CIVIL RIGHTS—TITLE IX OF THE EDUCATION AMENDMENTS OF 1972—PUBLIC SCHOOL BOARD MAY INCUR TITLE IX LIABILITY FOR STUDENT TO STUDENT SEXUAL HARASSMENT IF THE BOARD ACTED WITH DELIBERATE INDIFFERENCE TO THE HARASSMENT WHICH WAS SUFFICIENTLY SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE—*Davis v. Monroe County Board of Education*, 119 S.Ct. 1661 (1999).

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I. INTRODUCTION

The Spending Clause[1] of the United States Constitution provides for the federal government to tax citizens; hence every April, we, as taxpayers, dutifully forward our tax dollars to "Uncle Sam." As taxpayers, we understand that the Spending Clause likewise provides for Congress to disburse federal funds to various entities; thus, we expect certain rights and benefits as a consequence of sending those checks. One of those benefits is a public education, whether it be for our own benefit or for the benefit of our children.

However, imagine a scenario in which your son or daughter does not try out for an athletic team, does not try out for the band, chorus or school play, does not want to participate in student council or any other school group activity. What if your child does not even want to go to school? Imagine further that the reason for this lack of participation, attendance, and overall apathy about school is not because your child lacks the ability, initiative or intelligence to participate, not because your child has other interests, not even because he or she would simply rather watch television all day long.

Instead, imagine that the real reason your child is not gaining the full benefit of the public school education system is as a result of being the target of continuous harassment from a fellow student. Unfortunately, this harassment is not limited to teasing or pranks; rather, this harassment consists of lewd comments, licentious gestures, and even groping. However disconcerting this situation may seem, it becomes much worse when the child's teachers and school officials are well aware of the circumstance, yet they fail to either prevent or stop it.

Fortunately, pursuant to the Supreme Court's recent decision in *Davis v.*

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* J.D., anticipated 2000. The author wishes to express her gratitude to her family for believing in the possibility of success.

[1] *See* U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States, ..." *Id.*

Monroe County Board of Education,[2] administrative officials of federally supported educational institutions may no longer remain passive or disinterested when faced with student-to-student, hostile environment sexual harassment.[3]

II. STATEMENT OF THE CASE

In *Davis*, the Supreme Court addressed the issue of an educational institution's potential liability under Title IX for student-to-student sexual harassment.[4] Title IX safeguards the educational system in order to prevent discrimination.[5] Consequently, Congress may withhold federal funds from an educational institution which either engages in or permits discriminatory treatment.[6] Accordingly, when fifth-grader LaShonda Davis, despite numerous protestations to various school board employees, was sexually harassed by her classmate for over five months,[7] LaShonda's mother brought suit on her daughter's behalf against the school board under Title IX in the United States District Court for the Middle District of Georgia.[8] LaShonda's Title IX claim was dismissed by the district court based on a finding that Title IX did not provide a ground for a private cause of action for student-on-student sexual harassment.[9]

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[2] 119 S.Ct. 1661 (1999).

[3] *See id.*

[4] *See id.*

[5] *See* Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 374 (codified as amended at 20 U.S.C. § 1681(a) (1994)). Title IX of the Education Amendments of 1972, states, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (a) (1994).

[6] *See generally*, David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 34 (1994) (providing an extensive historical analysis of the evolutions and implementation of Congress's Spending Power).

[7] *See* Aurelia D. v. Monroe County Bd. of Educ., 862 F.Supp. 363, 364-365 (M.D. Ga. 1994), *aff'd in part, rev'd in part, remanded sub nom.* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), *petition for reh'g granted*, 91 F.3d 1418 (11th Cir. 1996), *aff'd en banc*, 120 F.3d 1390 (11th Cir. 1997), *rev'd and remanded*, 119 S.Ct. 1661 (1999).

[8] *See* Aurelia D., 862 F.Supp. at 364-365.

[9] *See id.* at 363 (holding, in relevant aspects, that the school did not owe students the duty of protection from harassment by fellow students and that failing to protect the child from a classmate's advances did not violate Title IX).

After bouncing back and forth in the Eleventh Circuit,[10] on *certiorari*, the Supreme Court reversed and remanded LaShonda Davis's claim under Title IX.[11] The Court concluded that an action against a public school board may exist under Title IX; however, the Court conditioned this right of action to situations in which the school board acted with deliberate indifference in permitting the harassing behavior to continue, and further, that the victim of the harassment was denied access to an educational opportunity or benefit as a result of the severe, pervasive or objectively offensive nature of the harassing behavior.[12]

The tumultuous judicial journey through the Supreme Court's holding in *Davis* shall be mapped out in the following pages. Noteworthy stops along the path shall include the constitutional foundation for Title IX, the legislative history and evolution of Title IX, significant interpretations and implementations of Title IX, and finally, the evolution of the judicial approach toward expanding Title IX's application.

III. CONSTITUTIONAL FOUNDATION

Pursuant to the Spending Clause, the Constitution designated to Congress the power to tax and spend.[13] However, with that power, concern and disagreement arose regarding the extent of Congress' ability to exert that power.[14] Despite the

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[10] *See* Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996) (On appeal, the Eleventh Circuit reversed the district court by holding, in relevant aspect, that Title IX does encompass claims for damages due to sexually hostile, educational environments created by the actions of fellow students when supervising authorities knowingly fail to eliminate the harassment). *But see* Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996) (granting the school board's motion for a rehearing *en banc*, and thus vacated its previous decision). *See also* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (concluding that Title IX did not permit a claim for student-on-student sexual harassment, thus the panel affirmed the District Court's dismissal).

[11] *See* Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1676 (1999).

[12] *See id.* at 1675.

[13] *See* U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States, ..." *Id.*

[14] *See generally*, Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1112 (1987) (observing that the Framers disagreed over the proper construction of the spending power). In fact, since the foundation of this nation, our greatest leaders debated as to the diverse effects resulting from congressional use of this power. *See id.* For further discussion, see Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1144 (1997) ("The debate over unfunded federal mandates is part of the cyclic evolution of intergovernmental relations in the United

continuous discourse, the Supreme Court has tended to adopt the perspective that Congress may utilize its power under the Spending Clause "to achieve ends outside of those attainable pursuant to the other granted powers."[15]

Accordingly, in order to achieve those ends under the Spending Clause, Congress may attach nonnegotiable conditions when granting federal funds to any given organization,[16] thereby, frequently causing much debate as to the amount of control Congress possesses when granting federal funds.[17] As a result, Title IX,[18] the statute at issue herein, is typical of Spending Clause legislation because Congress has conditioned an educational institution's receipt of federal funds by mandating that the institution act in a nondiscriminatory manner when using those funds.[19]

States." (internal citations omitted)); *see also* Engdahl, *supra* note 6, at 10-13 (discussing the debate surrounding the allocation of power within a federal model of government).

[15] Melanie Hochberg, Note, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. REV. 235, 249 (1999) (citing Engdahl, *supra* note 6, at 13-24).

[16] *See* Engdahl, *supra* note 6, at 34-35 (discussing the various conditions impugned to spending federal funds). Early exertions of the Spending Clause were:

> the Maternity Act of 1921, which authorized federal matching funds for states submitting plans satisfactory to the Children's Bureau of the Department of Labor for promoting maternal and infant hygiene and welfare[,] . . . the Agricultural Adjustment Act of 1933, which authorized federal payments to individual farmers in exchange for agreements to reduce acreage under production.

Id. at 35 (internal citations omitted).

[17] *See* David L. Burnett, Note, 9 SETON HALL CONST. L.J. 173 (1988). The casenote discusses the decision making process exerted by the National Endowment for the Arts ("NEA") in determining which artist(s) or organizations shall receive a grant derived from federal funds. *See id.* Pursuant to *National Endowment for the Arts v. Finley*, the Supreme Court held that the First Amendment was not violated by the NEA's consideration of standards of decency when disbursing federal funds. *See id.* (citing National Endowment for the Arts v. Finley, 118 S.Ct. 2168 (1998)).

[18] *See* Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 374 (codified as amended at 20 U.S.C. § 1681(a) (1994)). Title IX of the Education Amendments of 1972, states, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (a) (1994).

[19] *See* Floyd v. Waiters, 133 F.3d 786, 792-93 (11th Cir. 1998) (observing that Title IX is

IV. LEGISLATIVE HISTORY AND EVOLUTION

Intending to abolish "the use of federal resources to support discriminatory practices,"[20] Congress finally enacted Title IX in 1972,[21] but only after many alterations.[22] Congress attempted to fill the void between Title VII,[23] which prohibited discrimination, including gender discrimination, in employment, and Title VI,[24] which prohibited discrimination, but not gender discrimination, in education.

Introduced to the floor by Senator Birch E. Bayh, Jr., what was to eventually become Title IX, was initially intended to be an amendment[25] to the Education

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typical Spending Clause legislation), *vacated*, 119 S.Ct. 33 (1998) (mem.). *See also* 20 U.S.C. § 1681(a) (1994).

[20] Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (holding that private litigants may bring Title IX claims even if not expressly authorized by the statute); *see also* 118 CONG. REC. 5803 (1972) (statement of Senator Birch E. Bayh, Jr. [hereinafter Bayh]) (stating that "the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds").

[21] *See* Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 374 (codified as amended at 20 U.S.C. § 1681(a) (1994)).

[22] *See* Paul C. Sweeney, *Abuse, Misuse and Abrogation of the Use of Legislative History: Title IX and Peer Sexual Harassment*, 66 UMKC L. REV. 41, 46-67 (1997). What came to be known as Title IX was originally introduced as the Women's Equality Act of 1971. *See id.* at 54. This Act sought "to extend the provisions of the 1964 and 1968 Civil Rights Acts to cover instances of sex discrimination and to strengthen the existing civil rights legislation." *Id.*

[23] *See* 42 U.S.C. § 2000e-2(a) (1994). Title VII states, in relevant part, that: "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

[24] *See* 42 U.S.C. § 2000(d) (1994). Title VI states, in relevant part, that: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

[25] *See* 117 CONG REC. 30,156 (1971) (statement of Senator Bayh). The first version of the amendment provided, in relevant part, that:

> [n]o person . . . shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any educa-

Amendments of 1971.[26] The proposed legislation was to eradicate gender discrimination in school admissions, as well as educational employment opportunities for female applicants.[27] Both areas produced statistics that reveal great inequity among the sexes.[28]

In support of the legislation, Senator Bayh stressed the importance of ensuring women equal access to education.[29] Senator Bayh further promoted the comprehensiveness of the proposed legislation.[30] Despite Senator Bayh's efforts, the bill returned from the House to the Senate without an anti-

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tion program or activity . . . .

Id.

[26] *See* Grove City College v. Bell, 687 F.2d 684, 692 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984) (holding that a school, whose students receive federal grants, is considered a recipient of federal funding under Title IX). The primary concern of the Education Amendments of 1971, in establishing the Basic Educational Opportunity Grant program, was the availability of educational facilities to poor students, improving the quality of education provided by the nation's educational institutions, as well as establishing continuing education programs for teachers. *See id.*

[27] *See* 117 CONG. REC. 30,155-56 (1971) (statement of Senator Bayh).

[28] *See id.* at 30,411 (statement of Senator McGovern).

[29] *See id.* at 30,412 (statement of Senator Bayh). Senator Bayh stated that:

> [t]he bill deals with equal access to education. Such access should not be denied because of poverty or sex. If we are going to give all students an equal education, women must finally be guaranteed equal access to education . . . . It does not do any good to pass out hundreds of millions of dollars if we do not see that the money is applied equitably to over half our citizens.

Id.

[30] *See* Sweeney, *supra* note 22, 66 UMKC L. REV. at 54. The commentator noted that

> Senator Bayh wished to ensure that all Americans, regardless of race, color, religion, national origin, or sex, "enjoy the educational opportunity [they] deserve . . . ." It was clear to Senator Bayh that "sex discrimination reach[ed] into all facets of education admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."

Id. (internal citations and emphasis omitted).

discrimination provision.[31] Undaunted, Senator Bayh reintroduced the legislation by borrowing from the language of Title VI[32] and stressing that without educational equality, women will continue to be perceived and treated as second-class citizens.[33]

Once enacted, Title IX was not left to rest. In 1976, with the passage of the Civil Rights Attorney's Fees Awards Act,[34] successful plaintiffs in actions brought pursuant to Title IX, could, subject to judicial discretion, be awarded "reasonable attorney's fees."[35]

Soon thereafter, the Supreme Court made a dramatic decision, which was unrelated to Title IX *per se*, yet discussed the abrogation of state immunity.[36] Pur-

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[31] *See* 117 CONG. REC. 30,415, 30,882 (1971); 118 CONG. REC. 2806 (1972).

[32] *See* Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 374 (codified as amended at 20 U.S.C. § 1681(a) (1994)). Congress believed it was "only adding the 3-letter word 'sex' to existing law," and was "not doing anything to the private school that [was] not [already] in the law under Title VI of the 1964 Civil Rights Act, relating to discrimination in other areas." 117 CONG. REC. 30,408 (1971) (statement of Senator Bayh).

[33] 118 CONG. REC. 5804 (1972) (statement of Senator Bayh). In support of the legislation, Senator Bayh remarked that:

> [t]he field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.

Id.

[34] *See* Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1994)).

[35] 42 U.S.C. § 1988(b) (1994).

[36] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (holding that Congress did not intend to abrogate state immunity when it passed § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994)). *Compare* 29 U.S.C. § 794 (1994) (prohibiting exclusion from participation in, denial of benefits of, or subjection to discrimination "under any program or activity receiving Federal financial assistance"), *with* 20 U.S.C. § 1681 (1994), (prohibiting discrimination, based on gender, under federally financed, educational programs), *and* 42 U.S.C. § 2000d (1994) (prohibiting discrimination, based on race and national origin, under federally financed programs). Accordingly, Congress effectively abrogated sovereign immunity with respect to suits brought under § 504, Title IX, and Title VI. *See* S. REP. NO. 99-388, at 27-28 (1986) (remarking about the similarity among the statutes).

suant to the Court's decision, Congress passed Section 1003 of the Rehabilitation Act Amendments of 1986.[37] Congress' new legislation effectively abrogated states' Eleventh Amendment immunity from actions under statutes such as Title IX;[38] therefore, plaintiffs were permitted to collect damages against the previously protected state.[39]

Further expanding the reach of Title IX, Congress passed the Civil Rights Restoration Act of 1987,[40] thus endorsing the premise through which an entire institution is subjected to Title IX.[41] Consequently, should only one branch, office, or component of the institution be in receipt of federal funds, Title IX not only applies to that given component, but rather the entire institution with which it is associated.[42]

In light of these amendments, Congress affirmed the broad scope of Title IX;[43] therefore, a plaintiff bringing suit under Title IX could presumably, sue a state university for alleged discriminatory treatment in one of the university's campus programs, and potentially collect attorney's fees for the litigation.

V. INTERPRETATIONS

Despite the fact that Title IX was enacted close to thirty years ago, as well as subsequently amended, gender discrimination in schools not only continues to exist, but is present in alarming numbers. A survey of children in grades eight

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[37] *See* Pub. L. No. 99-506, 100 Stat. 1807, 1845 (codified as amended in sections of 29, 42 U.S.C. (1994)).

[38] *See* 42 U.S.C. § 2000d (1994) (stating that: "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

[39] *See id.*

[40] *See* Pub. L. No. 100-259, 102 Stat. 28 (codified, as amended, in sections of 20, 42 U.S.C. (1994)).

[41] *See* 20 U.S.C. § 1687 (1994). The statute defines "program or activity" as encompassing an educational institution "any part of which is extended Federal financial assistance." *Id.*

[42] *See id.*

[43] *See* S. REP. NO. 100-64, at 7 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 9. "The inescapable conclusion is that Congress intended that . . . Title IX . . . be given the broadest interpretation." *Id.*

through eleven, conducted by the American Association of University Women ("AAUW"),[44] revealed that eighty-five percent of the female students surveyed responded that they had been sexually harassed, while seventy-nine percent reported that the harasser was a peer.[45] In fact, the survey revealed that more than fifty-percent of all children questioned have been subjected to sexual harassment.[46]

Not only concerned with numbers of incidence, the survey also inquired of the children as to the emotional effects, if any, resulting from the sexual harassment.[47] In response, the students expressed feelings of embarrassment, self-consciousness, fear, and lack of confidence.[48] These emotions frequently prompted depression and detachment resulting in less than desirable academic performance.[49]

Perhaps alarmed by the statistics reflected in the AAUW Survey, the Department of Education's Office for Civil Rights ("OCR"), the administrative agency responsible for the enforcement of Title IX,[50] recently issued standardized

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[44] *See* AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993) [hereinafter referred to as "AAUW Survey"].

[45] *See id.* at 7, 11.

[46] *See id.* The survey documented that seventy-six percent of boys experienced sexual harassment as well. *See id.*

[47] *See id.* at 6. The survey defined sexual harassment to include making sexual comments, jokes, or looks; spreading sexual rumors about a student; flashing or mooning; touching, grabbing, or pinching in a sexual way; pulling off or down clothing; and forcing sexual acts. *See id.* at 5.

[48] *See id.* at 16-17.

[49] *See id.* at 15-16.

[50] *See* 34 C.F.R. § 106.31(b) (1997). Section 106.31(b) of the federal regulations to Title IX established the jurisdiction of the OCR, providing, in relevant part:

> (b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

guidelines for schools to follow when dealing with the issue of sexual harassment.[51] The OCR concluded that action must be taken to address not only the high numbers of sexual harassment victims, but to further establish and maintain a school environment that is conducive to academic achievement.[52]

The guidelines state that Title IX encompasses, in certain circumstances, student-on-student sexual harassment.[53] This liability attaches if "(i) a hostile envi-

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Provide different aid, benefits, or services or provide aid, benefits or services in a different manner;

Deny any person any such aid, benefit, or service;

Subject any person to separate or different rules of behavior, sanctions, or other treatment;

Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

Id.

[51] *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997) [hereinafter referred to as "Sexual Harassment Guidance"].

[52] *See id.* The OCR remarked that

a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.

Id.

[53] *See id.* at 12,038. The Sexual Harassment Guidance identifies hostile environment,

ronment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action."[54] Consequently, a school is not going to be held liable for the actions of a student, but rather, for its own inaction in failing to remedy the harassment, thereby condoning the discrimination.[55]

The approach adopted by the OCR is not inconsistent with either the judicial interpretation of Title IX[56] or with the Equal Employment Opportunity Commission's tendency to hold employers liable for permitting, via non-intervention, a hostile work environment.[57]

VI. JUDICIAL APPROACH: PAST CASE HISTORY

Although sexual harassment is typically associated with behavior in the workplace environment,[58] no longer is this behavior isolated to corporate offices. Instead, sexual harassment has moved into classrooms and playgrounds.[59]

The traditional view of sexual harassment was that of *quid pro quo*, namely that job advancement or even job security was dependent upon submitting to a superior's demands for sexual gratification.[60] Alternatively, sexual harassment

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sexual harassment as sexually harassing conduct "by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment." *Id.*

[54] *Id.* at 12,039.

[55] *See id.* at 12,039-40.

[56] *See infra* Part VI.

[57] *See* 29 C.F.R. pt. 1604 (1980).

[58] *See* 29 C.F.R. §106.2 (1995) (defining sexual harassment as "verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX").

[59] *See generally*, Karen M. Davis, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123 (1994); Edward S. Cheng, *Boys Being Boys and Girls Being Girls—Student-To-Student Sexual Harassment From the Courtroom to the Classroom*, 7 UCLA WOMEN'S L.J. 263 (1997).

[60] *See generally*, MICHAEL J. ZIMMER, CHARLES A. SULLIVAN, RICHARD F. RICHARDS, AND DEBORAH A. CALLOWAY, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 627 (4th ed.) (1997) (providing overview of legally recognized sexual harassment claims).

in education means, as defined by the National Advisory Council on Women's Educational Programs, "the use of authority to emphasize the sexuality or sexual identity of the student in a manner which prevents or impairs the student's full enjoyment of education[al] benefits, climate, or opportunities."[61]

A. LAYING THE FOUNDATION—EARLY TREATMENT OF TITLE IX AND SEXUAL HARASSMENT

Over twenty years ago, sexual harassment under Title IX was initially recognized by the District Court of Connecticut in *Alexander v. Yale University*.[62] Seeking implementation and enforcement of grievance procedures regarding sexual harassment claims,[63] students of Yale University asserted that their educational experience was crippled as a result of the absence of grievance policies.[64]

In addition to claims for *quid pro quo* sexual harassment,[65] other students asserted hostile environment sexual harassment claims; however, the District Court concluded that the students were not denied any benefits or access to participation in education based on a hostile environment.[66] Moreover, the court remarked that "it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education."[67] Although the district court acknowledged the possible presence of *quid pro quo* sexual harassment, the claim was ultimately dismissed.[68]

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[61] *See* Jill Suzanne Miller, *Title VI and Title VII: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699, 707 (1995) (citing Massachusetts Bd. of Educ., *Who's Hurt and Who's Liable: Sexual Harassment in Massachusetts Schools* 9 (1986) (curriculum and guide for school personnel, quoting the Advisory Council on Women's Educational Program's definition of sexual harassment in education)).

[62] 459 F.Supp. 1, 5 (D.Conn. 1977), *aff'd* 631 F.2d 178 (2d Cir. 1980).

[63] *See id.* at 2.

[64] *See id.*

[65] *See id.* at 3-4. A female student alleged that she received a low grade after refusing her professor's sexual advances. *See id.*

[66] *See id.*

[67] *See Alexander*, 459 F.Supp. at 4.

[68] *See id.* The plaintiff failed to prove that the alleged harassment actually occurred. *See id.*

Despite the fact that the *Alexander* plaintiffs were ultimately unsuccessful, a greater good was nonetheless achieved when the Second Circuit, on appeal, likewise recognized a claim for *quid pro quo* sexual harassment under Title IX.[69]

Once the federal circuit courts started to recognize Title IX claims for sexual harassment, the Supreme Court followed suit. In *Cannon v. University of Chicago*,[70] the Supreme Court found that a woman alleging sex discrimination, after being denied admission to a federally funded medical school, could assert a private right of action under Title IX.[71]

Writing for the majority, Justice Stevens stated that, notwithstanding Title IX's failure to expressly authorize a private right of action, a woman who, because of her sex, is denied admission to an educational program of an institution which receives federal financial assistance, may maintain a federal court action for a violation of Title IX.[72] The majority recognized that a woman discriminated on the basis of sex is a member of the class for whom Title IX was enacted.[73] The Court emphasized that Title IX's legislative history indicated Congress' intent to create a private cause of action for such an excluded person, as well as provide a remedy which is consistent with the enforcement of Title IX.[74] Furthermore, the Court held that a private action under Title IX does not delve into issues of federalism.[75]

A plaintiff's implied private right of action under Title IX was further fortified by the Supreme Court's subsequent decision in *North Haven Board of Education v. Bell*.[76] Observing that Title IX was closely akin to Title VI, the Court drew upon judicial interpretations of Title VI to hold that employment discrimination, based upon sex, is prohibited by Title IX within educational institutions.[77]

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[69] *See* Alexander v. Yale Univ., 631 F.2d 178, 185 (2d Cir. 1980).

[70] 441 U.S. 677 (1979).

[71] *See id.*

[72] *See id.* at 709.

[73] *See id.* at 717.

[74] *See id.*

[75] *See id.*

[76] 456 U.S. 512 (1982).

[77] *See id.* at 529-30.

B. RAISING THE FRAMEWORK—THE SUPREME COURT RECOGNIZES TEACHER-TO-STUDENT SEXUAL HARASSMENT CAUSE OF ACTION UNDER TITLE IX.

It was not until 1992 that the first case dealing with sexual harassment in education was heard by the Supreme Court. In *Franklin v. Gwinnett County Public School*,[78] the Court held that a Title IX damages claim asserted against the school district was available for a student who was sexually harassed and abused by her coach and teacher.[79] The high school student asserted that her teacher "engaged her in sexually oriented conversations . . . , forcibly kissed her . . . [and] subjected her to coercive intercourse."[80]

Delivering the opinion for the majority, Justice White remarked that Title IX imposes upon public school boards the duty to prohibit gender-based discrimination.[81] Despite the fact that school officials were not only on notice about the harassment, but had also investigated the charges, the Court noted that no action was taken to alleviate the harassment, and furthermore, the student was actually discouraged from filing charges against the offending faculty member.[82]

The Court applied the following axiom: "'[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'"[83] Pursuant to this concept, the Court determined that, absent specific congressional directives to the contrary, federal courts are well within their authority to award relief in claims brought pursuant to federal statutes.[84] The majority likewise commented that "[this Title VII] rule should apply when a teacher sexually harasses and abuses a student."[85]

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[78] 503 U.S. 60 (1992).

[79] *Id.* at 76.

[80] *Id.* at 63.

[81] *See id.* at 75. "Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate(s) on the basis of sex.'" *Id.* (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

[82] *See id.* at 63-64. A deal was struck between the teacher and the school board: if the teacher resigned, the board's investigation would cease. *See id.* at 64.

[83] *Franklin*, 503 U.S. at 66 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

[84] *See id.* at 68-69. The Court concluded that Congress had no intentions to limit remedies and relief available to the courts for redressing violations of the statute. *See id.* at 71-72.

[85] *Id.* at 75.

Accordingly, in *Franklin,* the Court confirmed the viability of a Title IX claim for sexual harassment in the educational environment;[86] therein paving the way to finally address the issue of curtailing, if not eliminating sexual harassment in education. However, the *Franklin* Court had not yet addressed student-on-student sexual harassment.[87]

C. MISPLACING THE BLUEPRINTS—CONFUSION ABOUNDS IN THE CIRCUITS REGARDING STUDENT-ON-STUDENT SEXUAL HARASSMENT CLAIMS UNDER TITLE IX.

The first federal court to actually recognize student-on-student sexual harassment as a viable claim under Title IX was the District Court for the Northern District of California in *Doe v. Petaluma City School District.*[88] The federal court conditioned this recognition by mandating that to recover damages, a plaintiff must demonstrate that the educational institution had the required *mens rea* with regard to the alleged discriminatory treatment.[89] The plaintiff in *Petaluma* asserted that the school knew of the fact that she was subjected to sexual harassment during grades seven through eight, yet the administration did nothing to stop it.[90] Reading *Franklin*, the *Petaluma* court construed the Supreme Court's decision as implying that Title IX was not only applicable to *quid pro quo* type of sexual harassment claims but to hostile environment claims as

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[86] *See id.* the Franklin Court stated that:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." . . . . We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Id. (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)). *See also* Joanne Liebman Matson, *Note, Civil Rights—Sex Discrimination in Education—Compensatory Damages Available in a Title IX Sexual Harassment Claim*, 15 U. ARK. LITTLE ROCK L.J. 271, 291 (1993) (discussing Franklin v. Gwinnett County Public School, 503 U.S. 60 (1992)).

[87] *See id.*

[88] 830 F. Supp. 1560, 1571-73 (N.D. Cal. 1993), *aff'd*, 54 F.3d 1447 (9th Cir. 1995); *modified*, 949 F. Supp. 1415 (N.D. Cal. 1996) (different result upon reconsideration).

[89] *See id.* at 1571.

[90] *See id.* at 1563.

well.[91] Acknowledging that Title VII recognized peer-on-peer sexual harassment within the workplace, the court rationalized that peer-on-peer sexual harassment within the school should be recognized by Title IX.[92] Consequently, although permitting hostile environment claims under Title IX for student-on-student sexual harassment, the court still mandated the presence of intent on the part of the school in order to succeed with such a claim.[93]

Last year, this issue was finally given a forum for consideration by the Supreme Court in *Gebser v. Lago Vista Independent School District.*[94] Unfortunately, the result was not victim-friendly.[95] Basing its decision on the already established foundation of required "intent," the *Gebser* Court held that Title IX will only permit a monetary remedy when the person of authority has actual knowledge of the harassment, yet does nothing to ameliorate the situation.[96]

The plaintiff in *Gebser* was a freshman girl in highschool when her teacher initiated sexual conduct with her.[97] Although the conduct started off as kissing and fondling, it quickly progressed into numerous occasions of sexual intercourse.[98] In fact, the "relationship" spanned close to two years, commencing with suggestive commentary directed at Gebser while she was still in eighth grade and proceeding into a sexual affair through her sophomore year in high school.[99]

Although Gebser kept her "relationship" secret, other students brought their teacher's sexually explicit comments to the attention of the school principal,[100]

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[91] *See id.* at 1575.

[92] *See id.* at 1574-75.

[93] *See Doe*, 830 F. Supp. at 1574-76. The court's rationale of requiring intent was based upon the fact that both *Franklin* and Title VI, after which Title IX was modeled, likewise required intent. *See id.*

[94] 118 S.Ct. 1989 (1998).

[95] *See generally* Michael P. Meliti, Note, 9 SETON HALL CONST. L.J. 213 (1998).

[96] *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S.Ct. 1989, 2000 (1998).

[97] *See id.* at 1993.

[98] *See id.*

[99] *See id.*

[100] *See id.*

who only reprimanded the teacher and demanded that he apologize to the parents of the complaining students.[101] No other school or district official was informed of the teacher's questionable behavior, thereby violating the proscribed implementations of Title IX.[102]

Fortunately, a police officer came upon Gebser and her teacher having sex.[103] The offender was subsequently arrested, fired, and his license to teach was revoked.[104] Gebser, in turn, brought suit against both the teacher and the school district alleging violations of Title IX and state negligence law, among other claims.[105]

After being removed to federal court, summary judgement was granted in favor of the school district by the District Court for the Western District of Texas,[106] which surmised that although Title IX was intended to fight the predominance of gender discrimination in education, a plaintiff may not recover damages under Title IX without establishing that the school board officials were not only on notice regarding the harassment, but also failed to address the harassment.[107] On appeal, as to the issue of Title IX liability, the Fifth Circuit affirmed the district court.[108]

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[101] *See id.*

[102] *See Gebser*, 118 S.Ct. at 1993. The principal should have notified the superintendent of schools of the complaint pursuant to federal regulations under Title IX. *See id.* The regulations, in relevant part, mandate that:

> [E]ach [school district] shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities . . . including any investigation of any complaint communicated to such [school district] alleging its noncompliance . . . . [and] [t]he [school district] shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed.

34 C.F.R. § 106.8(a) (1995).

[103] *See Gebser*, 118 S. Ct. at 1993.

[104] *See id.*

[105] *See id.*

[106] *See id.*

[107] *See id.* at 1993-94.

[108] *See Gebser*, 118 S.Ct. at 1994 (citing Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997) and Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996)). Basing its decision on its findings in *Rosa H.* and *Canutillo*, the court of appeals de-

Hoping to establish some standard in determining whether Title IX liability for a teacher's conduct applied to a school district, the Supreme Court granted certiorari to *Gebser*.[109] In the end, the Court formulated an analysis setting forth mandatory elements necessary to incur liability.[110] These included the condition that an authority possessed actual knowledge of the discrimination to which he failed to respond, and further, "that the response must amount to deliberate indifference to discrimination."[111]

Although acknowledging the extraordinary harm caused by a teacher's harassment of a student,[112] the Court deemed that, absent proof of actual notice as well as deliberate indifference, a school district shall not be liable for the actions of a teacher under Title IX.[113] In light of *Gebser*'s narrow interpretation of Title IX,[114] it is quite remarkable that the same Supreme Court reached such a remarkable decision only a year later.

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termined that mere constructive notice or vicarious liability was insufficient to hold the school district liable. *See id.* The court reaffirmed its holding in *Rosa H.* by stating that "school districts are not liable in tort for teacher-student sexual harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." *Id.* (quoting *Rosa H.*, 106 F.3d at 1226).

[109] *See id.*

[110] *See id.* at 1999.

[111] *Id.* The Court stated that the "administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation." *Id.*

[112] *See id.* at 2000. The Court commented that "[n]o one questions 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. *Id.*

[113] *See id.*

[114] The Court relied upon the sentiment that since "the express remedial scheme under Title IX is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, [the Court] conclude[d], in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines." *Gebser*, 118 S.Ct. at 1999 (citing 20 U.S.C. § 1682).

VII. LOCATING THE BLUEPRINTS—THE SUPREME COURT RESOLVES THE CONFLICT: *DAVIS V. MONROE COUNTY BOARD OF EDUCATION*

In *Davis v. Monroe County Board of Education*,[115] eleven year old LaShonda Davis was allegedly subjected to constant sexual harassment, not from a teacher, but from a fellow student, hereinafter referred to as G.F.[116] Comments such as "I want to get in bed with you" and "I want to feel your boobs," coupled with attempts at touching LaShonda's breasts and genital area, were examples of G.F.'s harassing behavior.[117] The harassment allegedly started in December of 1992 and lasted until the middle of May, 1993.[118] Throughout this time, LaShonda complained to her teacher, Diane Fort ("Fort"), who in turn admitted to having notified the school principal, Bill Querry ("Querry").[119] Despite these notifications, G.F.'s actions apparently went unpunished.[120]

G.F.'s harassment became more overt as time passed. In February of 1993, "G.F. purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda during physical education class."[121] LaShonda allegedly reported this incident to her gym teacher, Whit Maples ("Maples").[122] Another incident, occurring a week later, was likewise reported by LaShonda to a classroom teacher, Joyce Pippin ("Pippin").[123] More harassment followed: harassment which LaShonda continued to report to her teachers.[124] Although LaShonda was deeply affected,[125] the harassment only came to

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[115] 119 S.Ct. 1661 (1999).

[116] *See id.* at 1666-67.

[117] *See id.* at 1667 (citing Complaint P7).

[118] *See id.*

[119] *See id.* (citing Complaint P7).

[120] *See Davis*, 119 S.Ct. at 1667 (citing Complaint P16).

[121] *See id.* (citing Complaint P8).

[122] *See id.*

[123] *See id.* (citing Complaint P9). In addition to LaShonda bringing G.F.'s conduct to the attention of her teachers, her mother also contacted the respective school personnel as well. *See id.*

[124] *See id.* (citing Complaint P10, P11). Following yet another incident in March, G.F. apparently rubbed his body against LaShonda in April 1993. *See id.*

an end "when G.F. was charged with, and pleaded guilty to, sexual battery for his misconduct."[126]

According to petitioner's allegations, G.F. was never disciplined for his behavior despite LaShonda's mother's numerous conversations with Fort, Pippen, and Querry regarding her daughter's harasser.[127] The only response that petitioner received from Querry was a pithy and superficial statement: "I guess I'll have to threaten him a little bit harder."[128]

The lack of discipline implemented by the school,[129] as well as the absence of a district policy concerned with student-on-student sexual harassment[130] created a vulnerable environment for students in LaShonda's position. Moreover, LaShonda's situation was precarious because no efforts were exerted to prevent the continuation of harassment by method of separating G.F. and LaShonda.[131] In fact, for approximately half of the time of her harassing ordeal, LaShonda had to remain seated adjacent to G.F. in her classes.[132]

Consequently, Petitioner, on her daughter's behalf, filed suit[133] against the school board, the superintendent, and the principal[134] alleging that as a recipient of federal funds, the school board violated Title IX by permitting the continuous sexual harassment of LaShonda to be of such a nature as to interfere with her

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[125] As a result of G.F.'s harassment, LaShonda's grades plummeted and prompted her to write a suicide note. *See id.* (citing Complaint P15).

[126] *Davis,* 119 S.Ct. at 1667 (citing Complaint P14). The harassment was not isolated to LaShonda. Instead, G.F. targeted other girls in the class. *See id.* (citing Complaint P16). Petitioner's complaint alleges that LaShonda and the other harassed girls tried to discuss G.F.'s conduct with Querry. *See id.* (citing Complaint P10).

[127] *See id.* (citing Complaint P16).

[128] *Id.* (citing Complaint P12).

[129] *See id.* (citing Complaint P16).

[130] *See id.* (citing Complaint P17).

[131] *See id.* (citing Complaint P16).

[132] *See Davis,* 199 S.Ct. at 1667 (citing Complaint P13).

[133] *See id.* The litigation was filed in the United States District Court for the Middle District of Georgia on May 4, 1994. *See id.*

[134] *See id.* at 1667-68.

school attendance and performance.[135]

In reaction, the defendants moved to dismiss the Complaint for failure to state a claim.[136] The motion was granted.[137] The district court dismissed petitioner's claims under Title IX against the superintendent and the principal because private causes of action under Title IX are only permissible against federally funded educational institutions.[138] The allegations against the school board were likewise dismissed because pursuant to Title IX, liability attached only if "the Board or an employee of the Board had any role in the harassment."[139]

On appeal, the Court of Appeals for the Eleventh Circuit reversed.[140] The court analogized Title IX to Title VII, thus concluding that if Title VII assessed damages upon an employer for tolerating a sexually hostile environment created by co-workers, so too should Title IX assess damages upon a tolerating school district.[141] In addition, the Court of Appeals found that the petitioner had provided sufficient evidence to serve as a foundation for her hostile environment

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[135] *See id.* at 1668 (citing Complaint P27, P28). The Complaint alleged that "the persistent sexual advances and harassment by the student G.F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities," and that "the deliberate indifference by Defendant's to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abusive school environment in violation of Title IX." *Id.*

[136] *See id.* The Defendants made the motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[137] *See id.* (citing Davis v. Monroe County Bd. of Educ., 862 F.Supp. 363, 368 (M.D. Ga. 1994)).

[138] *Davis,* 119 S.Ct. at 1668 (citing *Davis*, 862 F.Supp. at 367).

[139] *Id.* (quoting *Davis*, 862 F.Supp. at 367).

[140] *See id.* (citing Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996)).

[141] *See id.* (quoting *Davis*, 74 F.3d at 1193). The Eleventh Circuit stated that:

> We conclude that as Title VII encompasses a claim for damages due to 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.

Id.

sexual harassment claim.[142]

On the Board's appeal, the Eleventh Circuit subsequently granted the Board a rehearing *en banc*.[143] In 1998, the Eleventh Circuit affirmed the district court's dismissal of the Title IX claims against the Board.[144] The court focused on the notice theory under the Spending Clause.[145] Although notice provisions exist within Title IX warning recipients of their duty to prevent discriminatory conduct on the part of their employees, the court proffered that the same could not be said with regard to student behavior.[146] In sum, because the statute does not, according to preceding judicial interpretation, specifically address a duty of prevention of student-on-student sexual harassment, the court of appeals chose not to render an expansive reading of Title IX in order to find such a duty.[147]

Primarily in an attempt to reconcile conflicting interpretations of Title IX[148]

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[142] *See id.* (citing *Davis*, 74 F.3d at 1995). "The Eleventh Circuit panel recognized that petitioner sought to state a claim based on school 'officials' failure to take action to stop the offensive acts of those over whom the officials exercised control." *Id.* (quoting *Davis*, 74 F.3d at 1993).

[143] *See* Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996).

[144] *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1998).

[145] *See id.* at 1399. The court of appeals interpreted that since Title IX was passed under congressional authority pursuant to the Spending Clause of the Constitution, Title IX must provide recipients of federal education funding with "unambiguous notice of the conditions they are assuming when they accept [federal funding]." *Id.*

[146] *Id.* at 1401. "Title IX . . . provides recipient with notice that they must stop their employees from engaging in discriminatory conduct, . . . the statute fails to provide a recipient with sufficient notice of a duty to prevent student-on-student harassment." *Id.*

[147] *See id.*

[148] *Compare* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996) (holding that private damages action for student-on-student sexual harassment is available under Title IX only where funding recipient responds to these claims differently based upon the gender of the harassment victim), *cert. denied*, 519 U.S. 861 (1996), *with* Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998) (reaffirming private damages action under Title IX for funding recipient's inadequate response to known student-on-student harassment), *cert. granted and vacated*, 119 S.Ct. 2016 (1999); Oona, R.S. v. McCaffrey, 143 F.3d 473 (9th Cir. 1998) (rejecting qualified immunity claim and concluding that a duty to respond to student-on-student sexual harassment claims under Title IX is clearly established), *cert. denied*, 119 S.Ct. 2039 (1999); Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997) (private damages action under Title IX available for funding recipient's inadequate response to known student-on-student harassment), *vacated*, district court decision *aff'd, en banc*, 169 F.3d 820 (4th Cir. 1999) (court of appeals postponed addressing the Title IX claim for hostile environment sexual harassment until the decision in *Davis* was rendered); *and* Seamons v.

in determining when, if at all, a recipient of federal funds may incur liability in a private damages action resulting from student-on-student sexual harassment, the Supreme Court granted certiorari.[149]

Prior to commencing the Court's opinion of the case, Justice O'Connor, writing for the majority, acknowledged that the Monroe County Board of Education ("Board") is a recipient of federal education funds pursuant to Title IX.[150] Furthermore, Justice O'Connor noted that the Board does not find that student-on-student sexual harassment is not a form of discrimination under Title IX.[151] According to the majority, the issue for the Court's consideration was isolated to determining if a recipient of federal funding could incur liability under Title IX under any circumstances for student-on-student sexual harassment discrimination.[152]

The Court's response, in the end, established a three-prong test which became the crux of the *Davis* holding. The Court concluded that a recipient may be held liable *only* where: (1) they were deliberately indifferent to sexual harassment, (2) of which they had actual knowledge, (3) that is so severe, pervasive, and objec-

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Snow, 84 F.3d 1226 (10th Cir. 1996) (finding it suspicious as to whether a school district should incur liability for a student's actions toward another student, the court of appeals tackled a male student's discrimination claim without contemplating Title IX).

For general discussions concerning the federal judiciary's interpretative applications of Title IX, see Jill Bodensteiner, *Higher Education and the Courts: 1997 in Review, Discrimination Against Students in Higher Education: A Review of the 1997 Judicial Decisions*, 25 J.C. & U.L. 331 (1997); Melanie Hochberg, *Note, Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. REV. 235 (1999); Emmalena K. Quesada, *Note, Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability under Title IX*, 83 CORNELL L. REV. 1014 (1998); George M. Rowley, *Note, Liability for Student-to-Student Sexual Harassment Under Title IX in Light of* Davis v. Monroe County Bd. of Educ., 1999 B.Y.U. EDUC. & L.J. 137 (1999); Kathleen A. Sullivan, J.D. and Perry A. Zirkel, Ph.D., J.D., LL.M., *Commentary, Student to Student Sexual Harassment: Which Tack Will the Supreme Court Take In a Sea of Analysis?*, 132 WELR 609, 132 ED. LAW REP. 609 (1999); David P. Thompson, Ph.D., and A'Lann Truelock, M.Ed., *Commentary, Student-to-Student Sexual Harassment: Sifting Through the Wreckage*, 125 WELR 1035, 125 ED. LAW REP. 1035 (1998); Meredith M. Todd, *Note, Are Schools Liable for Student-on-Student Sexual Harassment under Title IX?*, 63 MO. L. REV. 1049 (1998).

[149] *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 29 (1998).

[150] *See* Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1669 (1999).

[151] *See id.*

[152] *See id.*

tively offensive that it can deprive victims of access to the educational opportunities or benefits provided by the recipient.[153]

The Court commenced its analysis by tackling the sub-question of whether a private action for damages can be supported by a recipient's failure to respond to student-on-student harassment.[154] The Court conceded that an implied private right of action, as well as money damages, are available pursuant to Title IX.[155] However, because the Court has interpreted Title IX as arising under the auspices of the Spending Clause, the availability of private damage actions is limited to instances in which the federal funding recipients had adequate notice of their potential liability for the questionable conduct.[156]

A. TO INCUR LIABILITY UNDER TITLE IX, THE SCHOOL DISTRICT MUST HAVE BEEN DELIBERATELY INDIFFERENT TO THE SEXUAL HARASSMENT

Although the Court concurred with the Board's argument that pursuant to Title IX, a recipient of federal funds is only liable in damages for his own conduct,[157] the Court disagreed with the Board's allegation that petitioner was attempting to attach liability upon the Board for G.F.'s actions.[158] In fact, quite the

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[153] *See id.* at 1675.

[154] *See id.* at 1669 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998)).

[155] *See id.* (citing Cannon v. University of Chicago, 441 U.S. 677 (1979); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)).

[156] *See id.* at 1669-70. The Court's analysis regarding the issue of notice was heavily based the Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), in which the Court drew the comparison between legislation enacted pursuant to the Spending Clause with drawing up a contract between parties. *See Pennhurst*, 451 U.S. at 17. The *Davis* Court commented that when:

> interpreting language in spending legislation, we thus "insis[t] that Congress speak with a clear voice," recognizing that "[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it."

Davis, 119 S.Ct. at 1670 (quoting *Pennhurst*, 451 U.S. at 24-25).

[157] *See Davis*, 119 S.Ct. at 1670. The Board drew upon *Pennhurst* in establishing their contention that Title IX proscribes the recipient's conduct, not the conduct of third parties. *Id.*

[158] *See id.*

opposite was true. The Court construed petitioner's argument as attempting to hold the Board liable for its inaction with respect to G.F.[159]

Elaborating on *Gebser*, the Court concluded that liability for damages under Title IX hinged on whether the recipient was "deliberately indifferent to known acts of sexual harassment by a teacher," therein incorporating the notice requirement.[160] Utilizing the "deliberately indifferent" standard, the *Gebser* Court rejected a lower negligence standard under which the recipient could be liable for the actions of its employees not only if the recipient knew, but should have known of the misconduct.[161]

Instead, just as a recipient of federal funds would undoubtedly incur liability for intentional acts clearly prohibited by the given statute,[162] by imposing the "deliberately indifferent" standard, the Court will impose liability upon a recipient who, as a result of an official and administrative decision, has remained deliberately indifferent to allegations of sexual harassment by a teacher.[163] Consequently, the Court implied that intentional inaction by a school is, in effect, equivalent to causing the discrimination to occur.[164] The Court further examined its previous holding in *Franklin*, which determined that Title IX imposes upon school boards the duty to prevent teacher-to-student harassment within their schools.[165] Therefore, should school boards remain indifferent in such a situation, that indifference is a violation of Title IX.[166] Consequently, the Court concluded that in situations such as that of LaShonda Davis, a school board's deliberate indifference with regard to known acts of sexual harassment, albeit among students as opposed to teachers, may suffice as an intentional act in violation of

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[159] *See id.*

[160] *Id.* "[I]n *Gebser* we once again required "that 'the receiving entity of federal funds [have] notice that it will be liable for a monetary award'" before subjecting it to damages liability." *Id.* (citing to Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (quoting Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1992))).

[161] *Id.* at 1671 (citing *Gebser*, 524 U.S. at 283).

[162] *See id.* at 1670-71 (citing Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 597-98 (1983)).

[163] *See id.* at 1671 (citing *Gebser*, 524 U.S. at 290).

[164] *See Davis,* 119 S.Ct. at 1671 (citing *Gebser*, 524 U.S. at 291; Canton v. Harris, 489 U.S. 378 (1989)).

[165] *See id.* (quoting Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1992)).

[166] *See id.*

Title IX.[167]

B. TO INCUR LIABILITY UNDER TITLE IX, THE SCHOOL DISTRICT MUST HAVE HAD ACTUAL KNOWLEDGE OF THE SEXUAL HARASSMENT

Justice O'Connor explained that the issue of notice, with regard to liability based upon actions of third parties, was not an obstacle to the analysis of *Davis* primarily because the premise was not uncommon to school boards or districts.[168] The Court did condition the potential for third party liability under Title IX by limiting it only to situations in which the recipient, the Board, has some level of control over the alleged harassment.[169] Reviewing the actual language of Title IX, Justice O'Connor stipulated that the statute focuses on the recipient's level of control over the harasser, finding that for the deliberate indifference standard to come to effect, the recipient must, by allowing the discriminatory conduct, be indirectly causing it.[170]

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[167] *See id.*

[168] *See id.* "[T]he regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain non-agents." *Id.* The Court likewise observed that the Department of Education mandates that funding recipients "monitor third parties for discrimination in specified circumstances . . . ." *Id.* (citing 34 C.F.R. §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a), 106.51(a)(3) (1998)). Furthermore, the Court noted that under common law, schools may be liable for tortious actions of third parties directed at student(s). *Id.* at 1671-72 (citing Restatement (Second) of Torts § 320, and Comment a (1965)); *see also* Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982); Brahatcek v. Millard Sch. Dist., 273 N.W.2d 680 (Neb. 1979); McLeod v. Grant County Sch. Dist. No. 128, 255 P.2d 360 (Wash. 1953)).

[169] *See Davis,* 119 S.Ct. at 1672.

[170] *See id.* The Court stated that the statute

> confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subjects" its students to harassment. That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it . . . . Moreover, because the harassment must occur "under" "the operations of" a funding recipient [citing to 20 U.S.C. § 1681(a)], . . . the harassment must take place in a context subject to the school district's control.

Id. (internal citations omitted).

It is pivotal to note that the Court did not apply liability based upon principles of agency,

Accordingly, since the alleged harassment experienced by LaShonda Davis occurred during school hours and on school grounds, the school, as well as the Board, was in a position of control of the harassing behavior.[171] This position of control, coupled with the Court's long accepted philosophy concerning the "importance of school officials' 'comprehensive authority . . . , consistent with constitutional safeguards, to prescribe and control conduct in the schools,'"[172] led the Court to conclude that an institutional recipient of federal funding, which maintains disciplinary authority over an alleged harasser, may be liable under Title IX.[173] By exhibiting deliberate indifference, thereby failing to intervene, the recipient is effectively subjecting other students to discriminatory harassment.[174]

The Court further added that there was no reason for the Board to be caught off guard by the possibility of incurring liability as a result of G.F.'s actions.[175] The Court noted that in addition to school officials being informed of the liability risk under Title IX for student-to-student sexual harassment,[176] a publication was issued by the National School Boards Associations speaking to this very issue.[177] Specifically, the publications, incorporating guidelines formulated by the Equal Employment Opportunity Commission ("EEOC")[178] as well as the *Gebser*

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rather, the Court treated the terms of "under" and "subject" only as terms of limitation, and not of imposition of agency principles. The recipient's liability in cases like Davis is not imposed by method of attribution from the actual harasser onto the recipient. Instead, the recipient incurs liability for its own actions, or as the case may reveal, its lack of actions. *See id.* at 1672-73.

[171] *See id.* at 1672 (citing Doe v. University of Illinois, 138 F.3d 653, 661 (7th Cir. 1998)).

[172] *See id.* at 1673 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507 (1969)). The Court also remarked that "'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.'" *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)).

[173] *See id.*

[174] *See id.*

[175] *See Davis*, 119 S.Ct. at 1673.

[176] *See id.*

[177] *See id.*

[178] *See id.*

decision,[179] warned districts that "'if [a] school district has constructive notice of severe and repeated acts of sexual harassment by fellow students, that [notice] may form the basis of a Title IX claim.'"[180]

The Court went on to state that this potential liability for student-on-student sexual harassment does not mandate that schools rid themselves of all harassing students, or that a specific form of disciplinary action is mandated so as to offset the allegation of deliberate indifference.[181] Instead, the Court explained that as long as the school does not react unreasonably to the alleged situation, the "courts should refrain from second guessing the disciplinary decision made by school administrators."[182]

C. TO INCUR LIABILITY UNDER TITLE IX, THE SEXUAL HARASSMENT MUST BE SO SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE THAT IT CAN DEPRIVE VICTIMS OF ACCESS TO THE EDUCATIONAL OPPORTUNITIES OR BENEFITS PROVIDED BY THE RECIPIENT

Examining the question whether sexual harassment, specifically student-to-student sexual harassment, fits within the definition of discrimination under Title IX, the Court stated that not only has it previously found that sexual harassment is discrimination under Title IX,[183] it has likewise concluded that student-on-student sexual harassment, if sufficiently severe, may also be discrimination pursuant to Title IX.[184] However, once again the Court conditioned the attachment

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[179] *See id.* Interpreting the effect of the *Gebser* decision to the notice component of Title IX liability, the publication elaborated that "[i]t is unlikely that courts will hold a school district liable for sexual harassment by students against students in the absence of actual knowledge or notice to district employees." *Id.* (quoting NATIONAL SCHOOL BOARDS ASSN. COUNCIL OF SCHOOL ATTORNEYS, SEXUAL HARASSMENT IN THE SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS, 45 (rev. ed.)).

[180] *Davis,* 119 S.Ct. at 1673 (quoting SEXUAL HARASSMENT IN THE SCHOOLS, *supra* note 79, at 45). Despite the acknowledged fact that the Board could not benefit from its guidance as a result of the time frame in which the alleged misconduct occurred, the Court nonetheless mentioned that the Office of Civil Rights ("OCR") of the Department of Education adopted guidelines stipulating that student-on- student sexual harassment is encompassed within Title IX's proscriptions. *See id.* at 1673.

[181] *See id.* at 1673-74 (disagreeing with respondent's contention that this type of liability under Title IX would force schools to expel any alleged harasser).

[182] *See id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 342-43, n.9 (1985)).

[183] *See id.* at 1674 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 (1992)).

[184] *See id.* at 1674-75 (citing Bennett v. Kentucky Dept. of Ed., 470 U.S. 656 (1985)).

of liability by referring to Title IX's expletives that discrimination also includes being "excluded from participation in" or "denied the benefits of" any "education program or activity."[185] Accordingly, the Court concluded "that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school."[186]

To illustrate its rationale, the Court offered a situation in which male students physically threaten female students to the point that the females are effectively prohibited from using certain facilities or participating in activities.[187] The Court held that this would be an obvious example of the severe, pervasive, and objectively offensive conduct, which, if permitted to continue by school officials' deliberate, thus knowing, inaction, would satisfy the Court's herein requirements for liability under Title IX.[188] The Court found that for a meritorious action, it is enough that the harassing conduct "undermine[d] and detract[ed] from the victim's educational experience, that the victim-students [were] effectively denied equal access to an institution's resources and opportunities."[189]

The Court also stressed that, when analyzing cases like *Davis*, it must not be forgotten that social mores in the workplace are different from those in the school yard.[190] Hence, damages should not be awarded for teasing and the like, even if the taunting is gender focused.[191] Furthermore, the harassment, in what ever form, must nonetheless be of a serious nature as to "have the systemic effect of denying the victim equal access to an educational program or activity."[192] Accordingly, play-ground teasing alone would not be actionable under Title

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[185] *See id.* at 1675 (quoting 20 U.S.C. § 1681(a) (1994)).

[186] *See Davis,* 119 S.Ct. at 1675.

[187] *See id.*

[188] *Id.*

[189] *Id.* (citing Meritor Sav. Bank, F.S.B. v. Vinson, 466 U.S. 57, 67 (1986)).

[190] *Id.* at 1675. The Court stated that within the school atmosphere, "students often engage in insults, banter, teasing, shoving, pushing, and gender specific conduct that is upsetting to the students subjected to it." *Id.*

[191] *See id.* (reiterating the "severe, pervasive, and objectively offensive" language).

[192] *Id.* at 1676.

IX.[193]

In LaShonda's case, where the harassment spanned over five months and took place on school grounds under school supervision, the Court found that the Board did have actual notice of the harassment, specifically based on the numerous complaints rendered by both LaShonda and her mother.[194] The Court further found that the Board's failure to intervene in order to stop the harassment rose to the level of deliberate indifference, and that the continuous harassment was severe enough to deny LaShonda the full benefits of educational programs as exhibited in her dropping grades.[195] Consequently, the Court, holding that the Eleventh Circuit erred in dismissing petitioner's complaint for failure to state a claim, reversed and remanded the matter to the Court of Appeals for the Eleventh Circuit.[196]

VIII. CLOUDING A MUDDY POOL: THE *DAVIS* DISSENT'S CRITIQUE

Writing for the dissent, Justice Kennedy, joined by the Chief Justice, Justice Scalia and Justice Thomas, concentrated its analysis on Title IX's roots within the Spending Clause.[197] Justice Kennedy construed the majority's holding in *Davis* as "eviscerat[ing] the clear-notice safeguard of our Spending Clause jurisprudence."[198] Specifically, Justice Kennedy warned that the majority failed to consider the delicate balance Congress aspires to maintain when exerting its

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[193] *See Davis,* 119 S.Ct. at 1676. The Court commented that, in particular circumstances, a single instance of harassment may be sufficient to establish a claim. *See id.* Although dealing with racial discrimination as opposed to gender discrimination and/or sexual harassment, the Supreme Court of New Jersey recently held that a single racial remark unaccompanied by any other harassment, could substantiate a claim for emotional distress under the New Jersey Law Against Discrimination. *See* Taylor v. Metzger, 706 A.2d 685 (N.J. 1998) (discussing the implications and applications of N.J.S.A. 10:5-1 et seq. (West 1993)).

[194] *See Davis,* 119 S.Ct. at 1676.

[195] *See id.*

[196] *See id.*

[197] *See* Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1677 (1999) (Kennedy, J., dissenting), Justice Kennedy commented that "[o]nly if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power." *Id.* (citing South Dakota v. Dole, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting)).

[198] *See id.*

power pursuant to the Spending Clause.[199]

Continuing its critique by pursuing a contractual analysis of the application of Title IX in Spending Clause legislation, the dissent insisted that the language of the given statute required clear notice of potential liability.[200] The dissent further opined that the notice provision is necessitated by the sheer absence of the availability of a private cause of action within Title IX's statutory language.[201] Accordingly, absent clear congressional directive regarding a private right of action for damages under Title IX, the dissent commented on the inappropriateness of the majority grasping to deduce such a directive.[202] The dissent further admonished the majority for consequently creating an atmosphere in which school districts shall be forced to insulate themselves against the amorphous potential of Title IX liability; therein harming students by depriving them of otherwise available funds.[203]

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[199] *See id.*

> [T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.

Id.

[200] *See id.* The dissent heavily invoked language from *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), noting, like the majority, that under *Pennhurst*, "legislation enacted . . . pursuant to the spending power is much in the nature of a contract," thus Congressional conditional disbursement of federal funds depends upon "whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

[201] *See id.* The dissent further noted that Title IX's private cause of action exists only as an implication of the courts. *See id.* (citing Cannon v. University of Chicago, 441 U.S. 677 (1979)).

[202] *See id.* at 1677-1678 (Kennedy, J., dissenting). The dissent highlighted the Court's own difficulty in determining standards dictating when to imply a federal cause of action to an otherwise silent statute. *See id.* at 1677 (Kennedy, J., dissenting). The dissent likewise noted that the potential exposure to liability is a determinate factor of consideration for a recipient of federal funds. *See id.* at 1678 (Kennedy, J., dissenting).

[203] *See* Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661, 1678 (1999) (Kennedy, J., dissenting).

> The only certainty flowing from the majority's decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid

Reviewing Title IX's language, the dissent's textual analysis dismissed the majority's conclusion that a school may be held liable for peer sexual harassment,[204] particularly because Title IX proscribes discriminatory treatment by grant recipients, not third parties such as students attending the recipient's facility or program.[205] Justice Kennedy further discounted the majority's contention that liability may nonetheless be incurred when students are "subjected" to discrimination while under school care.[206] The Justice argued that a cursory reading of Title IX demands that liability for discrimination attaches only if the recipient authorizes, or is in accord with the practice.[207] It is not enough that the discrimination simply takes place within a context subject to the control of the given recipient.[208] Instead, the discrimination must actually be under the auspices of the school and/or its policies.[209]

Title IX peer sexual harassment suits, will adopt, whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them.

Id.

[204] *See id.*

[205] *See id.* The dissent quoted the majority which stated that "[t]he recipient itself must 'exclude [persons] from participation in, . . . deny [persons] the benefits of, or . . . subject [persons] to discrimination under' its 'programs or activities' in order to be liable under Title IX." *Id.* (quoting *Davis*, 119 S.Ct. at 1670).

[206] *See id.* at 1679 (Kennedy, J., dissenting). The dissent proffered that the majority mistakenly places emphasis on the word "subjected" as opposed to the phrase "subjected to discrimination under any education program or activity." *See id.* (citing 20 U.S.C. § 1681(a) (1994)).

[207] *See id.* (The dissent supported its interpretation of Title IX's language upon an extensive review of the words' inherent meanings, citing to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1981) (defining "under" as "required by: in accordance with: bound by"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1395 (1981) (defining "under" as "with the authorization of: attested by: by virtue of"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2059 (2d ed. 1987) (defining "under" as "authorized, warranted, or attested by" or "in accordance with")).

[208] *See id.* "Teacher sexual harassment of students is 'under' the school's program or activity in certain circumstances, but student harassment is not." *Id.* The dissent further referred to principles of agency in asserting that teachers, as agents of the school, may be construed as the school's agents and thus impugn liability to the school based on their own misconduct. *See id.* at 1680 (Kennedy, J., dissenting). The dissent stipulated, however, that the agency relationship between teacher and school employer is not in itself sufficient for Title IX liability to attach. *See id.*

[209] *See Davis*, 119 S. Ct. at 1679 (Kennedy, J., dissenting). The dissent elaborated that

Articulating that the majority failed to adequately set limitations on a recipient's liability for third party conduct,[210] Justice Kennedy suggested that the majority should have invoked agency principles as previously contemplated by the Court in *Gebser*.[211] The dissent additionally stated that the rationale behind the propagation of Title IX likewise touched upon agency principles,[212] but moreover, the dissent stressed that Title IX was never intended for application to student conduct.[213]

Drawing on the contended inapplicability of Title IX to student behavior, the dissent pointed to the particularly constrained parameters imposed upon school districts in their dealings with students as opposed to dealings with teacher personnel.[214] Justice Kennedy remarked that, unlike teachers employed by the school district, students are neither screened nor selected by their respective public school districts.[215] In fact, the dissent noted that school districts must provide free education to all students,[216] including, in some cases, students who

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the discrimination must be "authorized by, pursuant to, or in accordance with, school policy or actions." *Id.*

[210] *See id.* at 1680 (Kennedy, J., dissenting). "To state the majority's test is to understand that its is little more than an exercise in arbitrary line-drawing. The majority does not explain how we are to determine what degree of control is sufficient — or, more to the point, how the states were on clear notice that the Court would draw the line to encompass students." *Id.*

[211] *See id.* at 1680-81 (Kennedy, J., dissenting). Justice Kennedy remarked that the majority read *Gebser* too narrowly, despite the fact that "*Gebser* contemplated that Title IX liability would be less expansive than Title VII liability, not more so." *Id.* at 1681 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286-287 (1998)).

[212] *See id.* at 1681 (Kennedy, J., dissenting).

[213] *See id.* Drawing on the statute itself, the dissent remarked that the type of discriminatory conduct recognized at the time of Title IX's enactment was indicative to the acts inapplicability to student harassers - namely "discriminatory admission standards, denial of access to programs or resources, hiring." *Id.* (citing 20 U.S.C. § 1681(a)(2) (1994)). Justice Kennedy stated that "I am aware of no basis in law or fact, however, for attributing the acts of a student to a school and indeed, the majority does not argue that the school acts through its students." *Id.* at 1680 (1999) (Kennedy, J., dissenting).

[214] *See id.* at 1681 (Kennedy, J., dissenting).

[215] *See Davis*, 119 S. Ct. at 1681 (Kennedy, J., dissenting).

[216] *See id.* (citing to state constitutions stipulating a guarantee of gratuitous primary and secondary education).

are removed from the classroom for disciplinary reasons,[217] despite the fact that school districts are frequently restricted in enforcing discipline among students.[218] The dissent additionally perceived the practical problems of childhood immaturity[219] and public school student populations.[220] The dissent further noted the vast difference of control available to school authorities, based upon the level of education provided, which prohibits public schools from successfully insulating themselves against the Title IX liability imposed upon them by the majority's holding.[221]

Justice Kennedy then proceeded to discount the majority's contention that school districts were, and are, aware of their legal duty to prevent discrimination if not by Title IX, then certainly by the Court's decision in *Gebser*, the Department of Education's ("DOE") Title IX regulations, and by state tort law.[222] The Justice argued that *Gebser* only affirmed that Title IX prohibits discrimination by a recipient,[223] that the majority of DOE's regulations speak to the proscription of recipients affirmatively assisting third parties in perpetuating discrimination,[224] and finally, that state tort law, like Title IX itself, likewise lacks clear de-

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[217] *See id.* at 1681-1682 (Kennedy, J., dissenting) (citing Philip Leon M. v. Bd. of Educ., 484 S.E.2d 909 (W. Va. 1996) (holding that as a result of the state's constitutional guarantee of education, a school board must provide alternative educational programs to students who are either expelled or suspended for an extended time for bringing guns to school).

[218] *See id.* at 1682 (Kennedy, J., dissenting) (citing Goss v. Lopez, 419 U.S. 565, 579 (1975) (discussing due process rights of disciplined students)). The dissent also observed that school districts face statutory discipline enforcement constraints in situations in which students have behavior disorder disabilities. *See id.* (citing the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (1994)).

[219] *See id.*

[220] *See id.* "School districts cannot exercise the same measure of control over thousands of students that they do over a few hundred adult employees." *Id.*

[221] *See Davis*, 119 S. Ct. at 1682-1683 (Kennedy, J., dissenting). Although school districts may fulfill a tutelary and custodial role over elementary school children, the dissent expressed that the same cannot be said of university students, particularly when many universities enforce speech codes protecting the freedom of speech. *See id.*

[222] *See id.* at 1683-1685 (Kennedy, J., dissenting).

[223] *See id.* at 1683 (Kennedy, J., dissenting) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998)).

[224] *See id.* at 1683-1684 (Kennedy, J., dissenting) (citing 34 C.F.R. §§ 106.31(b)(6), 106.37(a)(2), 106.38 (a), 106. 51(a)(3), 106.31(d) (1988)) (concluding that the regulations are silent as to suggest a school's generalized duty to remedy third party discrimination).

lineation of forbidden conduct.[225] Consequently, the dissent declared that, aside from the majority's ineffective reliance on the previously discussed notice vehicles, the fact that the majority looked to alternatives of notice provision as opposed to concentrating on the language of Title IX significantly amplifies Title IX's inherent lack of a notice provision.[226]

Turning its analysis to another aspect of notice, the dissent indicated that clear notice requires not only notice of potential liability, but also notice of the specific kind of conduct which would trigger the attachment of liability.[227] Declaring that Title IX is silent on both counts,[228] the dissent criticized the majority for not addressing the peculiarities of childhood immaturities and thus not delineating a concrete guiding post as to what conduct is proscribed by Title IX.[229] Justice Kennedy refuted the majority's conclusion that fifth grade conduct rises to the level of sexual harassment and gender discrimination.[230] Pointing to the absence of any body of law which could assist courts in determining what type of student conduct is considered discrimination under Title IX, the dissent deemed futile the majority's attempts at applying either Title VII hostile environment analysis or Title IX teacher-to-student sexual harassment analysis to situations of student-to-student harassment.[231]

Moreover, the dissent was troubled by the majority's amorphous rationale that the analysis of student on student harassment should be case specific. Jus-

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[225] *See id.* at 1684-1685 (Kennedy, J., dissenting) (citing Holbrook v. Executive Conference Ctr., Inc., 464 S.E.2d 398, 401 (Ga. App. 1996) (holding that school districts may seek the protection of sovereign immunity for claims based on their supervision of students so long as the school did not exhibit malice, wilfulness, or corruption).

[226] *See id.* at 1683-1685 (Kennedy, J., dissenting). "The majority's presentation of its control test illustrates its own discomfort with the rule it has devised." *Id.* at 1683 (Kennedy, J., dissenting).

[227] *See Davis*, 119 S.Ct. at 1685 (Kennedy, J., dissenting).

[228] *See id.*

[229] *See id.* at 1685-1688 (Kennedy, J., dissenting).

[230] *See id.* at 1685-1686 (Kennedy, J., dissenting). The dissent noted that both the law and school agencies recognize that children, for the most part, lack the accountability for their actions, at lease as compared to adults; therefore, children should not be arbitrarily held to an adult standard. *See id.* at 1685 (citing 1 E. FARNSWORTH, FARNSWORTH ON CONTRACTS §4.4 (2d ed. 1998), Brief for National School Boards Association et al. as Amici Curiae 10-11).

[231] *See id.* at 1686 (Kennedy, J., dissenting) (commenting that the adult workplace is neither synonymous nor comparable to the class room environment).

tice Kennedy warned that by hedging the task of stipulating an explicit marker by which courts can measure conduct for discrimination, the majority has in effect clouded an already muddy pool.[232] The dissent further accused the majority of imposing upon states unexpected and unknown liability, whose scope is likewise unknown.[233] Although entrusted with invoking the full spirit and strength of the Constitution, the majority, according to the dissent, has only achieved a watering-down of the Spending Clause's clear notice provision.[234]

IX. CONCLUSION

In light of the alarming number of children who admit to experiencing sexual harassment in one form or another,[235] coupled with the troubling effects caused by peer sexual harassment,[236] it is not surprising that the Court expanded Title IX in *Davis* to encompass student-on-student hostile environment sexual harassment.

Although the dissent criticized the majority for not setting forth a specific delineation as to the type of conduct triggering Title IX liability,[237] the majority may have, in actuality, been keenly aware of the deficiencies within this arena, namely the fact that Title IX was not inherently intended for application to stu-

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[232] *See id.* at 1687-1691 (Kennedy, J., dissenting). Justice Kennedy further stated:

> The majority's inability to provide any workable definition of actionable peer harassment simply underscores the myriad ways in which an opinion that purports to be narrow is, in fact, so broad that it will support untold numbers of lawyers who will prove adept at presenting cases that will withstand the defendant school district's pretrial motions. Each of the barriers to run-away litigation the majority offers us crumbles under the weight of even casual scrutiny.

Davis at 1687 (Kennedy, J., dissenting).

[233] *See id.* at 1688 (Kennedy, J., dissenting). The dissent added that economic strain will be experienced in combating the on-slaught of future Title IX harassment suits. *See id.*

[234] *See id.* at 1692 (Kennedy, J., dissenting).

[235] *See supra* note 44, at 7 (reporting that four out of five students surveyed were victims of sexual harassment within the school environment).

[236] *See supra* note 44, at 15 (reporting that one in four students harassed admit to not wanting to attend school subsequent to the harassment).

[237] *See supra* text accompanying note 232.

dent conduct.[238] Consequently, by stipulating that student-to-student sexual harassment cases should be analyzed on a case by case basis,[239] as opposed to being measured against a detached standard, the majority could have been motivated by a desire to avoid constricting the evolution of student-to-student sexual harassment litigation as its relatively adolescent stage. To that effect, *Davis* has ensured that school districts, whether motivated by fear of incurring liability or by concern for students, will nonetheless take care to maintain a school environment conducive to educating students; therein accomplishing the purpose of Title IX.

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[238] *See supra* note 213.

[239] *See Davis*, 119 S.Ct. at 1675; *see also supra* notes 189-193.