{104}\) where the Supreme Court acknowledged hostile environment discrimination as a violation of Title VII, the court explained:

Unquestionably, Title IX placed on 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 discriminates on the basis of sex.' [footnote omitted] We believe the same rule should apply when a teacher sexually harasses and abuses a student.\(^\text{105}\)

---

101. See, e.g., Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980), aff'reg 459 F. Supp. 1 (D. Conn. 1977) (citing a Title VII case, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), for the theorem that imposing academic achievement for sexual performance is sex discrimination); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985) (showing that Title VII standards, as set forth by the EEOC, are also appropriate for Title IX). But see, e.g., Bougher v. University of Pittsburgh, 882 F.2d 74 (3d Cir. 1989) (refusing to decide whether Title VII sexually hostile environment claims were actionable under Title IX).


103. Id.

104. 477 U.S. 57, 64 (1986).

105. Franklin, 503 U.S. 60, 75 (1992). See also, Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137, 149 (5th Cir. 1992) (reasoning that "there is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter. Women need not endure sexual harassment by state actors under any circumstances the school setting included.") (decided under equal protection laws); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292 (N.D. Cal. 1993) (agreeing with Doe v. Taylor and further quoting Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 551 (1987): "The importance and function of environment is different in academia than in the workplace.... A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.").
The outcome of *Franklin*, however, left unanswered the question of whether Title VII standards should be applicable to Title IX actions.

While the majority of lower courts continue to look to Title VII definitions of hostile environment sexual harassment because of *Franklin*, a few courts have declined where they interpret Title VI as the statute upon which Title IX was implemented. Title VI prohibits racial discrimination in the educational setting and contains language notably similar to Title IX. Although this comment will only briefly discuss that the majority of courts have applied Title VII as opposed to Title VI standards to interpret Title IX, a more in-depth analysis of this complex issue may be found in other commentaries. Until Title IX is amended or the Office of Civil Rights implements regulations regarding student-to-student sexual harassment, the courts are left to construct Title IX by looking at the legislative history of Title IX, including predecessor titles, such as Title VI and VII. Whether Title VI or Title VII is the applicable statute is an important issue since it is the leading cause of the inconsistent interpretations of Title IX by the courts in peer sexual harassment cases.

IV. CONFLICTING INTERPRETATIONS OF TITLE IX PEER SEXUAL HARASSMENT CLAIMS IN THE COURTS

The courts have witnessed an incredible rise in the number of peer sexual harassment claims filed under Title IX. More and more victimized students see other sexually harassed peers finding relief through the courts, which gives them hope in receiving the same remedy for the harassment

106. See Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571 (N.D. Cal. 1993) (finding that Title IX is similar to VI, yet holding that a claim for hostile sexual harassment is actionable under Title IX); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1022 (W.D. Mo. 1995); Davis v. Monroe County Bd. of Ed., 74 F.3d 1186, 1192-3, vacated, 91 F.3d 1418 (11th Cir. 1996); Seamons v. Snow, 84 F.3d 1226, 1231 n.5, 1233 (expressing no opinion as to the district courts refusal to apply Title VII to Title IX, but considers the elements for a hostile environment sexual harassment claim); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996).


108. See id.


110. See Henry, supra note 21.
they have endured.\textsuperscript{111} Unfortunately, across the country courts are split in their guidelines for interpreting peer sexual harassment claims under Title IX.\textsuperscript{112} A student may very well need to hope that a judge will even recognize their claim for peer sexual harassment under Title IX.

This segment will provide a detailed analysis about the currently few decided peer sexual harassment cases and the discrepancies that remain among the decisions in the federal courts. Subpart A will probe whether courts have recognized a claim for peer sexual harassment under Title IX or, alternatively, whether the court will apply Title VII workplace sexual harassment standards to support an action for peer sexual harassment under Title IX. Subpart B of this segment looks at the failure of the courts in reconciling who may be liable among the school districts, school officials, or teachers in students' claims. Subpart C examines the indecisiveness among the courts as to the standard of liability, with a discussion of alternative standards that the courts should consider. Subpart D explores how severe a student's conduct must be for a court to find that the conduct is not just flirting or teasing, but that the conduct arises to the level of actionable peer sexual harassment which substantially alters the victim's learning environment.

A. DO THE COURTS FIND THAT TITLE IX INCLUDES AN ACTION FOR PEER SEXUAL HARASSMENT?

As previously mentioned, the Supreme Court has found that a teacher's sexual harassment of a student violates Title IX.\textsuperscript{113} Even though the Court has not heard a peer sexual harassment case to date, the Court has at least shown a response to the general problem of sexual harassment in the schools. In \textit{North Haven Board of Education v. Bell},\textsuperscript{114} the Court stated that Title IX should be accorded a sweep as broad as its language.\textsuperscript{115} This statement, combined with the Court's prohibition of teacher-student harassment, indicates that the Supreme Court would also find that Title IX forbids student-to-student sexual harassment.

The Northern District Court of California was the first lower court to address the question of whether student-to-student sexual harassment is actionable under Title IX. Only one year after the \textit{Franklin} decision, the

\textsuperscript{111} See Henry, \textit{supra} note 21.
\textsuperscript{112} See article cited \textit{supra} note 22.
\textsuperscript{113} \textit{Franklin}, 503 U.S. 60, 75 (1992).
\textsuperscript{114} 456 U.S. 512 (1982).
\textsuperscript{115} \textit{Id.} at 521.
court in *Doe v. Petaluma City School District* found a violation of Title IX upon a showing that the school district failed to end the sexual harassment of a student by her peers. In *Petaluma*, the plaintiff-student was harassed when male students made continuous comments about how she liked hot dogs in her pants and drew graffiti on the bathroom stalls about the same subject. Since this was the first court to address a Title IX action for peer harassment, the court looked to several teacher-to-student harassment cases to illustrate the development of sexual harassment law in education. The court also paid some deference to the Letter of Findings expressed by the Office of Civil Rights (OCR), the agency responsible for implementing Title IX and its regulations. The OCR believes that a school's failure to take an appropriate response to peer sexual harassment is a violation of Title IX, and the court held the same.

Nevertheless, some federal courts have decided to interpret *Franklin* and Title IX literally and have limited claims for peer sexual harassment under Title IX. The Southern District Court of Texas in *Garza v. Galena Park* succinctly decided that a student's peer sexual harassment claim under Title IX was not supported by the Supreme Court's decision in *Franklin*. The court briefly distinguished this case on the grounds that the *Franklin* decision applies only to teacher-student harassment. More recently, the Fifth Circuit Court of Appeals in *Rowinsky v. Bryan Independent School District* held that the structure of Title IX supports a claim only when the harassment is attributed to the conduct of the grant recipients. The court in *Rowinsky* reasoned that the scope and structure of Title IX, the legislative history, and agency interpretations of that law weigh in favor of holding that Title IX can only impose liability on federally funded educational institutions. This interpretation allowed only a little room for a student to prove a peer sexual harassment claim through Title IX. If the student could prove that the school district responded to peer sexual harassment

---

116. 830 F. Supp. 1560 (N.D. Cal. 1993), rev'd, 54 F.3d 1447 (9th Cir. 1995) (reversing the issue of qualified immunity for a school counselor).
118. *Id.* at 1563-1566.
119. *Id.* at 1572.
120. *Id.* at 1573.
121. *Id.*
123. *Id.* at 1438.
124. *Id.*
125. 80 F.3d 1006 (5th Cir. 1996).
126. *Id.* at 1013.
127. *Id.* at 1012.
sexual harassment claims differently on the basis of sex, then the federally funded school district would be violating Title IX. 128

Garza is one example of a case where the court has completely refused to recognize a claim for peer sexual harassment. 129 The court in Rowinsky also seems to retreat from extending Title IX to support such a claim, but the court held that a peer sexual harassment claim may be viable if the school district responded to sexual harassment claims differently based on sex. 130 Progressively, like Doe v. Petaluma, another court has recognized that Title IX prohibits sexual harassment in the educational setting, whether it be teacher-to-student or student-to-student. 131 Either type of conduct is sexual harassment, and sexual harassment in general prohibits any student from obtaining their right to an education. 132 With the Supreme Court’s response to the problem of teacher-to-student harassment in Franklin and their mandate to broadly interpret the language in Title IX, coupled with at least two lower courts recognizing that peer sexual harassment is a type of harassment prohibited by Title IX, victims of peer sexual harassment should reasonably believe that the courts will continue to find a remedy through a broad interpretation of Title IX.

Extending the language of Title IX itself is one way that courts will support a claim for peer sexual harassment. In the alternative, courts make peer sexual harassment claims actionable by applying Title VII standards for workplace sexual harassment to Title IX claims. Basically, where a court refuses to rewrite the text of Title IX to include a prohibition of peer sexual harassment, a court may direct the application of Title IX to achieve the same goal. One way for the court to accomplish this is by looking at the legislative history of Title IX and the language of predecessor titles, such as Title VI and VII.

128. Id. at 1016. (explaining that a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls).
129. See also Davis v. Monroe County Bd. of Educ., 862 F. Supp. 363 (M.D. Ga. 1994), claim reinstated, 74 F.3d 1186 (11th Cir.), vacated 91 F.3d 1418 (1996), original claim dismissed, 1997 WL 475207 (1997). The latest court opinion from Davis dismissed the original claim in its entirety for failure to state a claim upon which relief can be granted. Id. The court reasoned that a school district may not be held liable under Title IX where “Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-to-student sexual harassment when they chose to accept federal financial assistance under Title IX.” Id. at 13.
130. See supra note 128 and accompanying text.
131. See Oona R.-S., by Kate S. v. Santa Rosa City Sch., 890 F. Supp. 1452 (N.D. Cal. 1995). (holding that the right created by Title IX may be violated when students are subjected to sexual harassment by their peers).
132. See Stein, supra note 14 at 90.
As mentioned before, the courts are undecided as to whether Title VI or Title VII is the appropriate statute for which to interpret Title IX. Title VI prohibits racial discrimination in the educational setting and uses notably similar language as Title IX. Title VII, on the other hand, prohibits sexual harassment in the workplace, and the regulations of Title VII prohibit both quid pro quo and hostile environment sexual harassment. While both Title VI and VII were considered in implementing Title IX, the courts tend to choose only one of the titles as applicable to Title IX.

Recall the unanswered question left in Franklin: whether Title VII sexual harassment standards in the workplace should be applied to Title IX. Since Franklin, the majority of courts have answered this question in the affirmative. These courts have found the Supreme Court's recognition, that a student should have the same protection in school that an employee has in the workplace, supports the conclusion that Title VII provides standards for enforcing the provisions of Title IX in peer sexual harassment suits.

The court in Davis v. Monroe County Board of Education further argued that Title VII standards provide only minimum protection where damage caused by sexual harassment is arguably greater in the classroom than in the workplace. Harassment in the classroom generally has a greater and longer lasting impact on young victims, and a sexually abusive environment inhibits a student from developing her full intellectual potential. An adult may leave their work setting, whereas it is virtually impossible for a child to just leave their assigned school. Not only have the majority of courts applied Title VII standards to make a Title IX peer sexual harassment claim actionable, but the Davis court further argued that Title IX should have standards even more rigid than Title VII.

133. See cases cited supra notes 106 and 107 and accompanying text.
134. See related commentary text for supra note 107 and 108.
135. See supra note 98.
137. See cases cited supra note 136.
138. 862 F. Supp. 363 (M.D. Ga. 1994), claim reinstated, 74 F.3d 1186 (11th Cir.) (commentary text refers to this court opinion which supported a Title IX cause of action), vacated, 91 F.3d 1418 (1996), original claim dismissed, 1997 WL 475207 (1997). Also, see supra note 129 and accompanying text.
139. Davis, 74 F.3d at 1193.
140. Id.
141. Id.
B. WHO CAN BE LIABLE FOR PEER SEXUAL HARASSMENT UNDER TITLE IX?

While a student-victim can be assured that a court will probably allow a claim for peer sexual harassment under Title IX, the student will have difficulty in predicting whether the court will allow him or her to sue both the school district and the school officials. A peer sexual harassment suit is virtually worthless unless the student is afforded an end to the harassment or remedy for the harm suffered. Remedies for the harm suffered are the most common award where the victim-student has either withdrawn himself or herself from the school or graduated by the time the suit is settled. The issue of who may be liable will also determine the amount awarded to the student. In most situations, neither school districts nor school officials alone have a substantial amount of money to compensate a plaintiff. So a victim student will receive better compensation for the harm he or she endured if a court will acknowledge that both school districts and individual school officials may be liable.

At a very minimum, the consensus among the courts indicates that they are willing to allow a claim against the school district. The language of Title IX explicitly prohibits sexual discrimination by federally funded educational activities. School districts are the institutions which receive federal grants, so a literal interpretation of Title IX supports the conclusion that school districts may be held liable. Moreover, Congress could not have intended for federal monies to be expended on educational institutions which are found to have engaged in the conduct proscribed by Title IX. Such reasoning prompted the Supreme Court to hold in Franklin that monetary damages are available as a remedy in a Title IX enforcement action brought by a private plaintiff against a school district. Therefore, the courts are willing to allow a student-victim of peer sexual harassment to sue the federal grant recipient, which in most cases is the school district.

The waters become murky, however, when the lower courts consider whether individuals, such as principals and teachers, may be held liable in their official or individual capacities. When the majority of lower courts reject the Title IX claim against individuals, they do so for two reasons. First, the courts will not interpret Title IX to permit individual liability where clear direction from Congress is lacking. Second, the Supreme Court’s opinion in Franklin concerned only the case against the

142. See, e.g., Rowinsky, 80 F.3d at 1008.
143. Oona, 890 F. Supp at 1465. (quoting Franklin, 503 U.S. at 75).
144. Franklin, 503 U.S. at 75.
145. See, e.g., Petaluma, 830 F. Supp. at 1577; Seamons, 864 F. Supp. at 1116.
146. See, e.g., Petaluma, 830 F. Supp. at 1577.
school district and did not indicate whether such an action could be brought against individuals. But when a few courts at least consider the possibility of individual liability under Title IX, their reasoning may be important for future resolution of this issue.

In *Burrows v. Postville Community School District*, the court concluded that a Title IX claim may be asserted against school officials in their official capacity, but not in their individual capacity. The court reasoned that a claim against the school officials in their official capacity is essentially a claim against the school district itself. The victim-student in this case sought to hold liable not only the school district but also the superintendent and the principal for failing to take any meaningful action to end the peer sexual harassment. Here, the court’s reasons for prohibiting individual liability are basically the same two reasons as given by the majority courts which were stated previously. Though the student was inhibited from obtaining money out of the school official’s pockets, the student was able to bring the principal and superintendent in their official capacities as defendants to the lawsuit. Ultimately, being a party to the suit in their official capacities must of had the effect of punishing these individuals and hopefully will deter others from such conduct.

In a somewhat different approach, the court in *Mennone v. Gordon* also found that school officials could be held liable in their official capacities in addition to the school district itself. More strikingly, though, the court additionally found that the plain language of Title IX does not preclude the liability of defendants in their individual capacity so long as they exercised a sufficient level of control. In *Mennone* the court

---

147. See Petaluma, 830 F. Supp. at 1575. The court reminded that: The procedural posture of *Franklin* must be born in mind. The alleged sexual harasser in *Franklin*, Andrew Hill [a coach-teacher], was never a party to the lawsuit. Moreover, the only individual defendant in the case, William Prescott [another teacher], had been dismissed by the district court. Id.

148. See, e.g., Petaluma, 54 F.3d at 1452. (granting qualified immunity to the individual, but finding that if the individual engaged in the same conduct today, where the individual’s conduct occurred two years prior to the *Franklin* decision, the court might consider him individually liable); Burrows, 929 F. Supp. at 1207 (granting liability against the individuals only in their official capacities).


150. Id. at 1207.

151. Id. at 1207.

152. Id. at 1196.


154. Id. at 55. (holding that to maintain an action against the superintendent in his official capacity, the plaintiff must allege that official was directly and personally responsible for the inaction or action on the part of the school board or teacher).

155. Id. at 56.
looked at the plain language of Title IX, which broadly refers to discrimination occurring under any education program or activity. The court then reasoned that the language does not restrict the potential class of defendants based on their identity but does restrict them based on their function or role in a program or activity. Moreover, Title IX regulations include in the definition for “recipient” of federal funds those persons or entities that do not receive funding directly from the federal government, but who also operate a program or activity. Accordingly, the court in Mennone held that the student-victim could bring a claim under Title IX against the teachers in their individual capacities.

These two cases demonstrate a court’s willingness to stretch Title IX to include liability for school officials who did not appropriately respond to the peer sexual harassment. In the future such an approach could effectively stop ongoing peer sexual harassment in the schools. First, official liability for principals and superintendents will promote speedy action on their part to confront and deal with reported cases of peer sexual harassment. Second, individual liability will induce teachers to recognize and prohibit sexual harassment in their classrooms and in the hallways. In the end, if a teacher or school official fails to acknowledge such cases, then victim-students should be able to bring a claim not only against the school district but also against the individuals in either their official or individual capacities so that the victim-students will receive fair compensation for the harassment they have endured. Where the waters still remain unpredictable for this issue, victims of peer sexual harassment may see the tide turning in favor of allowing individual liability under Title IX.

C. WHAT IS THE STANDARD OF LIABILITY?

Thus far, the majority of courts are willing to allow a Title IX claim for peer sexual harassment against the school district and possibly individuals. The next issue, which remains undecided by the courts, pertains to the standard of liability for school districts. A definite standard of liability needs to be agreed upon by the courts. Otherwise, school districts do not know what degree of responsibility they have towards reported cases of peer sexual harassment.

---

156. Id.
157. Id.
158. Id. (citing to 34 C.F.R. § 106.1).
159. Id. It should be noted, however, that the teacher was subsequently granted qualified immunity where the teacher’s conduct was not determined to have violated the student’s right under Title IX.
sexual harassment. The discrepancies among the courts regarding this issue are based on the fact that Title IX does not set forth a standard nor do the regulations. Courts therefore rely upon standards from similar statutes, yet differ on whether the standard should be construed from Title VI or VII. Even if the courts choose which title the standard should come from, there remains a split among the courts that have addressed the issue as to what proof is necessary to state a claim against a school district for its failure to respond to and remedy peer sexual harassment. The following two court decisions will provide an illustration of this split.

The Fifth Circuit in *Rowinsky v. Bryan Independent School District* concluded that Title IX was enacted pursuant to Title VI, and found that Title IX requires proof of intentional conduct on the part of the educational institution before monetary liability could be imposed. In *Rowinsky*, the victim-students were continually sexually harassed by their peers at grade school and while riding the school bus. The Fifth Circuit deduced that Title IX was modeled after Title VI where precedent and the use of identical language in both strongly suggest a similarity. The standards of Title VI require the plaintiff to show intent to discriminate. By way of the court's example, the student-victims in *Rowinsky* could have shown intentional discrimination if they proved that the school district treated sexual harassment of boys more seriously than sexual harassment of girls or even that it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys. Consequently, the appellate court in *Rowinsky* held that the student-victim did not prove intent to discriminate on the part of the school district where it was not shown that the school district responded to the sexual harassment claims differently based on sex.

---

160. An example of when a school takes too much caution in their responsibility for disciplining cases of sexually harassing conduct is when a teacher reported a 1st-grader for kissing another on the cheek which resulted in the school suspending the child from class. See *School Suspends 1st-Grader for Kissing*, CHICAGO TRIBUNE, Sept. 25, 1996 at 4.
161. See supra note 22 and accompanying text.
162. For a complete comparison of all the cases that have addressed what standard of liability is applicable to peer sexual harassment claims under Title IX, see *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415 (N.D. Cal. 1996).
163. 80 F.3d 1006 (5th Cir. 1996).
164. Id. at 1016.
165. Id. at 1008-09. Details of the alleged harassment can be found in the second paragraph of the introduction section to this comment.
166. Id. at 1012-1013, n. 14.
167. Id. at 1016.
168. Id.
Two months after the Fifth Circuit’s opinion in *Rowinsky*, the Northern District Court of Iowa issued an opinion in *Burrows* which disagreed in part with the analysis of Title IX in *Rowinsky*. The district court in *Burrows* agreed instead with a previous Eleventh Circuit decision that found Title IX was enacted pursuant to Title VII.\(^{169}\) Moreover, the court reasoned that a student-victim can prove the required intent to discriminate standard of liability on the part of the school district from the totality of evidence, including evidence of the school’s knowing failure to respond to peer sexual harassment of a student.\(^{170}\)

In *Burrows*, the plaintiff was sexually harassed on a daily basis by her fellow students for over three years.\(^{171}\) The alleged conduct included students frequently calling the plaintiff “slut,” “whore,” “bitch,” “skank,” and “f----in’ tramp”; students repeatedly throwing food and spit wads at her; students who pushed, elbowed and intentionally ran into her; a male student kicked her between the legs many times in a sexually offensive manner; and students wrote sexual obscenities and threats on her books, her folder, her locker, and school bathroom walls.\(^{172}\) Although the school had actual knowledge of the sexual harassment, the school failed to prevent or stop the sexually harassing behavior by students over whom the school exercised some degree of control.\(^{173}\) In the end, the court in *Burrows* held that there was enough evidence from which a trier of fact could reasonably infer that the school district intentionally discriminated against her when it knowingly failed to respond to the peer sexual harassment.\(^{174}\)

The *Rowinsky* and *Burrows* cases demonstrate the two types of standards of liability that have been generally followed by courts which have addressed claims for peer sexual harassment.\(^{175}\) On one side, the court in *Rowinsky* adopted what one commentator dubbed as an “equal

---

169. *Burrows*, 929 F. Supp. at 1200 (agreeing with *Davis*, 74 F.3d at 1194).
171. *Id.* at 1197.
172. *Id.* at 1197.
173. *Id.* at 1205.
174. *Id.* The totality of evidence the court considered included the following: evidence that the school district knowingly failed to respond appropriately to peer sexual harassment of Lisa despite numerous report by her, her Parents, her attorney, various teachers and the OCR; evidence that the school district knowingly failed to implement appropriate sexual harassment policies and grievance procedures; . . . evidence that the school district failed to inquire into Lisa’s increasing tardiness and absences from school; and evidence that the school district chose to remove Lisa from the hostile sexual environment and granted her request to graduate early, rather than attempting to eliminate the hostile environment. *Id.*
protection-like test" for the intentional discrimination standard. 176 A Title VII "employment-like standard," 177 on the other hand, is essentially what the Burrows court followed for its "knowingly failed" standard.

Both, however, have been criticized for creating standards that rest on extreme ends of a spectrum. If a court uses the equal-protection like test, then fewer student-victims would prevail in cases claiming severe peer sexual harassment. 178 The student would have to prove that school officials intended for one gender to harass the other gender and deliberately encouraged this result by their failure to enforce rules against harassment. 179 But if a court uses the "knowingly failed" employment-like standard, then schools would be liable when they were unsuccessful in stopping the peer sexual harassment. Such a standard may not be appropriate for schools where students are arguably more difficult to control than employees. 180 Either way, one standard is too difficult to prove for student-victims while the other standard may be too easily imposed upon schools for student-to-student sexual harassment claims.

Alternatively, the opinions from two cases may suggest a happy medium between the equal protection-like test and the knowingly failed standards. In Oona v. Santa Rosa, the court found that discriminatory intent on the part of the school was a necessary element for a Title IX peer sexual harassment claim but further stated that "[s]uch discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment." 181 Likewise, the court in Petaluma held that it must be proven that the school district intended to discriminate but added that the school's failure to take appropriate action might be evidence of such intent to discriminate. 182 Although neither opinion explicitly states as such, it is apparent that in both opinions the courts preferred a standard of liability for intentional discrimination that resembles the deliberate indifference test as applied to Section 1983 claims in some courts. 183

177. Id.
178. Id.
180. See Baker, supra note 176.
182. See Petaluma, 830 F. Supp. at 1576.
183. See Baker, supra note 173 where the original interpretation of the "deliberate indifference" test appears.
Taken by way of example from two Section 1983 cases, the deliberate indifference standard of liability may be shown where the school's repeated negligence towards peer sexual harassment is considered to rise to the level of deliberate indifference. The deliberate indifference standard may also be established where the school officials act with such deliberate indifference to known or reasonably discoverable harm occurring to students as to project a custom of encouraging abuse of the student. Under the deliberate indifference standard of liability, the student-victim would just need to show that the school disregarded the ongoing peer sexual harassment, which is not as difficult to prove as the equal protection-like test. Additionally, a school would be liable under this standard only when school officials ignore the harm occurring to students and not when they failed in their efforts to stop the harassment. This deliberate indifference standard of liability may emerge from the case law as a reasonable middle ground between the Rowinsky and Burrows standards.

D. HOW SEVERE DOES THE PEER SEXUAL HARASSMENT HAVE TO BE?

If schools are to be held liable for remedying peer sexual harassment, then to what extent is a school responsible for recognizing the hostile environment created by the harassment? Surely a school would not be liable for controlling childish behavior or simple offensive utterances, comments, or vulgarities. Even the public was outraged when a first grader in North Carolina was suspended from his classroom after a teacher caught him kissing another first-grader on the cheek.

Thus far, the peer sexual harassment described in the previously mentioned cases contain sexually offensive acts which persist for years and sometimes force the student-victim to leave the school. Such situations should not be an example of the necessary level of severity where the peer sexual harassment rose to the level of compelling the student to withdraw from school. On the other hand, one-time occurrences, such as kissing a first-grader on the cheek, should not be compared to the level of severe peer sexual harassment which impairs the student's learning environment. To avoid such absurd interpretations, the courts need to hammer out when peer

186. See Baker, supra note 176 where a different version of this theorem originally appears.
187. See Davis v. Monroe County Bd. of Ed., 74 F.3d 1186, 1194 (11th Cir.), vacated, 91 F.3d 1418 (11th Cir. 1996).
sexual harassment will be considered so severe as to create a hostile environment in the educational setting.

The Eleventh Circuit Court of Appeals set forth a standard to aid in determining when the harassment is severe enough to require a remedy. The court held that Title IX is violated when the educational setting is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of the student’s environment and which creates an abusive educational setting.189 The court further added that in determining whether a student-victim has proven a hostile environment, a court must be concerned with “(1) the frequency of the abusive conduct; (2) the conduct’s severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff’s performance.”190 These factors must be viewed both objectively and subjectively.191 If the trier of fact finds that the conduct is not severe because a reasonable person would not find it abusive, then the harassment is without a Title IX remedy.192 Likewise, if the student-victim does not subjectively perceive the environment to be abusive, then the conduct does not violate Title IX.193

Accordingly, the severity of the harassment is judged by both the fact finder and the student-victim. This standard acknowledges that victims of varying ages may react to certain types of conduct in different ways.194 A first-grader may feel that a kiss on the cheek is harmless whereas a teacher who was a witness to the scene might consider the kiss to be harassing behavior from an adult point of view. So if a teacher now saw a 1st-grader kiss another on the cheek on the playground, the level of hostility from this conduct would be judged by both the adult and child’s perspective. Hopefully, the adoption of a standard like the Eleventh Circuit’s will filter out conduct which is simply childplay, childish vulgarities, or just adolescent flirting.

189. See Davis, 74 F.3d at 1194.
190. Id.
191. Id.
192. Id.
193. Id.
194. 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).
V. CONCLUSION

The statements and statistics presented here add up to an undeniable mandate: [the courts,] parents, teachers, and administrators must acknowledge that sexual harassment in school is creating a hostile environment that compromises the education of America's children. . . . For when children's self-esteem and development are hampered, the repercussions echo throughout our society.195

One goal our society should strive to achieve is the elimination of sexual harassment among our children. Children should not expect to grow up in a sexually abusive environment when we do not tolerate such conduct at the adult level. The law has already made great advancements towards remedying the problem of sexual harassment in the work setting. To clear the employment context of sexually abusive behavior, the law must complete the task of eliminating student-to-student sexual harassment. Sexual harassment will never stop if we do not teach our children at an early age that certain behavior is inappropriate before they enter the adult stage of their life.

Combating the problem will demand various methods. So far, California and Minnesota have recently enacted legislation which requires educational institutions to develop and maintain a written policy on sexual harassment.196 One commentator has proposed guidelines on sex-based harassment of students that should be adopted by the Office of Civil Rights to effectively enforce Title IX.197 Another commentator has recommended that Title IX itself should be amended to specifically include a prohibition of student-to-student sexual harassment.198 Even more specifically, one commentator has set forth what schools should include in their sexual harassment policies and procedures and further describes how schools can protect students from ongoing peer sexual harassment.199

In helping the efforts to eliminate peer sexual harassment, the goal of this article is to illustrate the need for courts to develop a uniform approach in remedying severe harassment in the schools. Since Title IX and Section

195. AMERICAN ASS'N OF UNIV. WOMEN FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS, June 1993 at 21.
198. See Bodnar, supra note 194.
1983 are currently the only federal statutes by which a student may bring a claim, the courts need to be consistent in their interpretations of these statutes. First, the courts should maintain Section 1983 as an avenue of relief by which a student may sue the school officials instead of just the school district or as a way to force the schools to recognize same gender sexual harassment. Secondly, the courts cannot continue to fluctuate in their development of applying Title IX to peer sexual harassment claims. This comment encourages the courts to expand the liability of school districts and include school officials. Additionally, a uniform standard of liability should be adopted, and this comment recommends the deliberate indifference test as an appropriate standard for solving the split among the courts. Lastly, the courts should follow the Eleventh Circuit's proposed standard for determining when sexual harassment is so severe as to require a remedy by the courts.

Promoting the awareness and recognition of the need to stop peer sexual harassment in the schools will have to develop over time. Meanwhile, the courts have the function of supplying a remedy to student-victims who are immediately faced with ongoing sexual harassment and who are disregarded by their peers, their teachers, and other school officials in their cries for help. In the future, the courts will assist in maintaining the integrity of peer sexual harassment policies in educational institutions when schools start to falter in their concern to eliminating this intolerable behavior. A consistent approach by the courts in student-to-student sexual harassment suits is an additional measure to insure that our children will enjoy a non-discriminatory environment while pursuing their education.

Megan Healy