

A NEW LESSON PLAN FOR EDUCATIONAL INSTITUTIONS: EXPANDED RULES GOVERNING LIABILITY UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 FOR STUDENT AND FACULTY SEXUAL HARASSMENT

ANNE-MARIE HARRIS*

KENNETH B. GROOMS**

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* Assistant Professor of Law, Bentley College, Waltham, MA. George Washington University (B.A. 1987). National Law Center, George Washington University (J.D. 1990).

** Vice President of Training and Corporate Development, Delany, Siegel, Zorn, & Associates, Inc. Brown University (B.A. 1972). Villanova University School of Law (J.D. 1975). Georgetown University Law Center (L.L.M. in Taxation 1986).

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Since Justice Thomas' confirmation hearing in 1991, much public debate and discussion has focused on sexual harassment issues.¹ Despite this increased public awareness, the incidence of sexual harassment in America's schools² is widespread.³ It remains a major barrier to the ability of schools to provide a non-discriminatory, safe learning environment in which students can succeed and achieve their potential.

The elimination of sexual harassment in schools is certainly a high priority for students, parents and educators. Despite increased education and public information, a significant number of male and female students experience some form of sexual harassment during their school careers. According to a leading study conducted by the American Association of University Women (AAUW), eighty-five percent of girls and seventy-six percent of boys in grades eight

1. "The nation's sensitivity to sexual harassment has changed profoundly since October 1991, when Anita Hill's charges against then Supreme Court nominee Clarence Thomas riveted Americans to their television sets. Sexual harassment claims filed with the federal government have increased dramatically, as have damages paid to successful plaintiffs." Sarah Glazer, *Crackdown on Sexual Harassment: Is the Nation Overreacting to the Problem* (July 19, 1996) <<http://libraryip.CQ.com/>>.

2. As used herein, the term "schools" applies to all public and private educational institutions that receive federal funds, such as elementary and secondary schools, school districts, proprietary schools, colleges and universities. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997) [hereinafter OCR Guidance]. The OCR Guidance provides detailed information regarding standards to identify, prevent, and resolve sexual harassment allegations made by students in educational institutions. As indicated in the Guidance, although such standards do not carry the force of law, "courts generally benefit from, and defer to, the expertise of an agency with authority." *Id.* at 12,036. See also 20 U.S.C. §§ 1681-1688 (1994) (defining and addressing issues arising from discrimination based on sex or blindness); 34 C.F.R. §§ 106.1-106.71 (implementing regulations regarding discrimination in educational programs receiving federal assistance) (1999).

3. In a survey of over 200 female students at more than 20 colleges and universities, 67% have felt sexually harassed: 16% by a teacher and 41% by another student. Katie Herrick & Jamilla Coleman, *Campus Confidential*, GLAMOUR MAGAZINE, Sept. 9, 1999, at 190.

through eleven reported that they experienced some form of sexual harassment during their school careers. Sixty-six percent of the girls and forty-nine percent of the boys also reported that they were targets of sexual harassment "often" or "occasionally."⁴

The pervasiveness of sexual harassment occurring in schools, colleges, and universities substantially interferes with many students' academic performance, and adversely affects their emotional and physical well-being.⁵ The sexually offensive conduct or behavior also conflicts with the broad educational and social benefits that otherwise accrue from a diverse academic setting.⁶

Two recent Supreme Court decisions clarified the responsibilities, duties, and roles of administrators, faculty, staff, parents, and students to identify, prevent, and resolve sexual harassment issues in schools. In *Gebser v. Lago Vista Independent School District*,⁷ the Supreme Court ruled that a school is liable under Title IX of the Education Amendments of 1972⁸ for teacher-on-student sexual harassment. Liability arises when a school official with authority to take corrective measures has actual notice of the teacher's sexual harassment and is "deliberately indifferent" to it.⁹ In *Davis v. Monroe County Board of Education*,¹⁰ the Supreme Court expanded the "deliberate indifference" liability standard to cases involving student-on-student

4. See AMERICAN ASSOC. OF UNIV. WOMEN EDUCATIONAL FOUND, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 2* (1993) [hereinafter *HOSTILE HALLWAYS*] (representing the first national scientific study of sexual harassment in public schools); Nan Stein, Nancy L. Marshall and Linda R. Tropp, NOW LEGAL DEFENSE AND EDUCATION FUND & WELLESLEY COLLEGE CENTER FOR RESEARCH ON WOMEN, *SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 2* (1993) (reporting that 83% of girls ages 9 to 19 had been touched, pinched, or grabbed, and 39% reported that this harassment occurred daily).

5. See, e.g., *Mary M. v. North Lawrence Community Sch. Corp.*, 131 F.3d 1220, 1226 (7th Cir. 1997) (stating that "a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. 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.").

6. See *Wessman v. Boston Sch. Comm.*, 996 F. Supp. 120 (D. Mass. 1998), *rev'd*, 160 F.3d 790 (1st Cir. 1998) (involving an applicant for admission to a Boston public examination school who sued the school committee and school officials and challenged their racially and ethically discriminatory admission policies). The court recognized that:

[o]f great significance is the fact that diversity in the classroom is the most effective of all weapons in challenging stereotypical preconceptions. When studying side by side, in a diverse setting, students grow to understand and respect differences among them as they share life in a complex, pluralistic society. And, as important, they learn that most people, regardless of their backgrounds, think in fundamentally the same way about matters of character, team work, and mutual respect.

Id. at 128.

7. 524 U.S. 274 (1998).

8. 20 U.S.C. §§ 1681-1688 (1994).

9. *Gebser*, 524 U.S. at 290-92.

10. 119 S. Ct. 1661 (1999).

sexual harassment.¹¹ These decisions also establish that a Title IX plaintiff must prove that the sexual harassment was “so severe, pervasive, and objectively offensive” that it denied the harassed student equal access to the school’s educational opportunities or benefits.¹²

The *Gebser* and *Davis* decisions establish a new Title IX liability standard that represents a significant change in the way that federal courts will determine a school’s liability for sexual harassment. These decisions further Title IX’s primary goal of eradicating sex discrimination in schools. They also strengthen the enforcement tools available to prevent sexual harassment, and to resolve claims as quickly and effectively as possible.

While *Gebser* and *Davis* are instructive, they do not explicitly clarify the day-to-day responsibilities, duties, and expectations of school administrators, parents, and students. In this article, Professor Harris and Mr. Grooms examine a number of key practical issues they believe potentially undermine the effectiveness of the “deliberate indifference” liability standard as a tool to prevent and remedy sexual harassment in educational institutions. The authors believe that contrary to its intended result, the “deliberate indifference” standard makes it more difficult for sexually harassed students to invoke Title IX coverage and its protection.

Professor Harris and Mr. Grooms review Title IX’s prohibition against sex discrimination, including its statutory purposes, regulatory scheme, and recognition of a private cause of action for students who allege that teachers or students sexually harassed them. The authors next analyze the new Title IX liability standards established under *Gebser* and *Davis*, including a comparison to the more rigorous standards the Supreme Court adopted in 1998 for workplace sexual harassment cases filed under Title VII of the Civil Rights Act of 1964. Their analysis includes a review of the key elements required to establish a school’s liability for prohibited sexual harassment.

The authors conclude with guidance on some of the key questions the Supreme Court has left unresolved. For example, what constitutes adequate notice of the sexual harassment to an appropriate school official? How does a student determine who is a school official with sufficient authority to correct the alleged sexual harassment? What are the key factors or considerations for

11. *Id.* at 1674-75.

12. *Id.* at 1675.

evaluating the adequacy of a school's response to determine whether it is "deliberately indifferent," i.e., in what manner did the school officials fail to reasonably respond and/or take corrective action? What if the harasser contends that alleged sexual harassment is protected "free speech"?

I. TITLE IX'S PROHIBITION AGAINST SEX DISCRIMINATION

A. *Title IX Covers Programs and Activities in Schools That Receive Federal Funds*

Congress enacted Title IX to prohibit sex discrimination in educational institutions that receive federal funding. Title IX states, in relevant part, that "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 educational program or activity receiving federal financial assistance."¹³ The two principal objectives of Title IX are "to avoid the use of federal resources to support discriminatory practices"¹⁴ and "to provide individual citizens effective protection against those practices."¹⁵

Title IX applies to all public and private educational institutions

13. 20 U.S.C. § 1681(a) (1994). Sexual harassment is a form of sex-based discrimination. See 29 C.F.R. § 16104.11(a) (1999) (defining "sexual harassment"). See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (recounting EEOC's administrative interpretation of the Act in its 1980 Guideline); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (affirming that Title VII is not limited to economic or tangible discrimination); *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211 (5th Cir. 1998) (concluding that Title VII of the Civil Rights Act of 1964 and Title X prohibit same sex harassment).

14. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). In addition to sexual harassment, Title IX's implementing regulations cover (1) "accommodation" claims wherein a student alleges sex discrimination because the school did not provide equal athletic opportunities for members of both sexes, e.g., decisions regarding which varsity teams to field and how many opportunities existed for female varsity athletes; and (2) "equal treatment" claims where a student alleges an unequal provision of scholarship funding and other athletic benefits or opportunities to varsity athletes based on sex. See 34 C.F.R. §§ 106.37(c) (1999) (pertaining to athletic scholarships); 106.41(c)(1)-(10) (1999) (providing factors to determine if force opportunity exists); see also *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) (contemplating a Title IX violation with regards to women varsity athletic teams); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (identifying three areas of regulatory compliance under Title IX: athletic financial assistance (scholarships), equivalence in other athletic benefits and opportunities, and effective accommodation of student interests and abilities). Title IX is viewed widely as succeeding in giving girls confidence through participation in athletics. According to Anne Driscoll, author of the soon-to-be published book, "Girl to Girl – Sports and You: The Real Deal on Being Fit and Having Fun," Title IX "has changed the lives of girls more than any law since the one that gave women the right to vote by" giving boys and girls "a new common experience and a new way to interact." Anne Driscoll, *Giving Girls a Sporting Chance*, BOSTON GLOBE, Oct. 24, 1999, at 18, available in 1999 WL 30398464.

15. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 at 286 (1998) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979); *X. v. Fremont County Sch. Dist.*, No. 96-8065, 1998 WL 704692, at *3 (10th Cir. Oct. 2, 1998)).

that receive federal funds, such as elementary and secondary schools, school districts, proprietary schools, and colleges and universities. Title IX protection extends to a school's "education program or activity."¹⁶ The Department of Education's (DOE) Office of Civil Rights (OCR) interprets this provision to include all of the school's operations, including academic, educational, extra-curricular, and athletic programs.¹⁷ The provision applies whether the activities or programs take place in the facilities of the school, on a school bus, at a class or training program the school sponsors at another location, or elsewhere.¹⁸

The initial flurry of litigation under Title IX addressed the issue of when Title IX applies to an educational institution because it is a "recipient of federal funding."¹⁹ Title IX defines a "recipient of federal funds" to include "any public or private agency, institution, or organization, or other entity, or any other person, to whom federal

16. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (stating that the environment at the teaching hospital consisted of a "mixed employment-training context"); *Women Prisoners of the D.C. Dep't. of Corrections v. District of Columbia*, 899 F. Supp. 659, 668-69 (D.C. Cir. 1995) (noting that vocational programs at a state correctional facility typically provided instructors, evaluations, and offered a particular course of training). In *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), the defendant was a state-run clinic that received federal money and permitted student-interns from Marymount College, with whom it had no affiliation, to perform volunteer field work at its facility. The clinic contended that it was not subject to Title IX because it was not an "education program or activity." *Id.* at 116. The Second Circuit Court of Appeals "declined" to convert [the clinic's] willingness to accept volunteers into conduct analogous to administering an 'education program' as contemplated by Title IX." *Id.* at 118. The court rejected the plaintiff's contention that the clinic's internship program could be viewed as "vocational education." *Id.* It concluded that education was not the clinic's "primary purpose," the clinic "accepts no tuition, has no teachers, has no evaluation process, and requires no regular hours of course study for its volunteer workers." *Id.* The Second Circuit refused to impute the fact that Marymount College operated an "education program" to the clinic "simply because [plaintiff] was a student at the former while she performed work with the latter." *O'Connor*, 126 F.3d at 118. Since there was no institutional affiliation, no written agreement binding the two entities in any way, no sharing of staff members, and no funds circulated between them, the court found that the connection between the college and the clinic was "insufficient to establish [the clinic] as an agent or arm of Marymount for Title IX purposes." *Id.* at 118-19.

17. See OCR Guidance, *supra* note 2, at 12,038 (discussing application of the statute).

18. See OCR Guidance, *supra* note 2, at 12,038 (discussing application of the statute in light of its language "education program or acting").

19. See *Kinman v. Omaha Pub. Sch. Dist. (Kinman II)*, 171 F.3d 607, 611 (8th Cir. 1999) (holding that Title IX will not support an action against a teacher in her individual capacity); *Bracey v. Buchanan*, 55 F. Supp. 2d 416, 419 (noting that school officials cannot be sued in their individual capacity under Title IX because they are not grant recipients); *NCAA v. R.M. Smith*, 525 U.S. 459, 470 (1999) (finding that receipt of dues from federally funded institutions does not bring an association within Title IX's mandate); see, e.g., *Floyd v. Waiters*, 133 F.3d 786, 789 (11th Cir.), *vacated and remanded*, 119 S. Ct. 33 (1998) (recounting Title IX basics including conditions of federal funding); *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1018-19 (7th Cir. 1997) (addressing whether a principal is an appropriate defendant in a Title IX action); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 722-24 (6th Cir. 1996) (discussing Title IX's limited application); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (noting that most Title IX cases raise jurisdictional questions).

financial assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits from such assistance.”²⁰

The Supreme Court initially examined the standards for determining whether an institution is a “recipient of federal funds” in *Grove City College v. Bell*.²¹ Grove City College was a private college that accepted no direct federal assistance.²² It enrolled, however, many students who received federal Basic Educational Opportunity Grants (BEOGs)²³ for educational purposes.²⁴

The Supreme Court determined that Title IX applied to Grove City College because it received tuition money from students who received federal financial aid.²⁵ Although Grove City College received federal funds *indirectly*, through student tuition payments, the Supreme Court held that application of Title IX did not require an educational institution to *directly* receive federal financial assistance.²⁶ It ruled, however, that the students’ receipt of federal grants did not automatically trigger institution-wide Title IX coverage, it only triggered coverage of the school’s financial aid program.²⁷

In response to *Grove City*, Congress enacted the Civil Rights Restoration Act of 1987 (CRRRA).²⁸ The CRRRA expanded the Supreme Court’s restrictive reading of the phrase “program or activity receiving federal financial assistance.”²⁹ It amended Title IX and other federal anti-discrimination statutes,³⁰ to make the entire

20. 34 C.F.R. § 106.2(h) (1999).

21. 465 U.S. 555 (1984).

22. *Id.* at 559.

23. According to the Court, “the structure of the Education Amendments of 1972, in which Congress both created the BEOG program and imposed Title IX’s nondiscrimination requirement, strongly suggests . . . [that some of the college’s] programs or activities receive federal financial assistance within the meaning of Title IX when students finance their education with BEOGs.” *Id.* at 563.

24. *Id.* at 559.

25. *Id.* at 563.

26. *Id.* at 564.

27. *Grove City College*, 465 U.S. at 573-74.

28. 20 U.S.C. § 1687 (1994).

29. 20 U.S.C. § 1681(a) (1994). *See Grove City College*, 465 U.S. at 573-74 (limiting the scope of Title IX application).

30. Several other anti-discrimination laws contain nearly identical language that determines their scope. *See generally* Title VI of the Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1994) (prohibiting race discrimination in “any program or activity receiving federal financial assistance”); The Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (1994) (prohibiting discrimination on the basis of disability in “any program or activity receiving federal financial assistance”); Age Discrimination Act of 1975 § 303, 42 U.S.C. § 6102 (1994) (prohibiting discrimination on the basis of age in “any program or activity receiving federal financial assistance”).

entity (either state agency or educational institution) subject to Title IX if one arm³¹ of an educational institution (or state agency) receives federal funds.³²

In *NCAA v. Smith*,³³ the Supreme Court re-examined this coverage issue in a challenge to a National Collegiate Athletic Association (NCAA) bylaw that prohibited a female student athlete from playing college varsity volleyball as a graduate student.³⁴ Smith contended that the NCAA's receipt of membership dues from its member institutions qualified it as an indirect recipient of federal funding, therefore, triggering Title IX coverage.³⁵ The Supreme Court rejected this approach. It held that the NCAA is not an "indirect recipient" of federal aid within the reach of Title IX, but merely an "indirect beneficiary" of such aid.³⁶

The Supreme Court distinguished *Grove City* because in that case, the federal funds were specifically earmarked for educational expenses.³⁷ In *Smith*, the student-plaintiff could not assert that federal

31. 20 U.S.C. § 1687(2)(A) (1994) provides that a "program or activity" includes "all of the operations of . . . a college, university, or other post-secondary institution, or a public system of higher education[,] . . . any part of which is extended federal financial assistance." It also provides institution-wide coverage for entities "principally engaged in the business of providing education" services, and for entities created by two or more covered entities. *Id.* at § 1687(3)(A)(ii), § 1687(4). See also *Bartlett v. New York State Bd. of Law Exam's*, 156 F.3d 321 (2d Cir. 1998). In *Bartlett*, the court concluded that the CRRRA:

does not require an analysis of whether the [state agency] to which the [federal financial] assistance is "extended" must also be in a position to accept or reject [statutory] obligations for the strictures of the [statute] to apply. Therefore, although there is nothing in the record to indicate that the Board ever actually elected to accept federal funds, the lack of such evidence is immaterial.

Id. at 330.

32. See, e.g., *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972) (finding that a tax exemption constituted "federal financial assistance" in the context of Title VI, not Title IX); *Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988) (determining that the defendant received federal financial assistance within the meaning of both Title VI and Title IX because it received both direct grants and tax-exempt status); *M.H.D. v. Westminster Schs.*, 172 F.3d 797, 801-02 (11th Cir. 1999) (discussing that the plaintiff asserted that the school was a "recipient of federal funds" because of its tax-exempt status and, since the court of appeals determined that this claim was not "immaterial or wholly frivolous," it agreed that the district court had subject-matter jurisdiction over the lawsuit). See also *Association of Mexican American Educators v. State of California*, 183 F.3d 1055, 1063 (9th Cir. 1999) (stating that the definition of "program or activity" means that if any part of the entity receives federal funds, the entire entity is covered under Title IX).

33. 119 S. Ct. 924 (1999).

34. *Id.* at 997.

35. *Id.*

36. *Id.*

37. Compare *Grove City College v. Bell*, 465 U.S. 555, 564 (1984) with *United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 607 (1986) where the Supreme Court held that airlines are not recipients of federal funds received by airport operators for airport construction projects, even when the funds are used for projects specifically beneficial to the airlines.

funds the NCAA member institutions received were earmarked for payments of NCAA dues.³⁸ Accordingly, the Supreme Court held that the NCAA was not covered under Title IX because it was merely "an entity that benefits from federal assistance."³⁹

B. Expanding Title IX To Recognize A Private Cause of Action for Sexual Harassment

Although the standards governing an employer's liability for sexual harassment under Title VII of the Civil Rights Act of 1964⁴⁰ have developed rapidly in the employment context,⁴¹ the same is not true in a school setting under Title IX. Before the Supreme Court examined whether schools are liable for teacher-on-student sexual harassment in 1998, its jurisprudence regarding an educational institution's liability under Title IX⁴² was limited to whether Title IX

38. *Smith*, 529 U.S. at 929.

39. *Id.* at 929-30. The Supreme Court declined to address two alternative theories for bringing the NCAA under the prescriptions of Title IX because it could not "decide in the first instance issues not decided [by the court] below." *Id.* at 930.

40. 42 U.S.C. § 2000e-2 (1994). Title VII of the Civil Rights Act of 1964 provides, in relevant part, that it "shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against 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.* § 2000e-2(a)(1).

41. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) and *Burlington Inds., Inc. v. Ellerth*, 524 U.S. 75, 78-9 (determining that an employer is vicariously liable for a supervisor's sexual harassment of a subordinate employee); *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998) (holding that Title VII prohibits sex discrimination consisting of same sex harassment).

42. 20 U.S.C. § 1681 (1994). In *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), the Supreme Court held that Title IX must be accorded "a sweep as broad as its language." As discussed above, the cases that the Supreme Court reviewed, required it to resolve whether a program received federal financial assistance within the meaning of Title IX. Those federal courts of appeals reaching the liability standard concluded that Title VII case law provided the most appropriate guidance in determining whether actionable sexual harassment occurred under Title IX. See *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) (discussing same sex harassment); *Brine v. University of Iowa*, 90 F.3d 271, 275-76 (8th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997) (noting that the elements of procedure for the two statutes are slightly different); *Doe v. Claiborne County Bd. of Educ.*, 103 F.3d 495, 514 (6th Cir. 1996) (holding that harassment allegations constitute a hostile work environment); *Torres v. Pisano*, 116 F.3d 625, 630 (2d Cir. 1997) (discussing the applicability of Title VII standards to a Title IX private right of action); *Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir. 1994) (holding that McDonnell Douglas standard applies in Title IX cases); *Ivan v. Kent State Univ.*, 863 F. Supp. 581, 586 (N.D. Ohio 1994), *aff'd mem.*, 92 F.3d 1185 (6th Cir. 1996) (deciding the relationship between Title VII and Title IX claims); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996) (stating that "by enacting Title IX Congress created a strong incentive for schools to adopt policies that protect federal civil rights"); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993) (considering whether Title IX requires a showing of discriminatory intent similar to Title VII); *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 315 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987) (discussing differences in the basis of a claim under Title VII or IX).

included a private cause of action.⁴³

Title IX does not explicitly provide a private cause of action for sex discrimination, including sexual harassment, at schools.⁴⁴ It established, however, a complex administrative enforcement scheme to ensure compliance with its non-discrimination provisions.⁴⁵ An aggrieved individual can file a complaint with the Department of Education (DOE) which is authorized to conduct investigations and engage in fact-finding.⁴⁶ The DOE can also conduct its own periodic review.⁴⁷ If the DOE finds a violation, it can attempt to informally resolve the matter.⁴⁸ If informal resolution is unsuccessful, the DOE can seek compliance by terminating the institution's federal funding after an administrative hearing.⁴⁹

In 1979, the Supreme Court first addressed the question of whether Title IX permitted enforcement beyond the administrative remedies available under the DOE complaint process. In *Cannon v. University of Chicago*,⁵⁰ it ruled that there was an implied private right of action for individuals to enforce Title IX. The Supreme Court recognized a private cause of action in addition to remedies already available under Title IX's administrative enforcement mechanism.⁵¹ Prior to *Cannon*, courts used federal funding cut-offs⁵² as the exclusive

43. Despite the Supreme Court's lack of guidance, the DOE has interpreted Title IX for well over a decade. See 34 C.F.R. § 106.1-106.71 (1999).

44. See 20 U.S.C. §§ 1681(a) and 1682 (1994) (providing a general prohibition against discrimination and federal administrative enforcement). See also *Liu v. Striuli*, 36 F. Supp. 2d 452, 463 (D. R.I. 1999).

45. See, e.g., *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998) (relating this scheme as a foreclosure to use of § 1983 in implementing Title IX).

46. See 34 C.F.R. § 100.7(b) (1999) (explaining conduct of investigation where any person can file a complaint of discrimination within 180 days unless excepted).

47. See 34 C.F.R. § 100.7 (A) (1999) (discussing periodic compliance reviews).

48. See *id.* § 100.7(d)(1) (providing for informal resolution when a prompt department investigation finds compliance failure).

49. See *id.* § 100.8 (establishing procedures for effecting compliance).

50. 441 U.S. 677 (1979). *Cannon* alleged that she was denied admission to the University of Chicago medical school program in violation of Title IX because of her sex. *Id.* at 680. The district court dismissed her claim on the ground that Title IX provided neither an explicit nor an implicit private right of action. *Id.* at 685-88. The Seventh Circuit Court of Appeals affirmed the district court's decision. *Id.* at 688-89. The Supreme Court held that the traditional method of enforcing Title IX by cutting off federal funding would not always be sufficient to fulfill congressional goals in enacting Title IX. *Id.* at 688-89. It identified these goals as a desire "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Id.* at 704-06.

51. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535-36 (1982), (affirming the Second Circuit's finding that federal funds could be terminated for discrimination visited upon employees and students of educational programs). The Court did not address the availability of a private right of action for employees of such programs. *Id.*

52. A similar enforcement scheme is employed to combat racial harassment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-1 to 2000d-7, which served as a model for

means of enforcing Title IX.⁵³

More than a decade after its *Cannon* decision, the Supreme Court revisited Title IX challenges in *Franklin v. Gwinnett County Public Schools*.⁵⁴ In *Franklin*, the Supreme Court addressed the scope of remedies available to a successful private litigant in a suit brought pursuant to the *Cannon* implied right of action.⁵⁵ In a unanimous decision, the Supreme Court held that monetary damages are available as a remedy to enforce Title IX when a teacher sexually harasses a student.⁵⁶

As part of its analysis, the Supreme Court reexamined its decision in *Pennhurst State School and Hospital v. Halderman*,⁵⁷ in which it had reviewed Congress' power to legislate under the Spending Clause.⁵⁸ In *Pennhurst*, the Supreme Court stated that:

"legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' [citation omitted] There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [citation omitted]"⁵⁹

Title IX.

53. "During the decade following *Cannon*, plaintiffs used Title IX to obtain injunctive and declaratory relief. It remained unsettled, however, whether a plaintiff could receive monetary damages for violations of the statute." Courtney G. Joslin, *Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment*, 34 HARV. C.R.-C.L. L. REV. 201, 207 (1999).

54. 503 U.S. 60 (1992).

55. Christine Franklin, a tenth grade student, alleged that she was subjected to continual sexual harassment (consisting of verbal and physical conduct, including forcible sexual intercourse) from Andrew Hill, a sports coach and teacher at the North Gwinnett High School. *Id.* at 60. Franklin's complaint further alleged that school officials were aware of and investigated Hill's conduct with other female students, but failed to intervene and even discouraged Franklin from pressing charges against Hill. The district court had dismissed Franklin's complaint because it held that Title IX did not authorize an award of damages and the Eleventh Circuit Court of Appeals affirmed. *Id.* at 63-64.

56. *Id.* at 61-62.

57. 451 U.S. 1 (1981).

58. See U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power To Lay and Collect Taxes . . . to . . . provide for the . . . general Welfare of the United States." *Id.*

59. *Pennhurst*, 451 U.S. at 17.

When a school violates Title IX, the DOE is authorized to withhold its funding pursuant to the Spending Clause analysis.⁶⁰ Title IX conditions federal funding assistance on the school's promise not to discriminate based on sex.⁶¹ In addition, as the Fourth Circuit explained in *Litman v. George Mason University*,⁶² Title IX "also conditions these funds on the [school's] consent to be sued in federal court for an alleged breach of the promise not to discriminate."⁶³

The *Franklin* Court explained that the result will be different when the school unintentionally violates statutory conditions. "In *Pennhurst*, [we] observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional* The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."⁶⁴ The court found that:

this notice problem does not arise in a case . . . in which intentional discrimination is alleged. Unquestionably, Title IX placed a duty on the Gwinnett County Schools 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. We believe the same rule should apply when a teacher sexually harasses and abuses a student."⁶⁵

60. See 20 U.S.C. § 1682 (1994) (allowing federal departments extending federal financial assistance to effectuate compliance through a termination of benefits). See also *supra* notes 7-10 and accompanying text (discussing recent Supreme Court decisions addressing sexual harassment in schools and liability).

61. See, e.g., *Pennhurst*, 451 U.S. at 17-18 (interpreting and applying Title IX to schools).

62. 186 F.3d 544 (4th Cir. 1999).

63. The Fourth Circuit referenced 42 U.S.C. § 2000d-7(a)(1) which amended Title IX to make explicit that "[a] state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of . . . Title IX of the Education Amendments of 1972." *Litman*, 186 F.3d at 551 (4th Cir. 1999). See also *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 918 (S.D. Ohio, 1998) (recounting the recently imposed standards to hold an educational institution liable under Title IX as actual knowledge and deliberate indifference). The Eleventh Amendment provides, in pertinent part, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. CONST. amend. IX. It is also well established that the Eleventh Amendment precludes citizens from bringing suits in federal court against their own states. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 9 (1890) (discussing the jurisdiction of federal courts); *Alden v. Maine*, 119 S. Ct. 2240, 2265 (1999) (discussing the constitutional immunity of states against private suits).

64. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992). In *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1034 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2367 (1998), the Seventh Circuit held that the proper Title IX standard for imposing liability on schools is "actual knowledge." The Seventh Circuit's analysis was based on its finding that the Spending Clause requires intentional discrimination to allow for a damages recovery, and on the basis that Title IX does not include agency language. *Id.* at 1029-30.

65. *Franklin*, 503 U.S. at 75 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

The Supreme Court concluded, therefore, that Gwinnett County school officials were on notice that they could be found liable for intentionally discriminating against a student under Title IX.⁶⁶

II. DEFINING THE STANDARDS FOR LIABILITY UNDER TITLE IX

While the *Cannon*⁶⁷ and *Franklin*⁶⁸ decisions recognized a private cause of action under Title IX, the Supreme Court did not set forth standards for determining when a school is liable under Title IX for sexual harassment by teachers or students until its decisions in *Gebser*⁶⁹ and *Davis*.⁷⁰

A. *Gebser v. Lago Vista Independent School District*

During the 1990-1991 academic year, Frank Waldrop, a teacher at Lago Vista High School, met Alida Gebser, an eighth-grade student, in his wife's honors class.⁷¹ The following year, as a ninth-grader, Ms. Gebser was assigned to Mr. Waldrop's advanced social studies class and their relationship grew.⁷² In the spring of 1992, Mr. Waldrop initiated sexual contact with Ms. Gebser when he visited her at home knowing that she would be alone.⁷³ During the summer of 1992, Waldrop and Gebser had a sexual relationship.⁷⁴ She was fifteen years

(recognizing sexual harassment as a form of sex discrimination prohibited under Title VII)). The Supreme Court did not determine whether Title IX proscribes teacher-on-student sexual harassment. It merely addressed what remedies were available under Title IX for sexual harassment. *Franklin*, 503 U.S. at 72-74. In *Davis v. Monroe County Bd. of Educ.*, the Eleventh Circuit Court of Appeals characterized the Supreme Court's suggestion that teacher-on-student sexual harassment gives rise to a cause of action under Title IX as arguably dicta. 120 F.3d 1390, 1400 n.14 (11th Cir. 1997).

66. *Franklin*, 503 U.S. at 75. Notwithstanding its discussion of the *Pennhurst* case and the Spending Clause, the Supreme Court refused to decide whether, in enacting Title IX, Congress used its Spending Clause power, or whether it did so pursuant to Section 5 of the Fourteenth Amendment. Instead the Court conclude[d] "that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute." *Id.* at 75 n.8. In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 719 (1982), the Supreme Court discussed Congress' goal of promoting equality in enacting Title IX and treated it as enacted pursuant to Congress' power granted by section five of the Fourteenth Amendment "to enforce that Amendment." *Id.* at 719.

67. 441 U.S. 677 (1979).

68. 503 U.S. 60 (1992).

69. 524 U.S. 274 (1998).

70. 119 S. Ct. 1661 (1999).

71. *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1224 (5th Cir. 1997).

72. *Id.*

73. *Id.*

74. *Id.*

old.⁷⁵ In January 1993, a Lago Vista police officer discovered the two engaged in sexual intercourse.⁷⁶ Waldrop was arrested and terminated from his employment.⁷⁷ Waldrop's teaching license was later revoked.⁷⁸

Ms. Gebser did not report the relationship to school officials or to her parents.⁷⁹ She did not dispute the fact that "there was no direct evidence that any school official was aware of Waldrop's sexual exploitation" until January 1993 when the police officer exposed the relationship.⁸⁰

Gebser filed suit against the Lago Vista School District alleging that her rights were violated under Title IX.⁸¹ The district court granted summary judgment in favor of Lago Vista.⁸² The Fifth Circuit Court of Appeals affirmed.⁸³

B. Davis v. Monroe County Board of Education

When LaShonda Davis was a fifth-grader (during the 1992-1993 academic year) at the Hubbard Elementary School in Monroe County, Georgia, a classmate, identified only as G.F., began to harass her during school hours.⁸⁴ According to the complaint, G.F.'s behavior began in December 1992 and continued through May 1993.⁸⁵ G.F. repeatedly attempted to touch LaShonda's breasts and genital area and made vulgar statements to her such as "I want to get in bed with you" and "I want to feel your boobs."⁸⁶ After each incident, LaShonda notified her classroom teacher, Ms. Fort, and her mother.⁸⁷ LaShonda's mother contacted Ms. Fort as well and was informed that Principal Bill Querry had been made aware of the

75. *Id.*

76. *Lago Vista*, 106 F.3d at 1225.

77. Bernadette Marczely, *Mixed Messages: Sexual Harassment in the Public Schools*, THE CLEARING HOUSE, 1999 WL 11744223, at *2 (discussing the facts of *Gebser v. Lago Vista*).

78. *Id.*

79. *Id.*

80. *Lago Vista*, 106 F.3d at 1225.

81. Gebser also sued the school district for negligence under Texas state law (not pursued on appeal) and violations of 42 U.S.C. § 1983. *Lago Vista*, 106 F.3d at 1225. Plaintiff appealed only the summary judgment on her Title IX claim. *Id.*

82. *Id.*

83. *Id.* at 1223.

84. *Aurelia D. v. Monroe County Bd. Of Educ.* 862 F. Supp. 363, 364 (M.D. Ga. 1994).

85. *Id.* at 364-65.

86. *Id.* at 364.

87. *Id.*

incident.⁸⁸

In February 1993, "while in gym class, G.F. placed a door stop in his pants and behaved in a sexually suggestive manner towards LaShonda. She reported this incident to her gym teacher."⁸⁹ In March or April 1993, LaShonda and a group of girls, who G.F. also harassed, decided they should talk to Querry about the situation.⁹⁰ Ms. Fort denied their request to go to Querry's office.⁹¹ "The complaint further alleges that LaShonda's assigned seat in Ms. Fort's class was next to G.F.'s seat."⁹² It was more than three months after her frequent complaints began that Ms. Fort allowed LaShonda to change her seating assignment.⁹³

LaShonda's "previously high grades dropped as she became unable to concentrate on her studies and, in April 1993, her father discovered that she had written a suicide note."⁹⁴ When LaShonda sought assistance from Querry in May 1993, he asked her why she "was the only one complaining."⁹⁵ LaShonda told her mother that she "didn't know how much longer she could keep [G.F.] off her."⁹⁶ LaShonda's mother then called the school board's superintendent to complain about G.F. and Querry.⁹⁷ G.F. was charged with sexual battery in May 1993.⁹⁸ He plead guilty to the charge.⁹⁹

LaShonda's mother filed a lawsuit in the U.S. District Court for the Middle District of Georgia against the School Board, the School District's superintendent, and Querry.¹⁰⁰ The complaint alleged that the School Board violated Title IX¹⁰¹ through their failure to protect LaShonda from G.F.'s unwelcome sexual advances which created an

88. *Id.* at 365.

89. *Aurelia D.*, 862 F. Supp. at 365.

90. *Id.* at 365.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Aurelia D.*, 862 F. Supp. at 365.

95. *Id.*

96. *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1667 (1999) (quoting from the complaint at paragraph 12).

97. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 365 (M.D. Ga. 1994).

98. *Id.* at 365.

99. *Id.*

100. *Id.* at 364.

101. In addition to her Title IX claim, Davis' lawsuit included allegations that defendants violated her rights under 42 U.S.C. § 1981 and 42 U.S.C. § 1983. These sections discuss the right of an individual to hold others liable for violation of their civil rights. See 42 U.S.C. §§ 1981, 1983. Chief Judge Owens granted qualified immunity to defendants Querry and Dumas (the School District's superintendent). *Aurelia D.*, 862 F. Supp. at 367.

intimidating, hostile, offensive and abusive school environment.¹⁰²

The District Court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted.¹⁰³ It interpreted Title IX as authorizing relief only when a plaintiff is subjected to discrimination under "any education program or activity receiving Federal financial assistance."¹⁰⁴ Since the court found that "the sexually harassing behavior of a fellow fifth grader is not part of a school program or activity," it concluded that LaShonda's mental and emotional stress "was not proximately caused by a federally-funded educational provider."¹⁰⁵

A three-judge panel of the Eleventh Circuit Court of Appeals reinstated plaintiff's claim.¹⁰⁶ The appeals court found that "as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment."¹⁰⁷

The School Board's motion for rehearing *en banc* was granted and the full panel upheld the district court's dismissal of the case.¹⁰⁸ Focusing first on Title IX's legislative history, Chief Judge Tjoflat explained that Title IX mirrored Title VI, rather than Title VII, in its construction.¹⁰⁹ In a footnote, Chief Judge Tjoflat identified three reasons for the Court's refusal to use Title VII standards of liability: (1) Congress could have worded Title IX as it had worded Title VII, but it did not; (2) while Title VII was enacted under the Commerce Clause, Title IX was not; and (3) liability under Title VII is

102. *Davis v. Monroe County Bd. Of Edu.*, 120 F.3d 1390, 1394 (quoting from the complaint at paragraphs 27-28).

103. *Aurelia D.*, 862 F. Supp. at 367-68.

104. *Id.* at 367 n.3 (quoting Title IX, 20 U.S.C. § 1681(a)). Title IX 20 U.S.C. § 1687(2)(B) defines a "program or activity" as encompassing "all the operations of . . . a local educational agency . . . or other school system.").

105. *Id.*

106. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d at 1195 (11th Cir. 1996).

107. *Id.* at 1193.

108. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d at 1392 (11th Cir. 1997), *aff'g* 91 F.3d 1418 (1996). The Eleventh Circuit, sitting *en banc*, considered only Davis' Title IX claim against the School Board since she did not appeal the dismissal of her Title IX claims against the individual defendants, Dumas and Querry, nor did she appeal the dismissal of her § 1981 claim. *Id.* at 1392. The three-judge panel of the Eleventh Circuit rejected Davis' § 1983 claim that she had expanded it to include a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1392 n. 3.

109. *Id.* at 1398 (quoting 110 CONG. REC. 6546 (1964) and 117 CONG. REC. at 30, among other references to the Congressional Record).

determined based on agency principles that are irrelevant in the Title IX context where students are not “agents” of the school.¹¹⁰

C. Supreme Court Analysis

The Supreme Court granted certiorari, in *Gebser*¹¹¹ and in *Davis*,¹¹² to determine under what circumstances a school is liable for the independent misconduct¹¹³ of a teacher and student. Justice O'Connor, who delivered the majority opinion in both cases,¹¹⁴ observed in *Gebser* that “it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official.”¹¹⁵ A year later in *Davis*, Justice O'Connor concluded that [a school board] may be liable for ‘subject[ing]’ [sic] their students to discrimination where [it] is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority.”¹¹⁶

In *Gebser*, Justice O'Connor distinguished Title IX from Title VII whose language explicitly calls for the application of agency principles in determining an employer’s liability.¹¹⁷ In addition to this difference in statutory construction,¹¹⁸ the Supreme Court in

110. *Davis*, 120 F.3d at 1400 n.13.

111. 524 U.S. 274 (1998).

112. 119 S. Ct. 1661 (1999).

113. In *Davis*, the Court observed that it has “elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes.” *Id.* at 1674.

114. A slim 5-4 majority determined the outcome in both cases. In *Gebser*, Justice O'Connor was joined by Chief Justice Rehnquist, Justices Scalia, Kennedy, and Thomas. *Gebser*, 524 U.S. at 276. The *Davis* majority consisted of Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer. *Davis*, 119 S. Ct. at 1666.

115. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 276 (1998).

116. *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1673 (1999).

117. See *Gebser*, 524 U.S. at 286-88 (analyzing the language used in each Act). Title VII prohibits an employer from discriminating against employees and applicants for employment. 42 U.S.C. § 2000e(b). It includes “any agent” in its definition of employer. *Id.* See *Floyd v. Waiters*, 133 F.3d 786, 788-793 (11th Cir. 1998) (involving the Eleventh Circuit’s explicit rejection of agency liability as a basis for Title IX claims). The court concluded that “there must be actual notice of the sexually harassing behavior by the school board or school superintendent in order for there to be a claim against the school system under Title IX.” *Id.* at 285.

118. In *Howard v. Bd. of Educ. of Sycamore Community Unit Sch. Dist.*, 876 F. Supp. 959, 974 (N.D. Ill. 1995), the district court found that “actual notice” is the correct standard for imposing liability to the educational institution, based on the following rationale: “When Congress enacted Title IX, it expressly revoked the former exclusion in Title VII that prohibited Title VII claims from being brought against an educational institution. Had Congress desired to expressly incorporate the agency language of Title VII into Title IX, it very easily could have done so then or since.” *Id.* at 974. In *McCue v. State of Kansas Dep’t. of Human Resources*, 165 F.3d 784 (10th Cir. 1999), a workplace sexual harassment case brought under Title VII, to restrict

Gebser concluded that Congress would have intended¹¹⁹ to limit the scope of available remedies under Title IX had they addressed the issue of employer liability.¹²⁰ It also observed that Title IX's contractual framework was modeled after Title VI.¹²¹ The court refused, therefore, to adopt "wholesale" Title VII principles to Title IX cases.¹²²

For cases brought pursuant to Title IX, the Supreme Court rejected the agency principle of *respondeat superior*¹²³ as well as the negligence principle of constructive notice that applies in Title VII cases.¹²⁴ It held that the purpose of Title IX is to *protect* individuals against federal funding recipients who misuse such "federal resources to support discriminatory practices" whereas Title VII seeks to *compensate* victims of discrimination.¹²⁵ Justice O'Connor clarified

liability, defendants argued that principles of agency ought not to apply in Title VII cases since they do not apply under Title IX. Defendants attempted to analogize the two statutes in order to avoid responsibility under *respondeat superior* for the actions of a supervisor vis-à-vis an employee. *Id.* at 788. The Tenth Circuit cited *Gebser*, noting that Title VII and Title IX differ in "language, form, purpose, and content," which "preclude any reasonable analogies between them with regard to the applicability of respondeat superior in actions maintained under each statute." *Id.* at 788.

119. "We attempt to infer how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the statute." *Gebser*, 524 U.S. at 285 (1998) (quoting *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 178 (1994)). Although Title IX's legislative history does not provide guidance with respect to the liability issue, the First Circuit in *Lipsett v. University of Puerto Rico* invokes a House Report "strongly suggest[ing] that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1988); see also H.R.REP. NO. 92-554, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 2462.

120. See *Gebser*, 524 U.S. at 285-86.

121. The Supreme Court noted that both Titles VI and IX specifically condition federal funding on a recipient's promise not to discriminate. *Id.* at 286. As in *Franklin*, the Supreme Court contrasted Title IX from Title VII which contains an outright prohibition against discrimination. *Id.* at 286-89.

122. See *Id.* In *Morlock v. West Central Educ. Dist.*, 46 F. Supp. 2d 892, 907 (D. Minn. 1999), the district court observed that "the *Gebser* Court's rejection of agency principals [sic] as a ground for teacher against student harassment Title IX liability leaves little logical basis for distinguishing between peer harassment and teacher harassment suits." It held, therefore that *Gebser* supported a finding that peer harassment was actionable. *Id.* at 907.

123. OCR Guidance indicates that it applies agency principles for imposing liability on schools when the harasser is one of the school's employees. See OCR Guidance, *supra* note 2, at 12, 039. The Guidance explains that, contrary to OCR policy, the Fifth Circuit held that a school could not be found liable under Title IX pursuant to agency principles where the school's male karate instructor repeatedly initiated sexual intercourse with a fifteen-year old female student. See OCR Guidance, *supra* note 2, at 12, 039 (citing *Rosa H. v. San Elizario Ind. School Dist.*, 106 F.3d 648 (5th Cir.)). See also RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) (discussing principles governing the delegation of authority to or authorization of another person to act on one's behalf); R. GAULL SILBERMAN, EEOC NOTICE NUMBER N-915-050 (1990).

124. See *Gebser*, 524 U.S. at 285.

125. *Id.* at 286 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979)).

“[t]hat [the] reference [we made] to *Meritor* [in the *Franklin* decision] was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX.”¹²⁶

In *Davis*, the Supreme Court declared that, “we have repeatedly treated Title IX as legislation enacted pursuant to Congress’ authority under the Spending Clause.”¹²⁷ Justice O’Connor reiterated the *Gebser* Court’s conclusion that “the scope of liability in private damages actions under Title IX is circumscribed by *Pennhurst*’s requirement that funding recipients have notice of their potential liability.”¹²⁸ The Supreme Court then clarified its reasoning by holding that “this limitation on private damages actions is not a bar to liability where a funding recipient *intentionally* violates the statute.”¹²⁹

The *Gebser* Court held, therefore, that compensatory damages are available under Title IX only when a plaintiff can establish *intentional* discrimination on the part of the school district.¹³⁰ An educational institution’s liability is predicated on its “deliberate indifference” to notice of misconduct in an institutional program.¹³¹ Justice O’Connor stated that for liability to attach to the educational institution, there must be an official decision by the recipient of federal funds not to remedy the situation after the alleged discriminatory conduct has been brought to the attention of an

126. *Id.* at 283.

127. *Davis*, 119 S. Ct. at 1669. Although the Supreme Court indicates that it has “treated” Title IX as Spending Clause legislation, it has not yet determined the source of power under which Congress passed this legislation. See *supra* note 35 and accompanying text (discussing the Supreme Court’s analysis in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)). As previously discussed, the Supreme Court declined to consider this issue in *Franklin* and, in *Gebser*, without any analysis. See *supra* notes 85-103 and accompanying text (analyzing the Supreme Courts’ interpretation of legislative intent and Title IX). The Court assumed that the issue was resolved.

128. *Davis*, 119 S. Ct. at 1670 (citing *Gebser*, 524 U.S. at 287-88).

129. *Id.* at 1670 (quoting *Franklin*, 503 U.S. at 74-75 (emphasis added)).

130. See *Gebser*, 524 U.S. at 292-93. Like the Supreme Court, the Seventh Circuit, in *Doe v. University of Illinois*, 138 F.3d 653, 661 (7th Cir. 1998) found that the school’s failure to respond promptly to known sexual harassment is itself intentional discrimination based on sex. Contrast, *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 519 U.S. 861, where the Fifth Circuit Court of Appeals framed the issue as follows: “whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents.” *Id.* at 1010. It found that Title IX “applies only to the practices of the recipients themselves, not to third parties.” *Id.* at 1013. Therefore, based on this analysis, “a school [can] be found liable under Title IX for peer sexual harassment only if it treated sexual harassment of boys more seriously than sexual harassment of girls.” *Id.* at 1016.

131. *Gebser*, 524 U.S. at 290.

"appropriate person."¹³²

Likewise, the majority in *Davis* found that the Monroe County Board of Education can be held liable for damages under Title IX only for its *own* misconduct, i.e., its own decision to remain idle in the face of known student-on-student harassment in its schools, and not for the student's actions.¹³³ Responding to anticipated criticism from school officials that they would be held liable for actions of third-parties outside their control, the Supreme Court explained that it had not "expanded" the scope of liability beyond the recipients of federal funds.¹³⁴ Invoking Title IX directly, Justice O'Connor opined that students are not only protected from discrimination, but also specifically shielded from being "excluded from participation in" or "denied the benefits of" any "education program or activity receiving federal financial assistance" on the basis of gender.¹³⁵

The Supreme Court was naturally concerned about recipients of federal funding who are genuinely interested in promoting Title IX's goal of maintaining discrimination-free educational environments. Such recipients may not know of alleged discriminatory practices taking place in their "programs or activities." In accordance with Title IX's express means of enforcement, these institutions must be given the opportunity to correct the misconduct before federal funding is withdrawn.¹³⁶

III. ANALYZING KEY ELEMENTS OF THE "DELIBERATE INDIFFERENCE" STANDARD TO ESTABLISH TITLE IX LIABILITY

We will use the following hypothetical case to closely analyze the

132. *Id.* at 290. The Supreme Court found that an appropriate person is, "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." *Id.*

133. *Davis*, 119 S. Ct. at 1670-75. The Department of Education's sexual harassment guidance provides that:

[A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

OCR Guidance, *supra* note 2, at 12,039-40.

134. *See Davis*, 119 S. Ct. at 1670-75.

135. *Id.* at 1669-70 (citing 20 U.S.C. § 1681(a) (1999)).

136. Department of Education regulations require notice of a violation to the appropriate Department official or person, as well as an opportunity for voluntary compliance before administrative proceedings can commence. 34 C.F.R. §§ 100.8(c)-(d); *see also Gebser*, 524 U.S. at 282 (discussing Department of Education regarding harassment carried out by a teacher).

impact of the *Gebser-Davis* “deliberate indifference” standard on a student’s ability to allege and prove a school’s Title IX liability for prohibited sexual harassment. While we will review all elements of the *Gebser-Davis* liability standard, we will focus on the three elements we believe are the most difficult for a student-plaintiff to establish: (1) that the unwelcome sexual conduct was so severe, pervasive, and objectively offensive that it denied the student equal access to the school’s educational opportunities or benefits;¹³⁷ (2) that the school had actual notice of the alleged harassment;¹³⁸ and (3) that the school was “deliberately indifferent,” to the sexual harassment and failed to take appropriate corrective action to remedy it.¹³⁹

A. Hypothetical

Naomi Young is a 20 year old “Deans List” student at Fairness University. At the beginning of her junior year, Naomi began working as a researcher for James Lewis, an associate professor in the Psychology Department. Naomi was also enrolled in an early childhood development seminar that James taught weekly.

After working together for four weeks, Naomi began to date James. They had several lunch and dinner meetings/dates during the next few weeks. Naomi also accompanied James to several University social functions, including at least two dinner meetings at the home of William Tyson, Chair of the Psychology Department. During this period, James’ comments on Naomi’s research activities and classroom participation were very positive and supportive. By mid-October, Naomi was becoming increasingly concerned about her relationship with James. He was placing more demands on her social time, and was becoming more insistent about initiating an intimate sexual relationship. Naomi was also concerned about James’ behavior: he called her several times each day, repeatedly questioned her about her whereabouts, asked her about her prior “boyfriends,” and showed up unannounced at her apartment at least five times, the most recent incident occurring at 1:30 a.m. Naomi also began to hear comments from other students in her seminar about how she was sure to receive an “A” in the course.

Naomi began to have misgivings about their relationship. She felt that James’ behavior was becoming more erratic and controlling. After her seminar class one day, Naomi told James that she could no

137. See *Davis*, 199 S. Ct. at 1675 (defining sexual harassment under Title IX).

138. See *Gebser*, 524 U.S. at 291 (stating that the knowledge of the wrongdoer is unrelated to actual notice).

139. See *id.* at 20.

longer date him. James became very loud, yelled at her, and insisted that their relationship was not over. During their conversation, James reminded Naomi that he was responsible for her seminar grade. While James was berating Naomi, Professor Tyson walked by the classroom. Although he overheard some of what James said and realized that James was quite upset, Professor Tyson did not intervene in any manner.

James continued to call Naomi several times a day. He sent her a number of hand-written notes and e-mail messages in which he repeatedly asked Naomi to meet him for dinner, or come to his apartment. Naomi declined all of his invitations. James also became more critical of Naomi's in-class contributions and her written work. He began to return her research assignments as inadequate and superficial. The last incident occurred when James verbally abused Naomi at the end of last week's seminar, and physically threatened her if she did not go out with him.

Naomi began having difficulty sleeping. Her concentration began to waver, and her work in other classes began to slip. Naomi was particularly apprehensive about James showing up at her apartment, and becoming physically abusive.

In 1997, Naomi had attended a meeting on sexual harassment issues as part of her new student orientation. During this meeting, she received a student code of conduct that described Fairness University's sexual harassment policies and complaint procedures. The University did not reissue its sexual harassment policy in subsequent academic years.

B. KEY ELEMENTS TO ESTABLISH TITLE IX LIABILITY FOR SEXUAL HARASSMENT

To establish the University's Title IX liability for prohibited sexual harassment, Naomi must allege and prove that:¹⁴⁰

1. She is a member of a protected group based on her sex;¹⁴¹
2. She was subjected to unwelcome conduct of a sexual nature, i.e., quid pro quo or hostile environment sexual harassment;¹⁴²
3. The sexual harassment was so severe, pervasive, and objectively

140. See e.g., *Morse v. Regents of the Univ. of Colorado*, 154 F.3d 1124, 1127 (10th Cir. 1998) (explicating the standards to state a Title IX claim); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996) (listing the elements that must be proven to succeed on a claim of sexual harassment); *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 753 (2d Cir. 1998) (concluding that the plaintiff must prove six elements to demonstrate liability under Title IX).

141. See *Morse*, 154 F.3d 1127 (1998).

142. *Id.*

offensive that it deprived her of access to the University's educational opportunities or benefits;¹⁴³

4. A University official with authority to take corrective measures had actual knowledge or notice of the sexual harassment; and¹⁴⁴

5. Despite such knowledge, the University official was deliberately indifferent to the sexual harassment, and failed to reasonably respond.¹⁴⁵

1. Naomi Is A Member of A Protected Group Based On Her Sex

The easiest element for Naomi to satisfy is that she is a member of a protected group because Title IX prohibits sex discrimination against "any person." It protects, therefore, both male and female students from sexual harassment by school employees, other students, or third parties (in limited circumstances).¹⁴⁶ Naomi need only show that James would not have targeted her for harassment but for her sex, or that her sex played a role in or otherwise affected the nature of James' alleged misconduct.¹⁴⁷ Accordingly, Naomi should easily be able to establish that she is a member of a protected group based on her gender.¹⁴⁸

Although not applicable to Naomi's case, Title IX also prohibits sexual harassment by a school employee or a peer even if the student and the harasser are of the same sex, so-called "same-sex sexual harassment."¹⁴⁹ The critical inquiry is whether the student can show that the harasser treated him or her differently from other students based on gender.¹⁵⁰ For example, Title IX applies when a male

143. *Id.*

144. *Id.*

145. *Id.*

146. See 20 U.S.C. § 1681(a); OCR Guidance, *supra* note 2, at 12,039-40.

147. See *Righting the Wrongs: A Legal Guide to Understanding, Addressing, and Preventing Sexual Harassment in Schools*, National Women's Law Center 11 (1998).

148. See *Haines v. Metro. Gov't. of Davidson County*, 32 F. Supp. 2d 991, 999 (M.D. Tenn. 1998) (declaring that "it is undisputed that [the plaintiff], as a female, is a member of a protected class).

149. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that nothing in Title VII "necessarily bars" a discrimination claim because the victim and the harasser are of the same sex). See also OCR Guidance, *supra* note 2, at 12,039 (citing *Kinman v. Omaha Pub. Sch. Dist.* (Kinman I), 94 F.3d 463, 467-68 (8th Cir. 1996), which concluded that a female student's sexual harassment allegation is sufficient to state a Title IX claim); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1564-75 (N.D. Cal. 1993) (holding that a female student stated an actionable Title IX claim when she alleged sexual harassment by other students, including males and females).

150. The EEOC's long-standing policy is that a same sex claim is actionable under Title VII provided that the plaintiff alleges that the harassment was based on gender, and not sexual orientation. See EEOC, EEOC COMPLIANCE MANUAL, No. 615.2(b)(3) (1982).

teacher abuses or assaults male students,¹⁵¹ and when female students repeatedly send sexually explicit graffiti to another female student.¹⁵²

The more difficult Title IX claim to assert is one that involves comments or behavior based on a student's actual or perceived sexual orientation. The complexity of these types of Title IX claims is exacerbated because many students report that they would be "very upset" if other students or school employees called them "gay" or "lesbian."¹⁵³

Sexual harassment directed at gay or lesbian students is generally not actionable under Title IX unless it is based on the victims' "sex."¹⁵⁴ If a male student alleged that other students repeatedly taunted or heckled him because of his sexual orientation, he probably cannot establish harassment because of his sex.¹⁵⁵ If, however, a male student or a group of male students "target a lesbian student for physical sexual advances," the lesbian student can state a claim of a hostile or abusive educational environment based on her sex.¹⁵⁶ The student's burden is to show that the harasser's actions or comments involved prohibited sexual conduct, not merely comments based on the student's sexual orientation or some other non-discriminatory factor.¹⁵⁷

2. Naomi Was Subjected to Unwelcome Conduct Of A Sexual Nature

Under Title IX, sexual harassment is unwelcome behavior because it interferes with a student's ability to "learn, study, work, achieve, or

151. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998) (finding a third-grade male teacher's sexual molestation of numerous male students actionable under Title IX).

152. See OCR Guidance, *supra* note 2, at 12,039 (providing standards to identify, prevent and resolve sexual harassment).

153. 17% of public school students, grades eight through eleven, reported that they were called gay or lesbian when they did not want to be. See *HOSTILE HALLWAYS*, *supra* note 4, at 9. 86% of all respondents reported that they would be very upset if they were called "gay" or "lesbian." See *HOSTILE HALLWAYS*, *supra* note 4, at 10. For male students, this is considered the "most disturbing form of unwanted behavior." See *HOSTILE HALLWAYS*, *supra* note 4, at 23.

154. In addition to the EEOC, the federal courts have held that Title VII does not prohibit discrimination based on sexual orientation because such conduct is not based on the plaintiff's sex. See generally *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990) (affirming a lower court decision which held that homosexuality is a status that is not protected under Title VII); *DeSantis v. Pacific Telephone*, 608 F.2d 327, 330 (9th Cir. 1979) (concluding that homosexuals are not a protected class); *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *7 (6th Cir. Jan. 15, 1992) (holding that taunting, physical beatings, and harassment by co-workers because of plaintiff's homosexuality are not covered under Title VII).

155. See OCR Guidance, *supra* note 2, at 12,039.

156. *Id.*

157. Several state and local laws prohibit sexual discrimination based on sexual orientation. See e.g., M.G.L. 151B, § 1.

participate in school activities.”¹⁵⁸ For this element, Naomi must establish that James’ sexual conduct was “offensive” or “unwelcome.”¹⁵⁹ She must show, therefore, that she did not “solicit or incite the sexual conduct,” and “regarded [it] as undesirable or offensive.”¹⁶⁰ In this context, Naomi must demonstrate that she unequivocally indicated to James that his conduct was unwelcome, and that she did not initiate or otherwise continue their “relationship.”¹⁶¹

In a school environment, unwelcome harassment may take several forms of verbal,¹⁶² physical,¹⁶³ visual,¹⁶⁴ and non-verbal conduct.¹⁶⁵ The prohibited conduct generally covers a wide range of harassment,¹⁶⁶

158. NATIONAL WOMEN’S LAW CENTER, DO THE RIGHT THING: UNDERSTANDING, ADDRESSING, AND PREVENTING SEXUAL HARASSMENT IN SCHOOLS, 5 (1998).

159. See *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (defining conduct that constitutes sexual harassment).

160. *Id.*

161. *Id.* For younger or less mature students, a fact-finder may be required to evaluate the degree to which they are able to recognize that there is certain conduct to which they can or should “reasonably object,” and the degree to which the students can articulate an objection. For older students like Naomi, a fact-finder can evaluate whether the sexual harassment was unwelcome based on the totality of the factual circumstances. Key considerations include the following types of information: (1) witness statements regarding the alleged incidents, (2) corroborative evidence supporting the credibility of the student’s statement such as the level of detail or consistency, or that of the alleged harasser, (3) evidence of prior harassment, or prior false allegations, (4) evidence of the student’s reaction or behavior after the alleged harassment, including whether they filed a complaint or took other action, and (5) other contemporaneous evidence such as the students talking with their parents or friends. OCR Guidance, *supra* note 2, at 12,042.

162. See generally *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-88 (1998) (requiring typically innocent and nonoffensive behavior like teasing and joking to be of an extremely offensive nature to qualify as sexual harassment). This category includes unwelcome teasing, jokes, insults, sexual innuendoes or double entendres, sexual suggestive comments about a student’s body, clothing, or physical appearance, stories or questions of a sexual nature, asking about intimate or personal details of another individual’s sexual interests or behavior, pressure for dates or sexual favors, promises of educational advancement in return for sexual favors, sexually suggestive sounds, directing discussions or conversations into sexual topics, use of labels such as “honey,” “hunk,” “sweetie,” or use of obscene language with sexual overtones. *Id.*

163. See *Harris v. L&L Wings, Inc.*, 132 F.3d 978, 980 (4th Cir. 1997) (alleging physical sexual harassment to include stroking, patting, and massaging the shoulders). This covers physical conduct such as unwelcome kissing, touching, patting, pinching, rubbing against, stroking, fondling, grabbing, assault, cornering, or other physical conduct of a sexual nature, or coerced sexual intercourse. *Id.* at 980.

164. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1501 (M.D. Fla. 1991) (describing pictures of nude women and sexual suggestive posters as a visual assault on the senses). Examples of visual conduct include posters, pictures, calendars, cartoons, drawings, or other material of a sexual nature. *Id.* at 1500-01.

165. See, e.g., *Hirase-Doi v. U.S. West Communications Inc.*, 61 F.3d 777, 780-81 (10th Cir. 1995) (listing sexually explicit notes as among the types of sexual harassment the employee was forced to endure). This category includes, but is not limited to, sexually suggestive body movements, gestures, looks, or stares at particular parts of another student’s body, notes, letters, or other written communication. *Id.* at 780.

166. See *HOSTILE HALLWAYS*, *supra* note 4, at 9 (stating that public school students, grades 8

such as verbal and physical abuse,¹⁶⁷ inappropriate touching or kissing,¹⁶⁸ multiple violent and life threatening comments, threats of violence, ogling, and obscene language with sexual overtones,¹⁶⁹ assault, rape (including gang rape),¹⁷⁰ and repeated sexually derogatory comments.¹⁷¹

The OCR Guidance describes two types of hostile conduct or behavior that constitute prohibited Title IX sex discrimination: (1) quid pro quo sexual harassment that conditions a student's participation in an education program or activity on sexual favors,¹⁷² and (2) sexual harassment that is so severe or pervasive that it creates a "hostile" or "offensive" educational environment.¹⁷³ As described below, there are sufficient facts for Naomi to allege that James' conduct resulted in both quid pro quo and hostile environment sexual harassment.

a. Quid Pro Quo Sexual Harassment

Quid pro-quo sexual harassment occurs when a school employee explicitly or implicitly conditions a student's participation in an education program or activity, or bases an educational decision, on the student's submission to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual

through 11 experienced hostile educational sexual harassment of (1) being subjected to sexual comments, jokes, gestures, or looks (66%), (2) being touched, grabbed and/or pinched in a sexual way (53%), (3) intentionally brushed up against in a sexual way (46%), (4) being flashed or mooned (45%), and (5) having sexual rumors spread about them).

167. See generally *Haines v. Metropolitan Gov't of Davidson County*, 32 F. Supp. 2d 991, 997-98 (M.D. Tenn. 1998) (alleging the harassment of a ten year old by two eleven year olds to include assault, attempted rape, and verbal abuse). The harassment included attempted rape, assault, fondling, and verbal abuse on multiple occasions. *Id.* at 995-96.

168. See generally *Oona v. Mcaffrey*, 143 F.3d 473, 475 (9th Cir. 1998) (asserting that the teacher fondled, kissed, and straddled the student).

169. See *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 899 (D. Minn. 1999) (stating that the alleged sexual harassment included ogling and threats of violence).

170. See generally *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 952-53 (4th Cir. 1997) (noting victim's allegation of gang rape by two members of the football team was motivated by their discriminatory animus toward women); *Liu v. Striuli*, 36 F. Supp. 2d 452, 475-76 (D.R.I. 1999) (finding that rape and other features of the incident indicate that it was gender motivated).

171. See *Lipsett v. University of P.R.*, 864 F.2d 881, 903-04 (1st Cir. 1988) (describing the sexual instances that the female medical student was subjected to daily).

172. See generally *EEOC Policy Guidance on Current Issues of Sexual Harassment*, (last modified Mar. 19, 1990 <<http://www.eeoc.gov/docs/currentissues.html>> [hereinafter *EEOC Guidance on Sexual Harassment*] (outlining the EEOC's sexual harassment policy).

173. See generally *EEOC Guidance on Sexual Harassment*, *supra* note 172. Although "quid pro quo" and "hostile environment claims are conceptually distinct, the factual differences are often blurred, and they may occur together. For example, a teacher who makes sexual advances to a student may also threaten retaliation if the student complains about the behavior." *Id.*

nature.¹⁷⁴ This type of sexual harassment typically occurs when a school employee with authority over the student, such as a teacher or administrator, conditions educational benefits on sexual favors.¹⁷⁵ One example is when a teacher explicitly offers to change a grade if the student submits to his or her sexual demands.¹⁷⁶

This type of unlawful sexual harassment also covers situations in which the student resists or refuses the school employee's sexual demands and suffers threatened harm, and where the student submits and avoids the threatened harm.¹⁷⁷ When viewed in their entirety, Naomi's allegations regarding James' repeated requests to "date," his heightened scrutiny of her research work, his physical threats, and his veiled comment regarding her seminar grade are certainly sufficient to place the University on notice regarding a potential quid pro quo sexual harassment claim.¹⁷⁸

In most quid pro quo cases, the "unwelcome" sexual conduct will not be at issue because of the disparity in age and power between the student and the harassing school employee.¹⁷⁹ For these students, their failure to complain or their "participation" in a sexual relationship will not preclude a finding that the alleged harassment

174. See generally *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (defining quid pro quo sexual harassment).

175. See, e.g., *Canurillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 407-08 (5th Cir. 1996) (articulating the application of quid pro quo sexual harassment in the educational setting).

176. See *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 921 (S.D. Ohio 1998) (holding there was sufficient evidence to raise a jury question regarding whether a track coach's comments to a female track team member constituted a sexual advance); see also *Does v. Covington County Sch. Bd.*, 969 F. Supp. 1264, 1275-78 (M.D. Ala. 1997) (claiming that students saw test answers in return for allowing a teacher to sexually abuse them); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd*, 631 F.2d 178, 182 (2nd Cir. 1980) (finding that the student's academic achievement was conditioned on submission to a teacher's sexual demands); *Kadicki v. Virginia Commonwealth Sch.*, 892 F. Supp. 746, 778 (E.D. Va. 1995) (finding that a course reexamination was conditioned on a college student's agreement to be spanked if she did not attain a certain grade).

177. See generally OCR Guidance, *supra* note 2, at 12,038 (stating that quid pro quo sexual harassment is equally illegal whether the student submits or resists).

178. *Id.* Whether James' conduct rises to the level of actionable quid pro quo harassment is a determination for the University to make after an appropriate fact-finding investigation.

179. See *Mary M. v. North Lawrence Community Sch. Corp.*, 131 F.3d 1220, 1226 (7th Cir. 1997) (concluding that unwelcomeness is not a proper inquiry in Title IX cases involving sexual discrimination of elementary school children); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1296-97 (N.D. Cal. 1993) (creating an assumption that a reasonable student exposed to sexual harassment will be fearful of the school employee due to age difference and perception of power). But see *Nelson v. Almont Community Sch.*, 931 F. Supp. 1345, 1358 (E.D. Mich. 1996) (suggesting that unwelcomeness is a factual issue in dispute in the case of a high school student who was sexually involved with his teacher); *R.L.R. v. Prague Pub. Sch. Dist.*, 838 F. Supp. 1526, 1534 (W.D. Okla. 1993) (noting that no party disputed that an eight-grade student was "willingly" involved with her coach in a sexual relationship, and his advances were not unwelcome).

was “unwelcome.”¹⁸⁰

Given Naomi’s maturity, the issue of whether James’ conduct was “welcome” is fact-specific, and will be addressed as part of the University’s fact-finding investigation.

b. Hostile Educational Environment

“Hostile educational environment” sexual harassment includes unwelcome sexual advances, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.¹⁸¹ Naomi must show, by credible evidence, that James sexually harassed her, and that the sexual harassment was so pervasive or severe that it rose to the level of prohibited sex discrimination.¹⁸²

To satisfy this element, Naomi must establish that the sexual conduct or behavior was unwelcome, limited her ability to participate in or benefit from an education program or activity, or created a hostile or abusive educational environment.¹⁸³ Naomi must also show that the unwelcome conduct created an *objectively* hostile or abusive educational environment, and that she *subjectively* believed the educational environment was hostile or abusive.¹⁸⁴

In *Gebser*¹⁸⁵ and *Davis*,¹⁸⁶ the Supreme Court declined to apply Title VII’s vicarious liability standard to Title IX cases. Federal courts have referred to prior Title VII decisions for guidance regarding the

180. See generally *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (finding that voluntary submission to sexual conduct will not automatically defeat a Title VII claim since the correct inquiry is whether the employee indicated that the sexual conduct was unwelcome); cf. EEOC Policy Guidance on Sexual Harassment, *supra* note 172, at 4-5 (defining unwelcome sexual conduct). See OCR Guidance, *supra* note 2, at 12,040 (stating that the OCR will not treat sexual conduct between a school employee and an elementary school student as consensual). In cases involving secondary students, the OCR will find a strong presumption that the sexual conduct was not consensual. In cases involving older secondary students and post-secondary students, the OCR will consider a number of factors including: (1) the nature of the sexual conduct and the relationship of the school employee to the student, i.e., the employee’s degree of influence, authority, or control over the student, (2) whether the student was legally or practically unable to consent to the sexual conduct at issue, and (3) the student’s age, or disability. *Id.* at 12,040.

181. See generally *Wills v. Brown Univ.*, 184 F.3d 20, 33-34 (1st Cir. 1999) (suggesting that the acts of the teacher and his continued presence in class could create a hostile educational environment).

182. See *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1675-76 (1999) (detailing the standards to prove hostile educational environment).

183. See OCR Guidance, *supra* note 2, at 12,038 (noting the requirement to establish certain elements).

184. See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21-22 (1993) (stating that under *Vinson*, there must be a showing of an objectively hostile environment and the victim must have a subjective belief that a hostile environment exists).

185. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998) (declining to apply vicarious liability to a sexual discrimination suit).

186. See *Davis*, 119 S. Ct. at 1675 (holding that funding recipients are held properly liable only when they have actual knowledge of the sexual harassment).

appropriate standard for determining whether sex-based conduct constitutes unlawful harassment under Title IX.¹⁸⁷ Citing *Oncale v. Sundowner Offshore Services, Inc.*,¹⁸⁸ the Supreme Court held that evaluating whether sex based conduct rises to the level of actionable Title IX hostile environment sexual harassment “depends on a constellation of surrounding circumstances, expectations, and relationships.”¹⁸⁹ These factors include the sex and ages of the harasser and the victim;¹⁹⁰ the identity and relationship between the alleged harasser and the victim;¹⁹¹ the degree to which the conduct affected one or more student’s education;¹⁹² the size of the school, the location of the incidents, the number of individuals involved, and the context in which the incidents occurred;¹⁹³ the type, frequency, and duration of the conduct;¹⁹⁴ and evidence showing the existence of

187. See generally *Gebser*, 524 U.S. at 286-87 (detailing aspects of Title VII and Title IX). Under Title VII, the harassing conduct must be so pervasive or severe that a reasonable person would find it hostile or abusive. See generally *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-70 (1986) (defining harassing conduct under Title VII). It must create an objectively hostile or abusive environment, and the plaintiff must subjectively believe the work environment is hostile or abusive. See generally *New York Urban League, Inc., v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (applying Title VII standards to other similar claims); *Chicago v. Lindley*, 66 F.3d 819, 828-29, n.12 (7th Cir. 1995) (detailing the relationship between Titles VII and VI); *Elston v. Tallodega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (equating the standards of Title VII to apply to Title VI); see also *Harris*, 510 U.S. at 21-22 (requiring a showing of more than mere unwelcomeness).

188. 523 U.S. 75, 118 S. Ct. 998 (1998).

189. *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1675 (1999).

190. See generally *Mary M. v. North Lawrence Community Sch. Corp.*, 131 F.3d 1220, 1226-27 (7th Cir. 1997) (stating that age difference between a harasser and victim creates an assumption of reasonable fear of reprisal if the victim does not submit to the harasser’s demands).

191. See *Davis*, 119 S. Ct. at 1672 (holding that the identity of the harasser is relevant).

192. See, e.g., *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999) (stating that the student left school, engaged in self-destructive and suicidal behavior, and entered a psychiatric hospital); *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 753 (2nd Cir. 1998) (noting that the student withdrew from school and transferred after the board of education refused to allow a transfer to another class); *Oona v. McCaffrey*, 143 F.3d 473, 475 (9th Cir. 1998) (asserting that the student left school and began home schooling); *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 953 (4th Cir. 1997) (finding that after the incident the student stopped attending classes, attempted suicide, and sought aid of the school psychiatrist), *reh’g en banc granted, opinion vacated*, 169 F.3d 820 (4th Cir. 1998), *cert. granted*, 120 S. Ct. 11 (1999); *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 898 (D. Minn. 1999) (noting that the student left school); *Haines v. Metropolitan Gov’t of Davidson County*, 32 F. Supp. 2d 991, 996 (M.D. Tenn. 1998) (concluding the effect of the harassment was that the student missed many school days, received lower grades, and developed an inability to complete required course work).

193. See *Davis*, 119 S. Ct. at 1671 (holding that the context of harassment must be within the control of the school board to hold them liable under Title IX).

194. See *id.* at 1672-73 (applying the factors to the facts). Compare *Adusumilli v. Illinois Inst. of Tech.*, 191 F.3d 455, 1999 WL 528169, *1 (7th Cir. 1999) (finding that the plaintiff failed to state a claim since the two instances at issue were not pervasive or offensive, did not result in a denial of educational benefits, and the instances ended as soon as they had begun), with *Brzonkala*, 132 F.3d at 959 (citing *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995), *opinion vacated*, 169 F.3d 820 (4th Cir. 1998) (*en banc*). The court held that

other gender-based, non-sexual harassment, including race or ethnicity based comments directed at the student.¹⁹⁵

The EEOC guidelines are consistent with the *Harris* factors. The EEOC's policy identifies the following factors for determining whether harassment is sufficiently severe or pervasive: (1) whether the conduct was verbal or physical, or both; (2) how frequently the conduct was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a coworker or supervisor; (5) whether other individuals joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.¹⁹⁶

While there is no bright line between unwelcome harassment and merely unpleasant conduct, simple teasing, off hand comments, and isolated comments (unless severe or egregious) will not generally rise to the level of prohibited Title IX hostile environment sexual harassment.¹⁹⁷ In this case, however, James' conduct goes well beyond being "merely unpleasant." Naomi's allegations generally describe the type and frequency of sex-based conduct that is sufficient to show a hostile environment.¹⁹⁸

3. The Unwelcome Sexual Conduct Was So Severe, Pervasive, and Objectively Offensive That It Denied Naomi Equal Access To The University's Educational Opportunities Or Benefits

To satisfy this element in a hostile environment claim, Naomi must show that James' conduct had a specific, identifiable, negative affect on her ability to receive an appropriate education.¹⁹⁹ Naomi must also show how the sexual harassment affected her, and establish that the alleged sexual harassment reached a "wide spread" level.²⁰⁰ Specifically, Naomi must allege and prove that James' conduct was so severe, persistent, and objectively pervasive that it limited her ability

"rape is 'not only pervasive harassment but also criminal conduct of the most serious nature' that is 'plainly sufficient to state a claim for 'hostile environment' sexual harassment." *Id.*

195. See generally *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1032-35 (5th Cir. 1980) (finding race and gender based discrimination as relevant to a determination under Title VII).

196. See EEOC Policy Guidance on Sexual Harassment, *supra* note 172.

197. See *Davis*, 119 S. Ct. at 1675 (concluding that off hand comments and teasing usually found in school where children have yet to develop social skills as not rising to the level of Title IX discrimination).

198. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 61-69, 106 S. Ct. 2399, 2404-07 (1986) (discussing the meaning of a hostile environment).

199. See generally *Davis*, 119 S. Ct. at 1675-76 (requiring a demonstration of specific and identifiable negative effects on the victim's ability to receive an appropriate education).

200. See *id.* at 1675 (providing an example of overt student-on-student sexual harassment).

to participate in or benefit from a University education program or activity, or that it created a hostile or abusive educational environment.²⁰¹

In *Davis*, the Supreme Court held that sexual harassment covered by Title IX must be so “serious” and “persistent” that it has the systemic effect of denying a student equal access to a school’s educational program or activity.²⁰² In a student-on-student case, this requirement reconciles the school’s responsibility to remedy known sexual harassment with the “practical realities of responding to student behavior.”²⁰³

A single advance in a quid pro quo case will generally be sufficient to establish prohibited Title IX sexual harassment.²⁰⁴ A student can satisfy this element by showing the school employee, usually a teacher, explicitly or implicitly conditioned the student’s participation in an education program or activity on his or her submission to sexual advances or requests for sexual favors.²⁰⁵

If the student alleges hostile environment sexual harassment, an isolated incident is generally insufficient under Title IX, unless it is peculiarly egregious or severe.²⁰⁶ Sensitive to reminders that “children may regularly interact in a manner that would be unacceptable among adults,” the Supreme Court held that “damages are not available for simple acts of teasing and name-calling among school children, . . . even where these comments target differences in

201. See, e.g., *Kinman v. Omaha Public Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999) (finding that a Title IX complaint alleging a violation of the 14th Amendment must prove that the conduct complained of deprived the student of rights, privileges, and immunities); *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 953 (1997) (describing in graphic detail the gang rape of a freshman by two members of the university football team), *reh’g en banc granted, opinion vacated*, 169 F.3d 820 (4th Cir. 1998); *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 915 (S.D. Ohio 1998) (detailing the standard of hostile educational environment under Title IX).

202. 119 S. Ct. at 1675.

203. *Id.*

204. See EEOC Policy Guidance on Sexual Harassment, *supra* note 172, at *8 (concluding that a single instance of harassment can be enough to establish a Title IX violation). See generally *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 747-66 (1998) (holding that a supervisor’s threats that were not accompanied by tangible employment action may be actionable sexual harassment under Title VII).

205. The Supreme Court acknowledged that a “student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher’s conduct is reprehensible and undermines the basic purposes of the educational system.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292, 118 S. Ct. 1989, 2000 (1998).

206. See, e.g., *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 918-19 (D. Minn. 1999) (concluding that plaintiff’s allegations of daily offensive sexual comments, physical threats of a sexual nature, life-threatening behaviors, obscenity directed toward her and other female students, sexual gestures, and offensive physical contacts were adequate to state a hostile environment sexual harassment claim); *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 916 (S.D. Ohio 1998) (finding that limited and isolated sexual requests, when viewed against the long standing friendly relationship, did not create a hostile educational environment).

gender.”²⁰⁷

The Supreme Court distinguished teacher-on-student harassment from peer harassment in hostile environment sexual harassment cases.²⁰⁸ The Supreme Court’s difference in treatment is based, in part, on its observation that;

the relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX’s guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.²⁰⁹

Accordingly, the Supreme Court held that a single instance of “sufficiently severe” student-on-student sexual harassment will not generally satisfy Title IX’s requirement of a “systemic effect.”²¹⁰

Like the employment context, there is little dispute about the substantial negative effect of sexual harassment on harassed students, including tangible or obvious physical injuries, and emotional or psychological distress.²¹¹ To satisfy this element, Naomi must show, however, more than just the negative impact James’ conduct had on her. She must allege and prove that the persistence and severity of James’ unwelcome conduct resulted in the systemic effect of denying her equal access to a University educational program or activity.²¹² In this case, it is likely that Naomi’s allegations about the manifestations of her emotional and physical discomfort will meet this element; specifically, her sleeplessness, anxiety, lapses in concentration,

207. *Davis*, 119 S. Ct. at 1676.

208. *See id.* (stating that it is relevant who is the harasser).

209. *Id.*

210. *See id.* (stating that this heavier burden for student-on-student harassment is significant since the overwhelming majority of cases are based on peer harassment); *see also* HOSTILE HALLWAYS, *supra* note 4, at 10-11 (reporting that 79% of the respondents reported that they were harassed by current or former students, while 18% reported that they were harassed by a school employee).

211. The AAUW findings reported that sexual harassment has a significant educational, emotional, and behavioral impact on the students who reported that they were harassed. Nearly 23% of the students who were sexually harassed stated that they did not want to attend school, nor talk as much in class. 21% reported that it was harder to pay attention in school, and 13% reported a lower grade in class. 12% of these students thought about changing schools, while 3% actually changed schools because of the sexual harassment. These sexually harassed students also described the emotional impact of sexual harassment as follows: 50% were embarrassed, 37% felt self-conscious, 29% felt less sure of themselves, and 21% felt afraid or scared. Regarding the behavioral consequences of harassment, 49% of the respondents stated that they tried to avoid the harasser, 23% stayed away from particular places in the school or on the school grounds, 22% changed their seats in class, and 12% stopped attending a particular activity or sport. HOSTILE HALLWAYS, *supra* note 4, at 15-17.

212. *See Davis*, 119 S. Ct. at 1676 (declining to hold a mere decline in grades enough proof to survive a Motion to Dismiss).

apprehension about her personal safety, and concerns about a lower evaluation of her research and classroom work.

4. An Appropriate University Official Had Actual Notice Of James' Alleged Sexual Harassment

To satisfy Title IX's underlying Spending Clause limitation, Naomi must allege and prove that an "appropriate [University] person" had notice of James' alleged sexual harassment, and that the University had an opportunity to "rectify any violation."²¹³ An "appropriate person" is, at a minimum, "an official . . . with authority to take corrective action to end the discrimination" on the University's behalf.²¹⁴ Naomi must show therefore, that a University "official with authority to address James' alleged sexual harassment and to institute corrective measures on the [University's behalf] had actual knowledge of the discrimination," and failed adequately to respond.²¹⁵ This is a significant barrier for Naomi and many Title IX plaintiffs, especially younger, less mature students, to overcome.²¹⁶

a. The Notice Must Alert the University to James' Alleged Harassment

The first part of this element requires Naomi to show that a University official had actual notice or knowledge of James' unwelcome sexual conduct.²¹⁷ The Supreme Court did not describe

213. *Id.* at 1673. Compare *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998) (holding that to allow recovery on a constructive notice standard would frustrate the purpose of Title IX), and *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 960-61 (1997) (concluding that Virginia Tech was liable for students' sexual assault (rape) since it knew or should have known of the illegal conduct, and failed to take prompt and adequate remedial action), *reh'g en banc granted, opinion vacated*, 169 F.3d 820 (4th Cir. 1998), with OCR Guidance, *supra* note 2, at 12,042 (holding that an educational institution had constructive notice of the alleged harassment if it "should have known" about the harassment through a "reasonably diligent inquiry").

214. *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1673 (1999).

215. *Id.*

216. *Id.* For younger students, satisfying this element may be difficult given their general reluctance to report sexual harassment allegations to adults, including teachers. Only 7% of sexually harassed students reported that they told a teacher about their experience, while 23% reported that they told a parent or other family member. In contrast, 63% of sexually harassed students told a friend about their experience. *HOSTILE HALLWAYS*, *supra* note 4, at 14.

217. See *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908-09 (D. Minn. 1999) (asserting that school designated Title IX coordinator, who personally witnessed several of the alleged sexual harassing incidents, could properly be viewed as being in a position of authority since they could be characterized as responsible for receiving complaints under the district's sexual harassment conduct policy manual); *Wooden v. Board of Regents of the Univ. Sys. Of Ga.*, 32 F. Supp. 2d 1370, 1378 (S.D. Ga. 1999) (noting that the university president had knowledge of the alleged discriminatory admission policy and possessed the power to eliminate the policy); *Haines v. Metropolitan Gov't of Davidson County*, 32 F. Supp. 2d 991, 995-96 (M.D. Tenn. 1998) (concluding that the plaintiff had raised enough facts to sustain a Title IX claim);

the precise nature or specificity of the information that is sufficient to establish the requisite official "notice."²¹⁸ It is clear, however, that Naomi must prove, at a minimum, that she provided the University with sufficient detail to "alert" it to the possibility that "prohibited discrimination or harassment, is occurring, or has taken place in the context subject to the institution's control."²¹⁹

Since Title IX liability is based on actual notice principles, there are at least two hurdles Naomi must overcome to establish the requisite notice.²²⁰ First, Naomi is precluded from establishing the University's notice by simply proving James' knowledge of his own offensive conduct or wrongdoing.²²¹ Second, Naomi's general assertion of a social or a sexual relationship between her and James may also be insufficient to establish "actual notice" of improper conduct or harassment.²²² This means that Chairman Tyson's knowledge of their relationship, including his one-time observation of James' conduct, is inadequate, if there is no evidence that Chairman Tyson knew or had reason to believe that their relationship was "anything but mutually consensual."²²³ Naomi's reliance on Chairman Tyson to establish the University's notice will be misplaced

Carroll v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 621 (S.D.W. Va. 1998) (finding that evidence existed that a school district official had knowledge of the sexual harassment). *But see* *X v. Freemont County Sch. Dist.*, 162 F.3d 1175, No. 96-8065, 1998 WL 704692, at *2-3 (10th Cir. Oct. 2, 1998) (noting that the record was devoid of any evidence that a school official knew of the alleged harassing incidents when they occurred, nor that they knew of any other alleged harassment involving the same teacher); *Davis v. DeKalb County Sch. Dist.*, 996 F. Supp. 1478, 1482-83 (N.D. Ga. 1998) (finding no Title IX liability since the school board was entirely unaware of the fact that three students were sexually molested).

218. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289, 118 S. Ct. 1989, 1999 (1998). The dissent in *Gebser* opined that the majority's new rule potentially undermined the very purpose for imposing liability on schools: "to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to . . . odious behavior." The dissent warned that "school boards [will be able to] insulate themselves from knowledge about [sexually harassing] conduct . . . [and] claim immunity from damages liability." *Id.* They were concerned about a scenario where "every teacher at [a] school [knows] about the harassment but [does] not have authority to institute corrective measures on the district's behalf." *Id.* at 301 (Stevens, J., dissenting).

219. *See id.* at 291 (holding that the principal could not have known of the sexual harassment since comments by students were simply insufficient to put the principal on notice of a problem); *see also Morlock*, 96 F. Supp. 2d at 899 (inferring that the individual in charge had personal knowledge of the sexual harassment at issue).

220. *See Gebser*, 524 U.S. at 291-92 (discussing the notice requirements).

221. *See id.* at 280 (citing the RESTATEMENT OF AGENCY § 280 for the proposition that the school district was not responsible for the teacher's harassment because no other district official had actual knowledge of his prohibited behavior). *But see Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1667 (1999) (finding that the record showed no factual dispute regarding the school board's knowledge of the sexual harassment).

222. *See Liu v. Struili*, 36 F. Supp. 2d 452, 464 (D.R.I. 1999) (noting that the *Gebser* court required actual notice to hold a school district liable under Title IX).

223. *Id.* at 465.

unless Naomi alleges that she told him that her relationship with James was abusive or coercive.²²⁴

b. The University Official With Notice Must Have Authority To Take Corrective Action

If Naomi establishes that a University official has sufficient actual notice,²²⁵ she must also show that the official is “an appropriate person,” one who has “authority” to take corrective action on the school’s behalf and received actual notice.²²⁶ This requirement is based on the principle that the University is liable under Title IX only where it can exercise substantial control over the harasser and the context in which the known harassment occurs.²²⁷ Naomi can generally meet this element by first alleging that James’ harassment or misconduct occurred during “school hours” and/or on “school grounds.” Specifically, Naomi can show that James’ misconduct took place under an activity or operation of the University or otherwise under the University’s supervision.²²⁸

Naomi can satisfy this notice requirement by showing that she used the University’s harassment or grievance policy, provided it adequately described or designated certain individuals to whom complaints must be made, such as a “Title IX Coordinator.”²²⁹ Once

224. *See id.* at 465-66 (noting that petitioner did not establish that school officials knew that the relationship was anything but consensual).

225. *See X v. Freemont County Sch. Dist.*, No. 96-8065, 1998 WL 704692, at *3 (10th Cir. Oct. 2, 1998) (Lucero, J., concurring) (asserting that actual notice standard does not account for extreme youth). Judge Lucero opines that “... one result of *Gebser*, contrary to its expressed intent, will be to limit protection of very young students against teacher harassment” since they are: (1) inexperienced at discerning what conduct is appropriate or inappropriate, (2) taught to respect their teachers, (3) not likely or well-equipped to report misconduct by their teachers. *Id.*

226. *Id.* The OCR Guidance states that an employee will be considered to have received “actual notice” on behalf of a school if the employee is, in fact, an agent or a responsible school employee, or if it is reasonable for the student to believe that the employee is a responsible school employee. The reasonableness of the student’s belief depends on factors such as the authority that is actually given to the employee, and the age of the student. This general rule can apply to such employees as janitors or cafeteria workers if it would be reasonable for the student-victim to believe the employees are in positions of authority in relation to the student. OCR Guidance, *supra* note 2, at 12,039. OCR considers the fact that some young students may reasonably believe that an adult, such as a teacher or a school nurse, is an individual they can tell about incidents of sexual harassment regardless of that individual’s formal status in the school administration. *Id.* at 12,037.

227. *Id.* at 12,042.

228. *See Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1669 (1999) (noting that Title IX prohibits discrimination in the programs and activities of a federally funded educational institution). This should not be difficult since the evidence shows that students are being sexually harassed on school grounds and in school activities: school hallways (66%), classrooms (55%), on school grounds (43%), on school transportation (26%), or at a field trip (24%). *HOSTILE HALLWAYS*, *supra* note 4, at 12-13.

229. *See Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908-09 (D. Minn. 1999)

the University designates a specific individual to receive "notice" of harassment, actual knowledge will be imputed to it if Naomi gave notice, in fact, to such individual.²³⁰

Naomi can also satisfy the notice requirement by showing that she gave notice to other University officials who have apparent or implied authority to take appropriate, corrective action.²³¹ This notice will be adequate even though these officials are not specifically identified by the University as the proper parties to receive a grievance or complaint.²³² This is a fact-based inquiry and is not solely dependent on job titles and organizational structure.²³³

(finding that the school's policy manual required grievances to be filed with a Title IX coordinator who was required to forward that information to the building principal and that the Title IX coordinator at issue had actual notice of the alleged student misconduct); *Burtner v. Hiram College*, 9 F. Supp. 2d 852, 856 (N.D. Ohio 1998) (concluding that the school's director of career services and Title IX grievance officer did not meet the *Gebser* standard for an appropriate person).

230. DOE regulations require a school to designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities. A school must also notify all of its students and employees of the name, office address, and telephone number of the employee or employees. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance. 34 C.F.R. § 106.8(a). See also *Williamson v. City of Houston*, 148 F.3d 462 (5th Cir. 1998) (describing a Title VII case).

231. See generally *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289-92, 118 S. Ct. 1989, 1999-2000 (1998) (detailing the notice requirement).

232. See *Morlock*, 46 F. Supp. 2d 899, 910 (D.Minn. 1999) (stating that two teachers were appropriate persons for plaintiff's allegations of student misconduct because they had immediate responsibility over student discipline in their classrooms); *Floyd v. Waiters*, 171 F.3d 1264, 1264 (11th Cir. 1999) (holding that there was no notice because the two individuals identified by plaintiff were not school district officials, and lacked authority to end the alleged discrimination); *Miller v. Kentosh*, No. Civ. A. 97-6541, 1998 WL 355520, at *2 (E.D. Pa. June 29, 1998) (the high school's band leader and another teacher did not have authority to take corrective action against a music teacher who had a sexual relationship with plaintiff); *Adusumilli v. Illinois Inst. of Tech.*, No. 97 C 8507, 1998 WL 601822 at *3-4 (N.D. Ill. 1998) (deciding that the Director of a Master's Degree Program in Public Administration (MPA) was an appropriate person to receive a complaint from plaintiff, a MPA candidate, about an unwelcome touching by a fellow student. Plaintiff did not report this incident to the administrators designated by ITT to receive and investigate harassment complaints); *Canutillo Indep. Sch. Dist. v. Lejia*, 101 F.3d 393, 396 (5th Cir. 1996) (holding that the school district was not liable under Title IX harassment for a teacher's harassment of a student where the plaintiff only gave notice of the harassment to another teacher).

233. See generally *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1243-52 (10th Cir. 1999) (stating that the critical question is whether the school official exercises substantial authority to "halt known abuse, perhaps by measures such as transferring the harassing student, suspending him, curtailing his privileges, or providing additional supervision"). *Id.* Whether such individuals are "appropriate persons" depends on the context in which the harassment allegations arise, the identity of the harasser, the identity of the victim, and the institution's organizational structure. For example, an elementary or middle school student may be able to raise allegations of student-to-student harassment to his or her teacher, a principal, a guidance counselor, or an assistant principal, where each individual has responsibility over student discipline in the classroom. *Id.* at 1248. See also *Bruneau v. South Kortright Cent. Sch. Dist. & S. Kortright Sch. Bd.*, 163 F.3d 749, 760 (2d Cir. 1998) (deciding that plaintiff's "Title IX claim did not fail for a lack of actual notice" since several school officials were aware of her sexual harassment allegations). The Second Circuit also found that her classroom teacher's "personal observations alone are sufficient to establish actual notice." *Id.*

Since this is a case of alleged teacher harassment, Naomi must show that the University official with actual notice had authority to “police” relationships between faculty and students, or had authority to discipline James for his improper conduct or behavior.²³⁴ It is important to recognize, however, that the mere fact that a University official has a duty under its sexual harassment policy to report potential improper sexual conduct to the appropriate University authority may not be sufficient to invoke Title IX liability. The duty to report such information may not establish the requisite authority to take corrective action because a report, by itself, will not end the alleged discrimination.²³⁵

In Title VII harassment cases, there are limited circumstances in which a plaintiff’s failure to complain to an employer or otherwise provide notice of alleged harassment is excused and will not preclude liability.²³⁶ These include cases where the plaintiff has reason to believe that: (1) using the organization’s complaint process or procedures, or complaining to management, will result in retaliation; (2) the organization’s policy includes undue expense, has inaccessible contacts for making a complaint, or other burdensome administrative requirements; (3) the complaint process is ineffective – such as requiring the plaintiff to first complain to the harassing supervisor.²³⁷ Neither *Gebser* nor *Davis* specifically addressed whether a Title IX plaintiff can raise similar defenses to justify his or her failure to provide notice to the appropriate school official. It seems unlikely, however, that such defenses will be available in Title IX cases given the Supreme Court’s analysis of the Spending Clause limitation, and its actual notice requirement.²³⁸

234. See *Morse & Handley v. Regents of the Univ. of Colo.*, 154 F.3d 1124, 1128 (10th Cir. 1998) (asserting that in order to maintain a Title IX claim, the plaintiff must sufficiently allege that the University’s officials had the “authority to address the alleged discrimination and to institute corrective measures on the [University’s] behalf”) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). Federal regulations indicate that the ROTC Commandant is responsible to the University “for conducting the ROTC program in accordance with institutional rules, regulations, and customs.” *Id.* at 1128 n.1. In addition, the University President “exercise[d] the same control over the department of military science” as over any other department in the University). *Id.*

235. *Liu v. Striuli and Providence College*, 36 F. Supp. 2d 452, 466 (D.R.I. 1999).

236. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (noting that if the bank’s complaint procedures might have insulated it from liability if they “were better calculated to encourage victims of [Title VII] harassment to come forward.”).

237. See *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment By Supervisors* (June 18, 1999) <<http://www.eeoc.gov/docs/harrassment.html>>.

238. See *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1620 (1999) (citing *Franklin Gwinnett County Pub. Schs.*, 503 U.S. 60, 74-75 (1992) (asserting that schools administering programs based on the authority of Congress to grant funds pursuant to the Spending Clause, must be put on notice that they may be liable for Title IX monetary damages before such charges may be brought).

5. Did the University Act With "Deliberate Indifference" to Naomi's Sexual Harassment Allegations?

The University incurs Title IX liability only if its "deliberate indifference" subjected Naomi to prohibited sexual harassment and it had the "authority to take remedial action."²³⁹ At a minimum, Naomi must show that the University's "deliberate indifference" caused her to undergo "harassment" or made her vulnerable to it in one of its programs or activities.²⁴⁰

Assuming Naomi can establish that James' conduct constituted prohibited sexual harassment, she must then show that the University was "deliberately indifferent" to James' conduct, i.e., by showing that the University's response (or lack thereof) was "clearly unreasonable."²⁴¹ While the Supreme Court did not provide specific examples of a "clearly unreasonable" response that would warrant a finding of "deliberate indifference," it set forth several overarching principles that make it difficult for Naomi to satisfy her burden on this element.²⁴²

a. General Considerations

Title IX liability presupposes that the University official who has actual knowledge of a potential Title IX violation fails or refuses to take action to bring the school into compliance. This means that Naomi's underlying burden is to establish that the University made an "official decision . . . not to remedy the harassment."²⁴³

The "deliberate indifference" standard does not mandate that the University satisfy a threshold standard for its corrective or remedial actions to avoid Title IX liability. While Naomi may recommend or insist on implementation of specific corrective measures to "remedy . . . the harassment," or "ensure that . . . students conform their conduct to certain rules," the University is not required to adopt them.²⁴⁴ Courts should defer to the University's corrective actions and "refrain from second guessing the disciplinary decisions made by

239. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1672 (1999).

240. *Id.* ("The scope of prohibited conduct [is] based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.").

241. *Id.* at 1674.

242. *Id.* (maintaining that "[t]his is not a mere 'reasonableness' standard In an appropriate case, there is no reason why courts, on a motion to dismiss, for a summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law").

243. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998).

244. *Davis*, 119 S. Ct. at 1674.

school administrators.”²⁴⁵ To establish liability, the critical showing for Naomi is whether the University responded to her harassment allegations in a manner that is “clearly unreasonable.”²⁴⁶

The reasonableness of the University’s actions depends on the totality of the factual circumstances underlying Naomi’s sexual harassment allegations, and may include an analysis of the University’s control over James.²⁴⁷ The University’s corrective response can be flexible, and chosen from a range of alternatives. It will depend, in part, on the “level of disciplinary authority available to the [University], and the potential liability arising from certain forms of disciplinary action.”²⁴⁸ Accordingly, University officials will have reasonable discretion to choose from a range of responses, provided that the strategy they choose is calculated to end James’ harassment, and prevent it from reoccurring.²⁴⁹

245. *Id.* at 1674 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342-343 (1985)); *see also* *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 919-20 (S.D. Ohio 1998) (holding that the university did not discriminate because it “respond[ed] with good-faith remedial action” upon notice of the plaintiff’s complaint, and no harassment was reported after such action); *Wills v. Brown Univ.* 184 F.3d 20, 42 (1st Cir. 1999) (explaining the dissent opined that an educational institution need not

terminate [a] teacher’s employment in order to avoid Title IX liability. . . . The adequacy of the institution’s response . . . will depend on a myriad of factors relating to the nature of the harassment, its duration, the roles of the harasser and the victim before and after the harassment, the nature of their continuing contact, other acts of misconduct by the harasser known to the institution, and the conditions altered by the continuing presence of the harasser.

246. *Davis*, 119 S. Ct. at 1674.

247. *See, e.g., Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 909 (D. Minn. 1999) (explaining that the defendants argued that they were limited in their ability to discipline/expel some of the students whose misconduct toward the plaintiff related to a disability with which they were classified). The *Davis* Court observed “that the nature of [the State’s] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” *Davis*, 119 S. Ct. at 1673 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

OCR policy will consider the level of control that a school has over the harasser in determining the reasonableness of the school’s response to the allegations. OCR Guidance, *supra* note 2, at 12,043. In certain circumstances, OCR policy requires the school to take steps to remedy the effects of the harassment on the student who was harassed. OCR Guidance, *supra* note 2, at 12,042. A list of such arrangements included a change of grade, providing tutoring, and reimbursement for professional counseling. OCR Guidance, *supra* note 2, at 12,043. *See* *University of California at Santa Cruz*, OCR Case No. 09-93-2141, (requiring extensive individual and group counseling); *Eden Prairie Schools, District #272*, OCR Case No. 05-92-1174, (explaining that OCR ordered counseling).

248. *Davis*, 119 S. Ct. at 1674. The Supreme Court observed that a university may not be able “to exercise the same degree of control over its students that a grade school would enjoy . . . and would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.” *Id.*

249. *See Doe v. University of Ill.*, 138 F.3d 653, 667-68 (7th Cir. 1998) (holding that school officials can avoid Title IX liability if they aggressively investigate all sexual harassment complaints and respond “consistently and meaningfully” when they find that a complaint has merit); *Stacy v. Shoney’s Inc.*, 955 F. Supp. 751, 756 (E.D. Ky. 1997) (“Effectiveness is measured not by the extent to which the employer disciplines or punishes the alleged harasser, but rather

The University's failure to promulgate and disseminate a current policy and grievance procedure for sexual harassment claims will not establish the requisite "deliberate indifference." Although the DOE Guidelines require each covered school to "adopt and publish grievance procedures providing for prompt and equitable resolution of student/employee complaints,"²⁵⁰ the Supreme Court has held that a school's failure to promulgate a grievance procedure does not constitute Title IX discrimination, by itself.²⁵¹

The Supreme Court did not resolve the question of whether a school's promulgation of an effective sexual harassment policy²⁵² could be raised as an affirmative defense to liability. In *Gebser*, the dissent led by Justice Ginsburg (joined by Justices Souter and Breyer) would recognize a school's promulgation and publication of an effective policy for reporting and redressing sexual harassment as an affirmative defense.²⁵³ The effectiveness of the policy will depend on how and when it is communicated, how it is used, and the students' experiences when using the policy.²⁵⁴

This approach would be similar to that used in Title VII cases

the steps taken by the defendant halt the harassment.") (citing *Bouton v. BMW of N. Am, Inc.*, 29 F.3d 103, 110 (3d Cir. 1994); *Wills*, 184 F.3d at 27 (stating that the teacher-harasser's mere presence on the campus was not sufficient to show harassment and a "reasonably firm" reprimand for the teacher did not represent "deliberate indifference").

250. 34 C.F.R. § 106.8(b) (1999).

251. The Supreme Court stated that the Department of Education has "authority to promulgate and enforce requirements that effectuate [Title IX's] non-discrimination mandate, (citation omitted) even if those requirements do not purport to represent a definition of discrimination under the statute." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). The Supreme Court acknowledged that the DOE could enforce its requirements administratively, but declined to imply a private cause of action to allow recovery for violation of administrative requirements. *Id.*; see also *Ericson v. Syracuse Univ.*, 35 F. Supp. 2d 326, 328 (S.D.N.Y. 1999) (the institution's failure "to promulgate a grievance procedure for dealing with discrimination does not necessarily imply its knowledge of any given instance of discrimination").

252. See Office of Civil Rights, Sexual Harassment Guidance: Harassment of Student's by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12044-12045 (1997) (asserting that an effective policy should include the following elements: (1) a sexual harassment definition, including examples; (2) a clear and understandable statement of the organization's commitment to a harassment free school; (3) a clear and complete description of the procedures, including the availability of an investigation, the time frames and each step; (4) assurances regarding confidentiality of the student, and cooperating witnesses; (5) assurances of no retaliation against the student, and any witnesses; (6) a statement regarding discipline or other sanctions for sexual harassment; and (7) a clear description of the student's rights and responsibilities, and the school's obligations. It must also be routinely and regularly communicated to all employees, and updated, where necessary. *Id.* at 12043.

253. *Gebser*, 524 U.S. at 307.

254. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1401-402 (11th Cir. 1997); see also *Burtner v. Hiram College*, 9 F. Supp. 2d 852, 857 (N.D. Ohio 1998) (holding no deliberate indifference because the student did not establish the requisite school notice where she was "a more mature college student and the defendant school did have a sexual harassment policy and grievance procedure"). *Id.*

involving supervisory sexual harassment of a subordinate employee.²⁵⁵ In such cases, the employer can avoid Title VII liability or limit damages by establishing an affirmative defense that includes two necessary elements: (a) the “employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . [the] employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²⁵⁶

b. Evaluating the Adequacy of the School’s Response

Although the Supreme Court provided little guidance regarding the factors it will consider to evaluate the “adequacy” or “reasonableness” of a school’s corrective action, several lower court decisions have established certain minimal standards.²⁵⁷

Once the University learns of Naomi’s sexual harassment allegations, it must conduct a timely, thorough, and fair investigation.²⁵⁸ The University has a duty to investigate even if Naomi does not make a formal complaint, or otherwise ask the University not to take any action.²⁵⁹ The clearest indicator of “deliberate indifference” would occur if the University failed to conduct a minimal investigation, given these allegations.²⁶⁰

Although there are no fixed time lines, the University must conduct and complete its investigation in a prompt and reasonable time period from the date it learns of the harassment. The precise time lines depend on the nature and complexity of the allegations, and the workload of the investigator.²⁶¹ Depending on the

255. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) (suggesting that the mere existence of a sexual harassment policy would foreclose liability on the part of the school).

256. *Id.* at 765; *Faragher v. City of Boca Raton*, 542 U.S. 775, 777-78 (1998). See generally *EEOC Guidance On Vicarious Employer Liability for Unlawful Harassment by Supervisors*, *supra* note 237 at *8.

257. See, e.g., *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999) (concluding that to hold a school board liable under Title IX, a person with power to take corrective action must have notice of the alleged harassment); *Wills v. Brown Univ.*, 184 F.3d 20, 34 (1st Cir. 1999) (Lipez, J., dissenting) (citing assessment of action taken by university against the harasser and whether the harassment stopped in response as constituting relevant factors in satisfying the adequate response inquiry of Title IX claim). See generally *West v. Derby Unified Sch. Dist. No. 260*, No. 98-3247, 2000 WL 294093, at *7 (10th Cir. Mar. 21, 2000) (finding school district’s anti-discrimination policy reasonable).

258. OCR Guidance, *supra* note 2, at 12043.

259. OCR Guidance, *supra* note 2, at 12042.

260. OCR Guidance, *supra* note 2, at 12042 - 12043.

261. See *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 761 (2nd Cir. 1998) (assessing that “the appropriateness of the corrective measures taken” by school officials “incorporate[s] the issue of timeliness.”); *Frye v. Board. of Educ. of the County of Ohio*, No. 98-

circumstances, the University may be required to take interim measures while the investigation is underway, such as allowing Naomi to voluntarily transfer to a different class for the remainder of the semester, or reassigning her research duties to another professor.²⁶²

The University's investigation must be fundamentally fair and unbiased. Its procedures must provide for a reasonable level of confidentiality, and assurances of protection from retaliation for Naomi, and all witnesses.²⁶³ Merely being dissatisfied with the outcome of an investigation is not sufficient to establish "deliberate indifference."²⁶⁴

If the University determines that sexual harassment did occur or is ongoing, it must take prompt, remedial action. The University's actions must be reasonably designed to stop the harassment and prevent it from reoccurring. The University must tailor its remedial actions to the nature of the harassment, and can include a variety of actions, such as transfers, reassignments, education or training, the provision of support services, publishing or reestablishing the University's sexual harassment policy.

If the harassment stops after the University instituted its corrective actions, it is more likely that Naomi can not demonstrate a "deliberate indifference."²⁶⁵ Conversely, the mere fact that the harassment does not stop after the University took corrective measures does not automatically result in its liability. The University will not be liable if its corrective measures were reasonably designed to stop the harassment.²⁶⁶

1445, 1999 WL 22733, at *2 (4th Cir. Jan. 21, 1999) (holding that the Board of Education was not deliberately indifferent to plaintiff's allegations because it began an investigation on the day it received her complaint, removed her from harasser's class within seven days, and placed the harasser (a teacher) on a behavior modification program); *Bracey v. Buchanan*, 55 F. Supp. 2d 416, 420 (E.D. Va. 1999) (deciding that plaintiff's dissatisfaction with the results of the college's investigation does not establish deliberate indifference); *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 919 n.8 (S.D. Ohio, 1998) (stating that, although the plaintiff was "left in the dark" about the remedial action taken against the assistant coach (her alleged harasser), the University was not deliberately indifferent to her complaint where it conducted an investigation, counseled the assistant coach, and placed a written letter of reprimand in his file).

262. OCR Guidance, *supra* note 2, at 12043.

263. OCR Guidance, *supra* note 2, at 12043.

264. *Bracey*, 55 F. Supp.2d at 420.

265. See *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1672 (1999) (concluding deliberate indifference is a reasonable standard to judge a school board's liability).

266. See *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610 (8th Cir. 1999) (holding that the school district's response, upon receiving notice of sexual harassment allegations, did not amount to deliberate indifference where it conducted an investigation and initiated termination proceedings against the teacher-harasser as soon as it had conclusive evidence of the teacher's improper sexual relationship); see also *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 910 (D. Minn. 1999) (claiming that the plaintiff "may demonstrate deliberate

The University must also ensure that James' due process and privacy rights are adequately protected. Its remedial action must include appropriate discipline for James, and other steps reasonably calculated to stop the harassment. The discipline must be consistent with the University's overall disciplinary code, and satisfy other requirements.

The dissent's critique of the majority opinion in *Davis* includes a warning that enforcing school liability in cases of sexual harassment may foster additional litigation against educational institutions.²⁶⁷ For example, if the harasser is a student with a disability, a school can discipline him or her provided that it follows certain procedures, and the alleged harassment is not a manifestation of the student's disability.²⁶⁸

Similarly, a student facing discipline for engaging in sexually harassing conduct may claim that the educational institution will violate his or her right to freedom of expression that is guaranteed under the First Amendment of the U.S. Constitution.²⁶⁹ In post-secondary education in particular, "examining the conflict between protections against sexual harassment and freedom of speech in the academic context raises additional issues beyond the usual employment setting because of the central value of academic freedom and [the educational institution's] commitment to unfettered debate."²⁷⁰

indifference by showing that a school district took only minor steps to address the harassment with the knowledge that such steps would be ineffective"). The school district failed to discipline or counsel the harasser, "segregate him from plaintiff, or even to report plaintiff's complaints about him." *Id.* at 911. *H.M. v. Jefferson County Bd. of Educ.*, 719 So. 2d 793, 795-96 (Ala. 1998) (stating that there was adequate response to the allegations when the teacher who received notice of the complaint notified school administrators who promptly investigated the claim, placed the teacher on leave, initiated termination proceedings and notified local law enforcement officials).

267. *Davis*, 119 S. Ct. at 1687-91.

268. 20 U.S.C. § 1400 (stating that the purpose of the Individuals with Disabilities Education Act is to ensure that the rights of disabled children are protected); 29 U.S.C.A. § 794 (1994 & West Supp. 1999) ("No otherwise qualified individual with a disability in the United States, as defined in Section 706(20) of this title, shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefit of, or be subject to discrimination under any [federally funded] program or activity . . .").

269. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

270. Anita Cava and Beverly Earle, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BERKELEY J. EMP. & LAB. L., 282, 285 (1997). The Commentators demonstrate that cases of sexual harassment that arise in the "particularly tolerant environment of a university requires courts to wrestle with defenses not usually raised with vigor in Title VII claims." *Id.* at 298. They conclude that "cases involving charges . . . between professional colleagues do not seem to pose stark problems for courts outside of the general First Amendment concerns that sexual harassment law seeks to penalize

The Supreme Court has balanced these competing interests in cases involving public high school students. In *Tinker v. Des Moines Independent Community School District*,²⁷¹ it held that the school's enforcement of its disciplinary rules infringed upon the right of students to express their views.²⁷² The Supreme Court held that the school could not constitutionally prohibit students from wearing black armbands to exhibit their disapproval of the Vietnam hostilities "without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline."²⁷³ Noting that "[s]chool officials do not possess absolute authority over their students,"²⁷⁴ the Supreme Court emphasized the fact that the students' protest did not interrupt school activities, nor did it intrude in the lives of others.²⁷⁵

In *Bethel School District No. 403 v. Fraser*,²⁷⁶ the Supreme Court once again balanced the free speech rights of a student with the educational institution's "interest in teaching students the boundaries of socially appropriate behavior."²⁷⁷ The Court found that the "School District acted entirely within its permissible authority in imposing sanctions upon [plaintiff student] in response to his offensively lewd and indecent speech" before an assembly of 600 high school students.²⁷⁸

While the Supreme Court reaffirmed its view that a "nondisruptive, passive expression of a political viewpoint . . . 'did not concern speech or action that intrudes upon the work of the schools or the rights of other students,'"²⁷⁹ it distinguished *Bethel* from its holding in *Tinker*.²⁸⁰ In *Bethel*, the speech was "unrelated to any political viewpoint," was directed at a school audience of students—some as young as 14 years of age—and its vulgar content was "wholly inconsistent with the 'fundamental values' of public school education."²⁸¹ The Supreme Court emphasized the role of public schools in "inculcat[ing the] fundamental values necessary to the

and curtail some speech that rises to the level of harassment. The problems, however, seem much more acute where professors are alleged to have harassed students." *Id.* at 300.

271. 393 U.S. 503 (1969).

272. *Id.* at 514.

273. *Id.* at 511.

274. *Id.*

275. *Id.* at 514.

276. 478 U.S. 675 (1986).

277. *Id.* at 681.

278. *Id.* at 681, 685.

279. *Id.* at 680 (quoting *Tinker*, 393 U.S. at 508).

280. *Id.* at 680.

281. *Bethel*, 478 U.S. at 683, 685.

maintenance of a democratic political system”²⁸² and the role of “school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”²⁸³

The Fourth Circuit Court of Appeals examined these often conflicting interests in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*.²⁸⁴ The fraternity’s “ugly woman contest,” although admittedly a crude attempt at humor, was considered offensively sexist and racist by many in the audience.²⁸⁵ The Fourth Circuit determined that the University could not silence speech on the basis of viewpoint despite “its substantial interest in maintaining an educational environment [that is] free of discrimination.”²⁸⁶ In *Booher v. Board of Regents, Northern Kentucky University*²⁸⁷, the district court found that, despite the First Amendment guarantee, speech of a sexual nature could be regulated if it is severe enough to create an objectively (and subjectively) hostile or abusive environment.²⁸⁸ Thus, it struck down the University’s policy, in part because its definition of sexual harassment failed to indicate that offensive speech must be measured against a standard reasonableness.²⁸⁹

282. *Id.* at 681, 683 (quoting *Ambach v. Norwich*, 441 U.S. 68, 76-77 (1979)).

283. *Id.* at 684.

284. 993 F.2d 386 (4th Cir. 1993).

285. *Id.* at 388.

286. *Id.* at 393.

287. 163 F.3d 395 (6th Cir. 1998). In public educational institutions, teacher-employees are protected insofar as their speech relates to matters of public concern. *See Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 574 (1968). *See Padilla v. S. Harrison R-II Sch. Dist.*, 181 F. 3d 992, 997 (8th Cir. 1999) (holding teacher’s trial testimony did not constitute protected speech); *see also Connick v. Myers*, 461 U.S. 138, 147 (1983):

[w]hen a public employee speaks not as a citizen upon matter of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.

Id.

288. *Booher*, 163 F. Supp. at 27. Courts have restricted classroom speech that is of a sexual nature if it does not serve a legitimate pedagogical purpose. *See e.g., Silva v. Univ. of N.H.*, 888 F. Supp. 293, 316 (D.N.H. 1994) (finding that University’s policy “as applied to [professor’s classroom employ[ed]] an impermissibly subjective standard that fail[ed] to take into account the nation’s interest in academic freedom. . . .”); *McLellan v. Bd. of Regents*, 921 S.W.2d 684, 691-92 (Tenn. 1996) (finding University’s definition of sexual harassment in accordance with United States Supreme Court holdings).

289. *Booher*, 163 F. Supp. at 28. In this case, a tenured professor of art attacked the sexual harassment policy adopted by Northern Kentucky University as an unconstitutional infringement on free speech. The court’s inquiry involved a determination regarding “whether the policy acts in a content-neutral fashion to prohibit the secondary effects of speech or whether it impermissibly restricts the content of speech. The policy was deemed to be void for vagueness. *Id.*, at 24-25. The court referred to *R.A.V. v. City of St. Paul, Minn.* where the Supreme Court invalidated as facially invalid under the First Amendment a city “hate speech”

Challenges of "speech codes"²⁹⁰ have yielded the same result. Although university administrators are applauded for their efforts to create education environments that are free from discrimination,²⁹¹ the federal courts generally invalidate those codes on the basis of their vagueness and overbreadth.²⁹²

IV. CONCLUSION

The Supreme Court's reliance on a Spending Clause analysis may significantly affect the ability of students to obtain appropriate remedies under Title IX for prohibited sexual harassment by teachers or students. The Court's insistence on a student providing actual notice of the harassing behavior to school officials obviously conflicts with the practical realities of harassment within a school environment. The documented reluctance of students, especially less mature ones, to raise sexual harassment issues with school officials may impinge upon their ability to invoke Title IX protection, particularly in instances of teacher-on-student harassment.

When compared to the Supreme Court's handling of Title VII harassment cases, especially the vicarious liability standard for supervisory sexual harassment, the *Gebser* and *Davis* standards may

ordinance that prohibited bias-motivated disorderly conduct. 505 U.S. 377, 381 (1992). In that case, teenagers burned a cross on a black family's lawn and were charged with violating a city ordinance. *Id.* at 379-80. Although the Court acknowledged that speech can be curtailed in very limited situations (obscenity, defamation, and fighting words), it held that the ordinance impermissibly proscribed speech "on the basis of the subjects the speech addresses." *Id.* at 381.

290. "In response to . . . concerns about harassment in the workplace and in order to comply with the perceived requirements of Title IX, many colleges and universities have developed codes governing sexual and racial harassment." Cava and Earle, *supra* note 270, at 306.

291. The OCR provides two examples of the application of free speech rights to allegations of sexual harassment. OCR Guidance, *supra* note 2, at 12046. The first illustration involves a college level creative writing class in which the professor's choice of reading assignments includes descriptions of sexually explicit sexual conduct. OCR Guidance, *supra* note 2, at 12046. Here, where some students' essays contain similarly offensive language, academic discourse is protected by the First Amendment, according to OCR. OCR Guidance, *supra* note 2, at 12046. In the second example, "a group of male students repeatedly targets a female student for harassment during the bus ride home from school [by] making explicit sexual comments about her body, passing around drawings that depict her engaging in sexual conduct, and, . . . attempting to follow her home off the bus." OCR Guidance, *supra* note 2, at 12046. OCR considers such threatening and intimidating actions that are targeted at a particular student or group of students to be outside the protection of the First Amendment. OCR Guidance, *supra* note 2, at 12046.

292. See *Doe v. University of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (finding the code was overly vague where it proscribed language "that stigmatize[s] or victimize[s] an individual."); *UWM Post, Inv. v. Board of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (stating that content-based speech is invalid where it is not based on the fear of imminent violence); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182-85 (6th Cir. 1995) (finding the policy vague, overbroad and "not a valid prohibition of fighting words . . .").

create an anomalous situation for harassed students. For example, in Naomi's case, she may be able to establish a *prima facie* case under Title VII employment standards for James' conduct as her supervisor because actual notice to the University of his harassment is not required. This may result in an inequitable circumstance in which the University's liability turns on Naomi's status as an employee or a student. It also establishes a situation where the Supreme Court endorses a less rigorous standard for employees than for students who should ordinarily receive greater protection given their inexperience and lack of maturity.

