STUDENT-ON-STUDENT SEXUAL HARASSMENT: PREVENTING A NATIONAL PROBLEM ON A LOCAL LEVEL

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INTRODUCTION

Student-on-student sexual harassment is a pervasive problem in primary and secondary schools throughout our nation. Although most schools have established policies proscribing peer harassment, legislators have enacted laws prohibiting sexual harassment,\(^1\) and the United States Supreme Court has ruled that schools may be liable for failing to appropriately respond to student-on-student sexual harassment, student-on-student sexual harassment still persists. The laws and policies created by these entities only require schools to take corrective action after each incident of sexual harassment has occurred. Student-on-student sexual harassment, however, cannot effectively be prevented by correcting the actions of one harasser at a time. On the contrary, is it essential that schools first establish a supportive school climate so that they can address, and prevent, peer sexual harassment before it occurs.\(^2\) This supportive climate cannot be created by a school's policies and procedures alone, rather “good preventive work,” such as training programs aimed at educating students about sexual harassment, is necessary “to help ensure that schools provide a safe and welcome environment for all students.”\(^3\)

In January 1999, the United States Department of Education Office of Civil Rights (OCR) and the National Association of Attorneys General (NAAG) issued Protecting Students from Harassment and Hate Crime: A Guide for Schools (Guide)\(^4\) to aid schools and school

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\(^1\) See infra notes 13, 21, 35 (discussing federal legislation proscribing sexual harassment).


\(^3\) Id.

\(^4\) Id.
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districts in confronting and resolving problems of sexual harassment of students. The Guide supplements the Revised Sexual Harassment Guidance (Revised Guidance) issued by the Office of Civil Rights, the department in charge of enforcing Title IX of the Education Amendments of 1972. Like the Guide, the OCR's Revised Guidance provides information intended to enable schools to take appropriate action to prevent the occurrence of sexual harassment. The OCR Revised Guidance, contrary to the Guide, serves as the legal authority with which federally funded educational institutions should comply when investigating and resolving claims involving sexual harassment of students.

Although both the Revised Guidance and the Guide suggest preventive measures, under the Revised Guidance schools are only required to take corrective measures to protect students from harassment. Because preventive measures are not required, Title IX's goal of effectively protecting students against discriminatory practices has not been achieved. The National School Boards Association (NSBA) has indicated that schools need "good preventive work," rather than just corrective measures, to secure a safe and non-discriminatory environment for students. The OCR and the Supreme Court, however, have only addressed mandatory corrective measures used to fulfill the other goal of Title IX: "avoid[ing] the use of federal resources to support discriminatory practices."

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7 Id. at 66,099.
8 Id. at 66,092.
9 See generally HARASSMENT & HATE CRIME GUIDE, supra note 2 (providing suggestions for effective ways to implement corrective and preventive programs); Revised Guidance, supra note 6 (indicating that written grievance procedures, non-discriminatory policies, and appropriate corrective action are required but making no mention of required preventive action before the harassment occurs).
10 Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979) (noting that, through Title IX, Congress aimed to "provide individual citizens effective protection against [discriminatory] practices" by federally funded institutions).
11 See supra note 2 and accompanying text.
12 Cannon, 441 U.S. at 704.
The issue of whether schools should protect students from peer sexual harassment has become well-publicized in this country. The publicity peaked in May 1999, when the United States Supreme Court, in a five-to-four decision, ruled that federally funded schools may be held liable in a private damages action under Title IX. For a school to be held liable, the Court announced, the school must be deliberately indifferent to known acts of student-on-student sexual harassment, where the harassment is severe, pervasive, and objectively offensive. The standard created by the Court may have appeared to be a logical extension of the prior case law in this area, but the question remains whether it is really the most effective response in achieving Congress’ goal of preventing sexual harassment in schools.

This Comment suggests that neither the Court’s approach nor the OCR’s Revised Guidance achieve the goal of remediating the problem of student-on-student sexual harassment. Although both are important steps in enforcing Title IX, the legal standards only apply to situations in which the harassment has already occurred. Because statistics and reports show that sexual harassment is a prevalent problem in schools, this Comment suggests that federally funded educational institutions should be required to implement mandatory preventive programs in primary and secondary schools to effectively protect students from peer sexual harassment before it occurs. Part I of this Comment will provide a thorough overview of the legislative history of Title IX and the prior case law leading up to the Supreme Court’s decision in Davis v. Monroe County Board of Education. Part II

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13 See, e.g., 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, 266, 287 (1997) (reporting that student-on-student sexual harassment is prevalent in our schools and noting that participants in a survey of two schools agreed that schools must take action to prevent it); Cynthia Gorney, Teaching Johnny the Appropriate Way to Flirt, N.Y. TIMES MAG., June 13, 1999, at 43 (reporting about a sexual harassment school program run by sexual harassment specialist Judy Gillen and commenting on the effects of Supreme Court decisions in this area); John Leo, See Jane Sue Dick, U.S. NEWS & WORLD REP., June 7, 1999, at 16 (discussing positive and negative consequences of the Supreme Court’s decision in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), that school districts may be held liable for their deliberate indifference to known acts of student-on-student harassment); Tell Us What You Think: Were you ever sexually harassed as a grade or high school student?, GLAMOUR, Oct. 1999, at 198 (surveying readers about whether they have been sexually harassed, at what point do they think children’s actions become sexual harassment, and whether they believe a school should be responsible for preventing peer sexual harassment).

14 Davis, 526 U.S. at 632.

15 Id.

16 See infra note 201.

will address the facts in Davis and the majority and dissenting opinions. Part III of this Comment will address alternative methods of preventing peer sexual harassment in primary and secondary schools by examining the OCR's Revised Guidance and the OCR's Guide, and will discuss the realistic effect of sexual harassment prevention programs. Finally, Part IV will discuss whether Davis precludes proposed federal legislation to implement sexual harassment prevention programs in federally funded schools.

I. JUDICIAL DECISIONS INVOLVING DISCRIMINATION BEGIN TO EVOLVE

With the emergence of civil rights actions in the latter half of the twentieth century, courts began interpreting rights and establishing remedies more favorably to litigants who where denied certain benefits and opportunities due to discrimination. In the 1954 landmark case of Brown v. Board of Education, the Supreme Court of the United States emphasized the harmful effects of discrimination in education. The Court not only recognized the educational detriment a child suffers when treated unequally based on an immutable characteristic, but also the psychological harm a child endures when confronted with discrimination. In the years following the Brown decision, Congress enacted several laws expanding the notion of civil rights to include sex discrimination in the workplace and in schools.

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19 Id. In Brown, the United States Supreme Court held that states cannot deny black children admission to public schools attended by white children based on their race. See id. at 487-88, 495. Chief Justice Warren, writing for the majority, stated that education is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. Id. at 493.
20 Id. at 494. The Court acknowledged that separating African-American children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Id.
21 BARBARA ALLEN BACCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 170 (Little, Brown, & Company, 2d ed. 1996) (noting that Congress demonstrated sensitivity to sex-based discrimination by considering legislation such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2 (1994), which prohibited employers from discriminating against persons on the basis of “race, color, religion, sex, or national origin;” the Equal Pay Act of 1963, which prohibited employers under the Act from discriminating “between employees on the basis of sex;” and § 1 of the Equal Rights Amendment, which declared that “equality
In response to concerns about sex discrimination in education, Congress enacted Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally funded education programs and activities. In Cannon v. University of Chicago, the United States Supreme Court addressed the issue of whether an individual has a right to sue a federally funded school for sex discrimination under Title IX. Cannon, who was allegedly denied admission to medical schools at two private universities that were receiving federal funding at the time of her exclusion, sued the schools under Title IX for discriminating against her because she was a female. The Supreme Court concluded that Cannon had an implied right under Title IX to pursue a private cause of action against the universities.

In Pennhurst State School and Hospital v. Halderman, the Supreme Court recognized the implied private right of action under Title IX established in Cannon. However, the court clarified that a federally of rights under the law shall not be denied or abridged by the United States or by any State on account of sex”.

23 See Guidance, supra note 6, at 12,034. Congress created Title IX of the Education Amendments of 1972 for two primary purposes: “to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.” Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979). Title IX provides in pertinent 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). Title IX, thus, operates by “conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 286 (1998) (citing Guardians Ass’n. v. Civil Serv. Comm’n of New York City, 463 U.S. 582, 599 (1983)). The federal agencies that issue the education funding are permitted to enforce the terms of that contract through “any . . . means authorized by law,’ including ultimately the termination of federal funding.” 20 U.S.C. § 1682 (1994).
25 See id. at 680.
26 Id.
27 Id. at 717. The Court provided several reasons for its holding. First, the Court stated that “Title IX explicitly confers a benefit on persons discriminated against on the basis of sex . . . .” Id. at 694. Second, the Court stated that “Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of prohibited discrimination.” Id. at 703. Third, the Court opined that the private remedy is helpful in effectuating the statute’s purpose. Id. at 707-08. Lastly, the Court maintained that the use of federal funds to discriminate under Title IX justifies a federal remedy. Id. at 708-09.
funded institution cannot be subject to a private damages action unless it has adequate notice that it may be liable for damages for the conduct under inquiry pursuant to the Spending Clause. In *Pennhurst*, a resident of the state-owned and operated Pennhurst State School and Hospital, a facility for the care and treatment of the mentally retarded, sued the hospital and some of its officials for violating the terms of the Developmentally Disabled Assistance and Bill of Rights Act (DDABRA). Halderman alleged that the hospital conditions were unsanitary, inhumane, and dangerous, and thus denied the residents their rights under the DDABRA. The Court found that the DDABRA's language did not suggest that Congress intended the provisions to be a condition to receipt of federal funds. Therefore, the Court ruled that the hospital and its officials could not be held liable, because Congress did not adequately notify them that they may be liable for damages for failing to provide the "appropriate treatment" in the "least restrictive environment" to their residents.

The law against sex discrimination was greatly expanded in *Meritor Savings Bank, FSB v. Vinson* when the Supreme Court established that discrimination based on sex under Title VII of the Civil Rights Act of 1964 includes claims of sexual harassment.

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29 *Id.* at 17. The Court pointed out that Congress has the power under the Spending Clause to determine the conditions upon which it shall contribute federal funds to the states. *Id.* The Court further explained that: Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.


31 See *id.* at 6. Halderman claimed that the hospital and its officials violated 42 U.S.C. §§ 6010(1) and (2) of the Act, which stated that mentally retarded individuals "have a right to appropriate treatment, services, and habilitation" in "the setting that is least restrictive of . . . personal liberty." *Id.* at 8 (quoting 42 U.S.C. §§ 6010(1) and (2) (1976)).

32 *Id.* at 18.

33 *Id.*

34 477 U.S. 57 (1986).

35 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII of the Civil Rights Act of 1964 deems it unlawful "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because
Vinson claimed that her former employer, Meritor Savings Bank, violated Title VII by subjecting her to sexual harassment by her supervisor during her four years of employment at the bank. The Court adopted the Equal Employment Opportunity Commission (EEOC) Guidelines, which define “sexual harassment” as a type of sex discrimination in violation of Title VII. In addition, the Court noted that for there to be a cause of action for “hostile environment” sex discrimination under Title VII, the harasser’s behavior must not only be “unwelcome,” but must also be so severe or pervasive that it changes the conditions of the victim’s employment and produces an abusive working environment.

The Supreme Court, in Franklin v. Gwinnett County Public Schools, applied the reasoning in Cannon, Pennhurst, and Meritor to find that a private cause of action for money damages is also available for claims of sexual harassment in schools. According to

of such individual’s race, color, religion, sex, or national origin . . . .” Id.

Vinson, 477 U.S. at 66-67 (noting that sexual harassment creates a hostile work environment and gender inequality for the victim and for members of her sex).

Id. at 59-60.

Id. at 65. The Guidelines describe prohibited sexual harassment as sexual misconduct which “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” Id. (quoting 29 C.F.R. § 1604.11(a)(1) (1985)).

There are two different types of conduct that constitute student-on-student sexual harassment. The first, quid pro quo harassment, occurs when a student’s participation in an educational activity or an educational decision is conditioned upon that student’s submission to a school employee’s “unwelcome sexual advances or request of sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.” Guidance, supra note 6, at 12,038. The second, hostile environment sexual harassment, occurs when a school employee’s, student’s, or third party’s sexually harassing conduct is “severe, persistent, or pervasive as 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.

Vinson, 447 U.S. at 68. The Court emphasized that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” Id. (citing 29 C.F.R. § 1604.11(a) (1985)). Additionally, the Court clarified that the proper inquiry in a sexual harassment case “is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome . . . .” Id.

Id. at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).


See supra notes 25-27 and accompanying text.

See supra notes 28-33 and accompanying text.

See supra notes 34-41 and accompanying text.

Julie Carroll Fay, Gebser v. Lago Vista Independent School District: Is it Really the Final Word on School Liability for Teacher-to-Student Sexual Harassment?, 31 CONN. L. REV. 1485, 1496 n.82 (stating “it was not until 1992, in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), that Title IX became a more utilized vehicle for sexual harassment claims within educational institutions”). Fay points out that
the Court in Franklin, a federally funded educational institution could be held liable for monetary damages under Title IX if a teacher sexually harasses a student.\footnote{Franklin, 503 U.S. at 76.} In Franklin, Christine Franklin, a high school student, sued the Gwinnett County School District for hostile environment sexual harassment after the school intentionally failed to take action upon learning that the teacher and coach, Andrew Hill, had been continuously sexually harassing Franklin.\footnote{Id. at 63-64.} Based on the decisions in Cannon, Pennhurst, and Meritor Savings Bank,\footnote{Id. at 76.} the Court determined that damages are available, under the Spending Clause statutes where the defendant had notice of the harasser’s intentional discrimination against the student.\footnote{52 Id. at 63-64.} The Court therefore held that a federally funded school district could be held liable for money damages under Title IX when a teacher sexually harasses a student.\footnote{53 Id. at 64.}

The holding in Franklin was narrowed by the Supreme Court’s ruling in Gebser v. Lago Vista Independent School District,\footnote{54 See supra notes 23-27 and accompanying text.} which required the plaintiff to show that a school official\footnote{55 See supra notes 28-33 and accompanying text.} had actual notice of, and demonstrated deliberate indifference to, the sexual harassment of a student by a teacher.\footnote{56 See supra notes 34-41 and accompanying text.} In Gebser, Gebser’s teacher sexually harassed her continuously for almost two years. Despite the occurrence of teacher-on-student sexual harassment, the Court found that the school did not violate Title IX because it had no actual

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\item Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1997), was the first case in which a court deemed sexual harassment as actionable sex discrimination under Title IX. \textit{Id.} at 1497.
\item \textit{Franklin}, 503 U.S. at 76.
\item \textit{Id.} at 63-64. Franklin alleged that the sexual harassment included Hill initiating sexually oriented conversations with her, kissing her on her mouth on school property, calling her at home to ask her to meet socially, and taking her out of her class several times to a private office where he would have "coercive intercourse" with her. \textit{Id.} at 63. Franklin’s complaint also averred that even though teachers and administrators at her school knew that Hill sexually harassed Franklin and other female students, they took no corrective action and advised Franklin not to press charges against Hill. \textit{Id.} at 64.
\item See supra notes 23-27 and accompanying text.
\item See supra notes 28-33 and accompanying text.
\item See supra notes 34-41 and accompanying text.
\item \textit{Franklin}, 503 U.S. at 65-76 (formulating its holdings based on the decisions in Cannon, 441 U.S. at 677, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 1 (1981) and Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 57 (1986)).
\item Id. at 76.
\item 524 U.S. 274 (1998).
\item The Court specified that the official of the school district must be one "who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [district's] behalf . . . ." \textit{Id.} at 290.
\item Id.
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notice of, and thus was not deliberately indifferent to, the sexual harassment.\textsuperscript{57}

While the Supreme Court was deciding whether educational institutions could be held liable for teacher-on-student sexual harassment, several circuit courts were divided over the issue of whether schools could be held liable for student-on-student sexual harassment.\textsuperscript{58} In \textit{Rowinsky v. Bryan Independent School District},\textsuperscript{59} the Fifth Circuit concluded that federally funded educational institutions could be held liable in a private damages suit for violating Title IX only where the funding recipient responded to student-on-student sexual harassment claims differently based on the victim's gender.\textsuperscript{60} The Seventh Circuit, however, in \textit{Doe v. University of Illinois},\textsuperscript{61} determined that a funding recipient's "failure to promptly take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex."\textsuperscript{62} The Seventh Circuit, therefore, held that there was a Title IX violation where the funding recipient inadequately responded to known peer sexual harassment.\textsuperscript{63} The Ninth Circuit, in \textit{Oona, R.S. v. McCaffrey}, limited its holding by simply concluding that schools have a clearly established duty under Title IX to respond to student-on-student harassment.\textsuperscript{64} Thus, prior to \textit{Davis}, there was no clear law indicating whether federally funded educational institutions could be held

\textsuperscript{57} \textit{Id.} at 291-93. The Court explained that the only information about the teacher's misconduct known to school officials consisted of complaints by students and parents about the teacher's inappropriate comments during class. \textit{Id.} at 291. Once a school official had "actual notice" of the sexual harassment between Gebser and her teacher, the school terminated the teacher's employment. \textit{Id.} Based on these facts, the Court found that there was no Title IX violation. \textit{Id.} at 291-93.

\textsuperscript{58} See infra notes 56-64 and accompanying text.

\textsuperscript{59} 80 F.3d 1006, 1008 (5th Cir. 1996), \textit{cert. denied}, 519 U.S. 861 (1996).

\textsuperscript{60} \textit{Id.} In \textit{Rowinsky}, the plaintiff alleged that the school officials failed to take appropriate action to remedy the ongoing sexual harassment of her daughters by other students, however, the court dismissed the plaintiff's claim on summary judgment for failure to provide evidence to support a cause of action under Title IX. \textit{Id.} at 1009-11.

\textsuperscript{61} 138 F.3d 653, 668 (7th Cir. 1998), \textit{vacated by and remanded by}, 526 U.S. 1142 (1999), \textit{reinstated in part by, reaffirmed in part by, remanded by}, 200 F.3d 499 (7th Cir. 1999).

\textsuperscript{62} \textit{Id.} at 661.

\textsuperscript{63} \textit{Id.} at 668.

\textsuperscript{64} 143 F.3d 473, 478 (9th Cir. 1998), \textit{cert. denied}, 526 U.S. 1154 (1999). The Ninth Circuit asserted that "[p]arents have long had a right to expect school officials to do what they reasonably can to protect the children who are temporarily in their custody and to provide an appropriate learning atmosphere." \textit{Id.} at 477.
liable for damages for student-on-student sexual harassment or stating what steps, if any, schools should take to prevent the problem of student-on-student sexual harassment.\textsuperscript{65}

II. THE SUPREME COURT ESTABLISHES LIABILITY OF A SCHOOL FOR FAILURE TO CORRECT STUDENT-ON-STUDENT SEXUAL HARASSMENT

On May 24, 1999, in \textit{Davis v. Monroe County Board of Education}, the Supreme Court held by a vote of five-to-four, that federally funded schools may be liable for monetary damages under Title IX. The Court, however, limited liability to those situations where the schools are deliberately indifferent to known acts of student-on-student sexual harassment that is so severe, pervasive, and objectively offensive that it denies the victims access to educational opportunities or benefits provided by the schools.\textsuperscript{66} Justice O'Connor, writing for the majority, stated that the Court aimed to clarify the confusion among the circuits\textsuperscript{67} as to whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action under Title IX for discrimination arising from student-on-student sexual harassment.\textsuperscript{68}

LaShonda Davis, a fifth-grade student at Hubbard Elementary School, a public school in Monroe County, Georgia, was sexually harassed several times over a five-month period by her classmate, G.F.\textsuperscript{69} The sexual harassment started in December 1992 when G.F. attempted to fondle LaShonda's breasts and genital area and made offensive remarks.\textsuperscript{70} G.F. repeated this behavior twice in January 1993.\textsuperscript{71} LaShonda reported all three occurrences to her mother, Aurelia Davis and her teacher, Diane Fort.\textsuperscript{72} Aurelia also spoke with Fort, who assured Aurelia that the school principal, Bill Querry, had been advised of the incidents.\textsuperscript{73} Despite notification of the ongoing

\textsuperscript{65} Because the law was unclear about this matter, the Fourth Circuit instructed the District Court to hold a Title IX hostile environment sexual harassment claim in abeyance pending the \textit{Davis} decision regarding whether schools could be held liable for student-on-student sexual harassment. Brzonkala v. Va. Polytechnic Inst. and State Univ., 132 F.3d 949, 960-61 (4th Cir. 1997).

\textsuperscript{66} \textit{Davis}, 526 U.S. at 633.

\textsuperscript{67} See supra notes 55-64 and accompanying text.

\textsuperscript{68} \textit{Davis}, 526 U.S. at 637-38.

\textsuperscript{69} Id. at 633.

\textsuperscript{70} Id. G.F. made such remarks as "I want to get in bed with you" and "I want to feel your boobs." \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.} at 633-34.

\textsuperscript{73} \textit{Id.} at 634.
sexual harassment, the school refrained from taking disciplinary action against G.F.\textsuperscript{74}

The harassment by G.F. continued for three more months.\textsuperscript{75} During February, in physical education class, G.F. put a doorstop in his pants and acted in a sexually crude manner toward LaShonda.\textsuperscript{76} The next week, G.F. sexually harassed LaShonda again.\textsuperscript{77} Both times, LaShonda informed her supervising teachers about the incidents.\textsuperscript{78} In addition, Aurelia expressed her concern to the teachers for her daughter’s well-being.\textsuperscript{79} In early March 1993, G.F. once again acted in a sexually suggestive manner toward LaShonda during physical education class.\textsuperscript{80} As before, LaShonda reported the harassment to her teachers.\textsuperscript{81} In the following April, after G.F. rubbed his body against LaShonda in the school hallway in an offensive way, LaShonda informed Fort of the incident.\textsuperscript{82}

Despite receiving several complaints from LaShonda and Aurelia about G.F.’s actions, the school did not take disciplinary action against G.F. for his sexually harassing behavior.\textsuperscript{83} Furthermore, during the time LaShonda was sexually harassed by G.F., the Monroe County Board of Education had not established a policy or set of procedures that explained to its employees the proper way to respond to student-on-student sexual harassment.\textsuperscript{84}

The prolonged sexual harassment of LaShonda ended in May 1993 when charges of sexual battery were brought against G.F. and he pleaded guilty.\textsuperscript{85} Aurelia alleged that as a result of the sexual harassment, not only did LaShonda’s grades decline, but she also

\textsuperscript{74} Davis, 526 U.S. at 634.
\textsuperscript{75} Id. at 634-35.
\textsuperscript{76} Id. at 634.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Davis, 526 U.S. at 634.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 635. When asked by Aurelia what action would be taken against G.F. for his misbehavior, Query responded, “I guess I’ll have to threaten him a little bit harder.” Id. Query, furthermore, questioned why LaShonda was the only student complaining about G.F. Id. In fact, she was not the only complainant; on one occasion a group of female students, including LaShonda, requested to speak with Query about the persistent sexual harassment by G.F., but a teacher denied their request. Id. LaShonda’s request to have her seat moved so that she no longer sat next to G.F. was not granted until after three months of continuous reported harassment. Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 634.
contemplated suicide. Although it was clear that G.F. should be criminally charged for sexual battery, it was unclear as to whether the school should be held liable for monetary damages for the consequences of the harassment.

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86 The complaint alleged that in April 1993 LaShonda’s father found a suicide note written by LaShonda. Davis, 526 U.S. at 634.

87 G.F., in fact, pleaded guilty to charges of sexual battery. Id. at 634.

88 In addition to the criminal charges against G.F., Aurelia Davis filed suit on May 2, 1994, in the United States District Court for the Middle District of Georgia against the Monroe County Board of Education, Charles Dumas, the school district’s superintendent, and Principal Query for violation of Title IX. Davis, 526 U.S. at 635-36. The complaint alleged that the Board, as a federally funded educational institution, violated Title IX when it failed to prevent the continuous sexual harassment by G.F. toward LaShonda, and thereby, created an “intimidating, hostile, offensive and abusive school environment” which hindered LaShonda’s ability to properly participate in school activities. Id. at 636. Davis demanded compensatory damages, punitive damages, attorney’s fees, and injunctive relief. Id. The district court granted defendants’ motion to dismiss Davis’s complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Davis v. Monroe County Bd. of Educ., 862 F. Supp. 363, 365, 368 (M.D. Ga. 1994). The court dismissed the Title IX claims against Charles Dumas and Principal Query because only federally funded educational institutions may be liable in private causes of action under Title IX. Id. at 367. The court, moreover, concluded that the Board could not be subject to liability under Title IX if Davis did not allege in the complaint that the Board or an employee of the Board played a role in the harassment. Id.

Davis appealed the District Court’s decision to the Court of Appeals for the Eleventh Circuit. Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996). A panel of the Court of Appeals for the Eleventh Circuit reversed. Id. at 1195. The majority paralleled the language of Title VII, which provides an employee with a claim for damages for “a sexually hostile working environment created by a co-worker and tolerated by an employer,” with Title IX to provide a claim for damages against the Board where the supervisors knowingly failed to act or prevent the sexually hostile educational environment created by a fellow student or students. Davis, 526 U.S. at 636. The Eleventh Circuit upheld Davis’s claim of hostile environment based upon the school administrators’ deliberate indifference to the offensive acts to which the student over whom they exercised control were subjected. Davis, 74 F.3d at 1195.

The Eleventh Circuit granted the Board’s motion for rehearing en banc. Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996). The court later reversed and affirmed the district court’s decision to dismiss petitioner’s Title IX claim against the Board. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc). The majority of the Eleventh Circuit reasoned that Title IX provides federally funded educational institutions with notice that they must prohibit their employees from engaging in discriminatory conduct, but it does not provide sufficient notice of a duty to prevent student-on-student harassment. Id. at 1401. Four judges dissented, asserting that the statute’s omission of the identity of the harasser provides notice to the federally funded school board that they may be liable for failure to prevent harassment against students by any third party. Id. at 1412, 1414.

The United States Supreme Court granted certiorari to clarify “whether, and under what circumstances,” a federally funded educational institution may be held
The *Davis* majority determined that a private damages action against a school board in cases of student-on-student harassment may exist only where the federally funded recipient exhibits deliberate indifference to known acts of harassment in its programs or activities.\(^8\) Furthermore, the Court emphasized that the harassment must be so severe, pervasive, and objectively offensive that it clearly denies the harassed students an opportunity or benefit under the school’s federally funded program.\(^9\)

First, the Court stated that Title IX declares that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”\(^10\) The Court then explained that federal departments and agencies providing financial educational assistance are authorized by Congress to promulgate rules, regulations, and orders to enforce Title IX by any lawful means, including termination of funding.\(^11\) Because Congress enacted Title IX pursuant to its authority under the Spending Clause, the Court stated that a private damages action is only appropriate where Congress provided the federally funded recipient with adequate notice of potential liability for the conduct at issue.\(^12\)

The Court next emphasized that a federally funded educational institution itself must violate the conditions of Title IX.\(^13\) Aurelia Davis, the Court pointed out, sought to hold the Monroe County school board liable for its own misconduct—it’s failure to address the

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\(^8\) *Davis*, 526 U.S. at 633, 648.

\(^9\) *Id.* at 633.

\(^10\) *Id.* at 638 (quoting 20 U.S.C. § 1681(a) (1994)).

\(^11\) *Id.* at 638-39 (citing 20 U.S.C. § 1682 (1994)).

\(^12\) *Id.* at 640. The Court clarified that “adequate notice” requires that Congress be clear in defining conditions imposed on federally funded recipients. *Id.* (citations omitted).

\(^13\) *Id.* at 640-41 (noting that the conditions under Title IX to which the funding recipients may be liable include excluding students from participation in the recipient’s programs or activities or subjecting students to discrimination under its programs or activities).
known student-on-student sexual harassment—and not G.F.’s actions. The Court explained that a federally funded educational institution may be liable for private monetary damages under Title IX where the recipient is “deliberately indifferent” to known acts of teacher-student sexual harassment and where the recipient first has notice of liability for such conduct. In addition, the Court recognized that the deliberate indifference by the recipient must be intentional and must have “effectively ‘caused’ the discrimination.”

Next, the Court addressed the issue of whether the “deliberate indifference” standard supports a private damages action under Title IX where a student, rather than a teacher, sexually harasses another student. Because recipients of federal funds have received notice from a variety of sources, the Court concluded that they may be directly liable under Title IX for failing to protect students from discriminatory acts of third parties, over whom the funding recipient has control and the authority to take corrective action.

The Court, furthermore, analyzed the issue of a school’s authority over its students. The Court determined that the

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95 Davis, 526 U.S. at 641.
96 Id. at 641-42 (citing Gebser, 524 U.S. at 290, 292-93); see also supra notes 54-57 and accompanying text.
97 Id. at 642-43 (citing Gebser, 524 U.S. at 290). The Court explained that the “intentional deliberate indifference” theory imposed by the Gebser Court aimed “to eliminate any ‘risk that the recipient would be liable in damages not for its own official decision but instead for its employees’ independent actions’.” Id. at 643 (citing Gebser, 524 U.S. at 290-91).
98 Id. at 643.
99 The Court specifically referred to four sources that provide schools with notice of liability for their deliberate indifference to discriminatory acts by third parties. Id. First, the Court stated that the regulatory scheme encompassing Title IX gives federally funded educational institutions notice that they may be liable for failing to address discriminatory acts of particular non-agents. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 643 (1999). Second, the Court noted that the Department of Education requirements indicate that recipients are responsible for monitoring third parties for discrimination in specific situations and for avoiding interaction with outside agencies known to discriminate. Id. at 643-44 (citing 34 C.F.R. §§ 106.31(b)(6), 106.31(d), 106.37(a)(2), 106.38(a), 106.51(a)(3) (1998)). Third, the Court referred to the common law, which held educational institutions liable under state law for failing to safeguard students from the tortious conduct of third parties. Id. at 644 (citing RESTATEMENT (SECOND) OF TORTS § 320, and Comment a (1965)). Finally, the Court recognized that the state courts have consistently upheld “claims alleging that schools have been negligent in failing to protect their students from the torts of their peers.” Id. at 644 (citing 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)).
100 Davis, 526 U.S. at 645.
101 Id. at 646-49.
language of Title IX\textsuperscript{102} indicates that the scope of the recipient’s liability is based upon the “substantial control” the recipient not only exercises over the harasser but also over the environment in which the harassment occurs.\textsuperscript{103} The Court examined the present case to determine whether the school exercised control over the harasser and the environment.\textsuperscript{104} The Court found that G.F.’s harassment of LaShonda primarily occurred in the classroom during school hours, and thus, “‘under’ an ‘operation’ of the funding recipient.”\textsuperscript{105} Based upon these facts, the Court determined that the Monroe County Board of Education exercised substantial control over both the harasser and the environment in which the harassment took place.\textsuperscript{106} In addition, the Court referred to Supreme Court cases and common law, which both acknowledged the duty and the authority of a school to control the inappropriate behavior of its students.\textsuperscript{107} Thus, the Court declared that “recipients of federal funding may be liable for ‘subjecting’ their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual

\textsuperscript{102} The Court read the language of Title IX to mean that where a funding recipient does not directly harass the student, it might still be liable for damages if “its deliberate indifference ‘subjects’ its students to harassment.” \textit{Id.} at 644. The Court further elucidates that “the deliberate indifference must . . . ‘cause students to undergo’ harassment or ‘make them liable or vulnerable’ to it.” \textit{Id.} at 645.

\textsuperscript{103} \textit{Id.} at 644-46. The Court added that if the recipient has substantial control over the harassment and over the environment in which the harassment occurs, “[o]nly then can the recipient be said to ‘expose’ its students to harassment or ‘cause’ them to undergo it ‘under’ the recipient’s programs.” \textit{Id.} at 645.

\textsuperscript{104} \textit{Davis}, 526 U.S. at 645.

\textsuperscript{105} \textit{Id.} at 646 (citing Doe v. Univ. of Ill., 138 F.3d 653, 661 (7th Cir. 1998) (holding the school liable for its failure “to respond properly to ‘student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees’”)).

\textsuperscript{106} \textit{Id.} at 646.

\textsuperscript{107} \textit{Davis}, 526 U.S. at 646-47 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (observing “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”); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (indicating that school officials retain “comprehensive authority . . . consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools”); New Jersey v. T.L.O., 469 U.S. 325, 342 n.9 (1985) (asserting that “[t]he maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities”); Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996) (remarking that “[t]he ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace”); RESTATEMENT (SECOND) OF TORTS § 152 (1965) (reflecting the common law principle that ‘the school has the authority to discipline its students’ conduct).
harassment and the harasser is under the school's disciplinary authority."\textsuperscript{108}

The Court bolstered this conclusion by observing that, at the time the harassment occurred in the present case, both the school attorneys and administrators were made aware of potential Title IX liability in a report authored by the National School Boards Association Council of School Attorneys.\textsuperscript{109} Additionally, the Court noted that the OCR had recently\textsuperscript{110} promulgated policy guidelines proscribing student-on-student harassment under Title IX.\textsuperscript{111}

Next, the Court determined that a funding recipient will be "deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."\textsuperscript{112} The Court assured that its decision would not limit school administrators' flexibility in making disciplinary decisions by insisting that Title IX does not require funding recipients to "remedy" student-on-student harassment or to guarantee that students' conduct conforms to acceptable norms.\textsuperscript{113} In addition, the Court advised courts to avoid "second guessing" school officials' disciplinary decisions.\textsuperscript{114} The Court, moreover, assured that this deliberate indifference rule is flexible in both providing schools with the necessary disciplinary authority and creating potential liability where funding recipients' actions violate Title IX.\textsuperscript{115} The Court then

\textsuperscript{108} Davis, 526 U.S. at 646-47.
\textsuperscript{109} Id. at 647 (citing NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, SEXUAL HARASSMENT IN THE SCHOOLS: PREVENTING AND DEFENDING AGAINST CLAIMS v. 45 (rev. ed. 1993) (notifying school attorneys and administrators that school districts could be liable under Title IX for neglecting to respond to severe and repeated acts of known sexual harassment by peer students)).
\textsuperscript{110} The Court admitted that this new policy was established too late to provide the Board with notice of proscribed misconduct, but stated that its finding that school boards had notice of their duty to respond to peer sexual harassment is bolstered by the fact that school attorneys have similarly interpreted Title IX. Id.
\textsuperscript{111} Id. at 647-48. (citing Guidance, supra note 6 at 12,039-40; Department of Education, Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (1994)).
\textsuperscript{112} Id. at 648.
\textsuperscript{113} Id. at 648-49. The dissent interpreted the majority's standard to mean that Title IX requires federally funded educational institutions "to remedy peer sexual harassment" and to "ensur[e] that thousands of immature students conform their conduct to acceptable norms." Id. at 662, 666 (Kennedy, J., dissenting).
\textsuperscript{114} Davis, 526 U.S. at 648 (citing New Jersey v. T.L.O., 469 U.S. 325, 342-43 n.9 (1985)).
\textsuperscript{115} Id. at 649. The Court provided an example illustrating the flexibility of the standard by contrasting the control a university exercises over its students with the supervisory authority a grammar school exercises over its pupils. Id.
hinted that Davis might be able to demonstrate deliberate indifference by proving that the school board’s failure to respond to the peer sexual harassment “subjected” LaShonda to discrimination.\textsuperscript{116}

The Court then addressed “sexual harassment” as a recognized form of discrimination under Title IX.\textsuperscript{117} The Court determined that student-on-student sexual harassment may result in discrimination under Title IX when the school’s deliberate indifference to the harassment hinders the harassed student’s access to the educational opportunities or benefits provided by the federally funded recipient.\textsuperscript{118} The Court recognized, however, that because children are still in the process of learning appropriate behavior among their peers, schools are not liable in damages for “simple acts of teasing and name-calling” unless those acts are so severe, pervasive, and objectively offensive as to violate Title IX.\textsuperscript{119}

After examining the facts and applying the above standard, the Court ruled that Aurelia Davis was entitled to show evidence demonstrating that the Monroe County Board of Education violated Title IX by acting in a deliberately indifferent manner towards the sexual harassment of her daughter by another student, and thereby denying her daughter equal access to educational opportunities and benefits.\textsuperscript{120} The Court, therefore, reversed the circuit court’s holding and remanded the case to the district court.\textsuperscript{121}

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 649-53.
\textsuperscript{118} Id. at 650.
\textsuperscript{119} Id. at 651-52.
\textsuperscript{120} Davis, 526 U.S. at 653-54.
\textsuperscript{121} Id. at 654. Many courts have since applied the Supreme Court’s reasoning in Davis to address issues involving harassment in education. See, e.g., Vance v. Spencer County Pub. Sch. Dist., 231 F. 3d 253, 258-62 (6th Cir. 2000) (finding that, similar to the facts in Davis, the Spencer County School Board acted deliberately indifferent when it failed to take reasonable action in response to the plaintiff’s numerous complaints about severe, pervasive, and objectively offensive acts of sexual harassment against her daughter); Doe v. Dallas Indep. Sch. Dist., 220 F. 3d 380, 387-88 (5th Cir. 2000) (applying the deliberate indifference standard in Davis to determine whether the defendant’s response to allegations of teacher-student harassment violated Title IX); Reese v. Jefferson Sch. Dist. No. 14J, 208 F. 3d 736, 738-40 (9th Cir. 2000) (holding that under Davis, the school board did not violate Title IX, where the school board suspended four female students from commencement due to their misbehavior on a school trip, and where the plaintiffs claimed their inappropriate actions were in retaliation to unreported acts of sexual harassment by male students earlier in the school year); Gant v. Wallingford Bd. of Educ., 195 F. 3d 134, 140-41 (2nd Cir. 1999) (applying the deliberate indifference standard in Davis to determine whether the defendant’s decision to transfer the plaintiff’s child from first grade to kindergarten represented intentional discrimination on account of the
Justice Kennedy, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, dissented, condemning the majority for "impos[ing] on schools potentially crushing financial liability for student conduct that is not prohibited in clear terms by Title IX and that cannot... be identified by either schools or courts with any precision." The dissent argued that the majority's decision threatened principles of federalism by using the Spending Clause to intrude in a sensitive issue that should be handled by state and local governments. The dissent further demanded that the federal courts leave school disciplinary decisions to the schools' principals and teachers.

According to the four dissenting justices, student-on-student sexual harassment under Title IX should be treated differently than sexual harassment in the workplace under Title VII and teacher-student sexual harassment under Title IX, because schools do not exercise the same amount of control over students as employers exercise over their employees. The dissent distinguished teacher-student harassment from student-on-student sexual harassment by asserting that sexual harassment of a student by a teacher is always wrong while student-on-student sexual harassment is just an innocent part of a child's social development. Unlike adults, the dissent

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122 Davis, 526 U.S. at 672 (Kennedy, J., dissenting).
123 Id. at 684-86 (Kennedy, J., dissenting) (noting that the majority's opinion threatens the federal balance, and that decisions regarding issues of sexuality and socialization are best made by parents, teachers, and school administrators).
124 Id. at 684 (Kennedy, J., dissenting). Justice Kennedy asserted that he "fail[s] to see how federal courts will administer school discipline better than the principals and teachers to whom the public has entrusted that task" and expressed concern that students' "educational opportunities will be diminished by the diversion of school funds to litigation."
125 Id. at 674-75 (Kennedy, J., dissenting).
126 Id. at 675 (Kennedy, J., dissenting) (acknowledging that teacher-student sexual harassment is "always inappropriate," but dismissing peer sexual harassment as "an inescapable part of adolescence").
added, children cannot sexually harass each other, because their behavior, although inappropriate, is immature and childish.\(^{127}\)

The dissent, furthermore, characterized the majority's "severe, pervasive, and objectively reasonable" test as an ambiguous standard that leaves school officials questioning what type of behavior constitutes sexual harassment and what actions to avoid liability will be considered reasonable within the minds of the court and jury.\(^{128}\) Lastly, the dissent expressed concern that the decision will result in a flood of litigation, and that the uncapped damages could produce harsh consequences to schools, students, and taxpayers by "the diversion of school funds to litigation."\(^{129}\)

III. ALTERNATIVE METHODS TO PREVENTING PEER SEXUAL HARASSMENT IN PRIMARY AND SECONDARY SCHOOLS

Although there is no current requirement for preventive programs to eliminate sexual harassment in schools, the OCR has published two documents that are designed to help primary and secondary schools remedy the problem of sexual harassment of students.\(^{130}\) In addition, existing programs aimed at preventing harassment in primary and secondary schools demonstrate that proactive measures can ameliorate the problem of student-on-student sexual harassment.\(^{131}\)

The OCR published the first document, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Guidance), in March 1997.\(^{132}\) The Guidance was designed to inform school officials at primary and secondary schools about the standards that OCR uses and that educational institutions should utilize when investigating and responding to claims of sexual harassment of their students.\(^{133}\) In light of the Supreme Court's decision in Davis, the OCR published the Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Revised Guidance),\(^{134}\) to "reaffirm [the OCR's] standards regarding sexual harassment, to clarify the regulatory basis

\(^{127}\) Id. at 672-73 (Kennedy, J., dissenting).

\(^{128}\) Davis, 526 U.S. at 675-76 (Kennedy, J., dissenting).

\(^{129}\) Id. at 684, 686 (Kennedy, J., dissenting).

\(^{130}\) See HARASSMENT & HATE CRIME GUIDE, supra note 2; see also Guidance, supra note 6.

\(^{131}\) See infra Part IV.C.

\(^{132}\) Guidance, supra note 6.

\(^{133}\) Id. at 12,034.

\(^{134}\) Revised Guidance, supra note 6.
for the 1997 guidance, and to illustrate how and why the administrative enforcement of Title IX’s nondiscrimination requirements differs from private lawsuits for money damages. The Revised Guidance indicates that a federally funded school is required to take reasonable action to end the discrimination, prevent its recurrence, and remedy the effects of sexual harassment on victims. If a school’s response does not effectively remedy the situation, the Revised Guidance requires the school to take further action to eliminate discrimination and to ensure students that the school will not tolerate sexual harassment of its students.

According to the Revised Guidance, every school must adopt a non-discriminatory policy that prohibits sexual discrimination and provides grievance procedures that effectively prevent and respond to the sexual harassment of students. The Revised Guidance notes that the policy and procedures must be written in language that can be easily understood by the school’s students and must be distributed to the students, their parents, and school employees. Each school, the Revised Guidance advises, is required to employ one coordinator to ensure that all Title IX requirements are met. In addition, the Revised Guidance states that if a student or the student’s parent notifies the school about the sexual harassment of the student, the school should explain the available options and the grievance procedures

135 Id. at 66,092 (noting that the Revised Guidance did not change the standards that the OCR uses, and that a school district should use the new guide to determine the school district’s responsibility for sexual harassment of students). Unlike the 1997 Guidance, the Revised Guidance focuses on “a school’s administrative responsibilities under the nondiscrimination requirements of the Title IX statute and regulations,” rather than the requirements a school must follow to avoid liability to private litigants. Compare Guidance, supra note 6, at 12,039-40, with Revised Guidance, supra note 6, at 66,093.

136 Id. at 66,095, 66,101.

137 Id. at 66,104-05. The Revised Guidance suggests different types of additional action the school should take to prevent any additional harassment, including: issuing a new, improved policy or grievance procedures and “making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation;” providing counseling for the harasser and/or the victim; and training students, parents, and teachers to recognize and appropriately respond to sexual harassment of students. Id.

138 Id. at 66,105. The Revised Guidance notes that the procedures of each school will vary due to differences in the age of the students, “[the] school sizes and administrative structures, State or local legal requirements, and past experience.” Id. at 66106.

139 Id. at 66106.

140 Revised Guidance, supra note 6, at 66106. The school must give the Title IX officer’s name, office address, and telephone number to all students and school employees. Id.
the student or parent may seek in response to the harassment.\textsuperscript{141} The \textit{Revised Guidance} notes that, regardless of the actions a student or the student's parent takes in response to the alleged harassment, the school must perform a timely investigation and then respond appropriately to remedy the situation.\textsuperscript{142}

The \textit{Revised Guidance} refers to preventive measures as additional steps that may be taken to prevent the recurrence of sexual harassment and eliminate the hostile educational environment.\textsuperscript{143} There is no mention, however, of incorporating these preventive methods in schools before the harassment occurs.\textsuperscript{144} With the prevalence of sexual harassment in schools across the nation,\textsuperscript{145} the implementation of preventive programs in primary and secondary schools would provide an effective approach to changing attitudes about sexual harassment and eliminating hostile educational environments.\textsuperscript{146} As the NSBA indicated, policies and procedures alone will not prevent harassment.\textsuperscript{147} Requiring preventive programs in schools, therefore, will enable schools to ensure a safer, more positive environment and will provide schools with a reliable means to avoid liability.

In January 1999, the OCR published a supplementary guide, \textit{Protecting Students from Harassment and Hate Crime: A Guide for Schools (Guide)}, to provide primary and secondary schools with realistic suggestions and information to help deter sexual harassment of students.\textsuperscript{148} The \textit{Guide} warns that the use of its suggestions will not

\textsuperscript{141} \textit{Id.} at 66104. The \textit{Revised Guidance} indicates that the school should take the same steps if a "school employee has directly observed the sexual harassment of a student." \textit{Id.}

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{Id.} The \textit{Revised Guidance} provides examples of preventive measures, including "special training or other interventions to help repair the educational environment" and "training for administrators, teachers, and staff and age-appropriate classroom information for students . . . [to] help ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond." \textit{Id.} at 66104-05. In addition, the \textit{Revised Guidance} notes that "[e]ven if harassment stops without the school's involvement, the school may still need to take steps to prevent or deter any future harassment—to inform the school community the harassment will not be tolerated." \textit{Id.} at 66104 n.91 (citing Fuller v. City of Oakland, 47 F.3d 1522, 1528-29 (9th Cir. 1995)).

\textsuperscript{144} See generally \textit{id.}

\textsuperscript{145} See \textit{supra} note 13.

\textsuperscript{146} SHOOP & EDWARDS, infra note 181 and accompanying text (explaining that training has proven to be a valuable tool in changing students' attitudes about sexual harassment).

\textsuperscript{147} See \textit{supra} note 2 and accompanying text.

\textsuperscript{148} HARASSMENT & HATE CRIME GUIDE, \textit{supra} note 2.
abolish all sexual harassment in schools, but will nonetheless assist schools with the development of “policies and procedures necessary to create safe schools that foster constructive relationships among students and staff.”\textsuperscript{149} Furthermore, the \textit{Guide} insists that a school cannot achieve an environment free of hostility without the contribution of all members of the local community.\textsuperscript{150}

A majority of the \textit{Guide} is devoted to outlining a step-by-step guideline on how to formulate and implement an effective written policy and adequate corrective procedures.\textsuperscript{151} Unlike the \textit{Guidance}, the \textit{Guide} also emphasizes the significance of preventive programs to eliminate harassment in schools.\textsuperscript{152} First, the \textit{Guide} suggests that sufficient information about the anti-harassment program should be publicized in the school and local community.\textsuperscript{153} In addition, the \textit{Guide} encourages the school to post a summary of the policy and grievance procedure and provide a thorough and clear explanation of them.\textsuperscript{154} Next, the \textit{Guide} stresses the importance of training all school board members and employees in accordance with their appropriate roles, to investigate complaints, prevent sexual harassment, and understand diversity principles.\textsuperscript{155} The \textit{Guide} further indicates that schools should teach students about sexual harassment and include them in prevention programs.\textsuperscript{156} In order to eliminate

\textsuperscript{149} Harassment \\& Hate Crime Guide, \textit{supra} note 2, at \\

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Harassment \\& Hate Crime Guide, \textit{supra} note 2, at 5, 35-39. The Harassment \\& Hate Crime Guide indicated:

To establish an educational environment free from discrimination and harassment will ordinarily require more than just punishing individual instances of misconduct. Students will benefit most from stopping harassment from happening at all. Therefore, an effective anti-harassment program must incorporate the kinds of strategies that will prevent harassment, not merely increase the chance of punishment.

While building a strong program often starts with developing and enforcing written policies and procedures, all of a school district’s programs and activities should support its anti-harassment efforts. The school’s instructional program, calendar of events, extracurricular activities, professional development efforts, and parent involvement initiatives are key to establishing an environment in which respect for diversity can flourish.

\textsuperscript{153} Id. at 5.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 5-9. The Harassment \\& Hate Crime Guide includes six samples of exemplary school policies. Id. at 55-84.

\textsuperscript{156} Harassment \\& Hate Crime Guide, \textit{supra} note 2, at 36. The Harassment \\& Hate Crime Guide suggests: teaching "students about their basic rights and responsibilities;"
sexual harassment in schools, the *Guide* also suggests that schools "[i]mplement monitoring programs and prevention strategies."\(^{157}\) The *Guide* also proposes that schools involve parents and community members in preventive programs by hosting speakers and workshops, or by showing films, plays, and videos.\(^{158}\) Lastly, the *Guide* informs educational institutions that an adequate record-keeping system and consistent evaluation of data are effective remedial measures to "address patterns of harassment and prevent future incidents."\(^{159}\)

While the ideas suggested by the Guide exemplify the type of proactive approach necessary to prevent peer sexual harassment in primary and secondary education, their effectiveness has yet to be proven. One study was conducted at two schools to determine whether the principals, teachers, students, and the students' parents perceived peer sexual harassment as a problem in schools and whether they believed that schools should and effectively could prevent student-on-student sexual harassment.\(^{160}\) The results of the study showed that, for the most part, the principals, teachers, students, and students' parents at both schools believed that schools could not prevent the sexual harassment of students by other students.\(^{161}\) The interviewees, however, asserted that once a school has knowledge of the sexual harassment of a student, it has a duty to intervene and protect the victim from further harassment.\(^{162}\) Despite the subjective perceptions of the interviewees, the study revealed that High School B, which included an educational program on sexual

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\(^{157}\) HARASSMENT & HATE CRIME GUIDE, *supra* note 2, at 37. The *Harassment & Hate Crime Guide* indicates that schools should perform self-assessments and examine the school environment to monitor problems of sexual harassment. *Id.* In addition, the *Guide* states that schools should evaluate and enforce their anti-harassment policies and grievance procedures. *Id.* The *Guide* also suggests that schools should incorporate instructional intervention programs in their regular school activities and programs (e.g. "school plays, newspapers, elections, and yearbooks"). *Id.* The *Guide* lists government agencies and private and public organizations that may assist in the implementation of these programs. *Id.* at 139-45.

\(^{158}\) HARASSMENT & HATE CRIME GUIDE, *supra* note 2, at 38.

\(^{159}\) *Id.* at 38-39.

\(^{160}\) Cheng, *supra* note 13, at 266, 269.

\(^{161}\) *Id.* at 283-84.

\(^{162}\) *Id.* at 286.
harassment in its human sexuality class, was more effective in dealing with sexual harassment than High School A, which provided no educational programs on sexual harassment.\textsuperscript{163} This disparity between the two high schools "reveals that the education of the entire school on the policy concerning sexual harassment, from administration to faculty to students, was the key to creating an environment relatively free of sexual harassment."\textsuperscript{164} In addition, unlike High School A, the school officials of High School B enforced its peer harassment policies and followed the school's harassment guidelines by educating students in mandatory sexual harassment programs.\textsuperscript{165}

There are some existing preventive programs that reportedly help primary and secondary schools deter student-on-student sexual harassment. For example, in Duluth, Minnesota, Judy Gillen, a harassment specialist, coordinates a successful anti-harassment program for the Duluth school district.\textsuperscript{166} Unlike the dissent in \textit{Davis},\textsuperscript{167} Gillen recognizes that student-on-student sexual harassment "has a devastating effect on a child's mental and emotional well-being."\textsuperscript{168} Gillen, therefore, runs workshops for students in eighth grade and high school health classes.\textsuperscript{169} She also provides anti-harassment training to bus drivers, because as agents of the school district, they may be liable under Title IX for not reporting incidents of sexual harassment that occur on the buses.\textsuperscript{170} Gillen acknowledges that her presentations will not "turn all schoolchildren into sensitive, caring, gender-enlightened New Persons,"\textsuperscript{171} but they will teach school administrators, employees, and students that the problems arising from the sexual harassment of students must be taken seriously and dealt with in a reasonable manner.\textsuperscript{172} Gillen, moreover, reports that the intervention program seems to be working, because more students are willing to report harassment.\textsuperscript{173} If more students

\begin{footnotesize}
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  \item \textsuperscript{163} \textit{Id.} at 285-86.
  \item \textsuperscript{164} \textit{Id.} at 286.
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} Gorney, \textit{supra} note 13, at 44.
  \item \textsuperscript{167} \textit{See Davis}, 526 U.S. at 674-75 (Kennedy, J., dissenting).
  \item \textsuperscript{168} Gorney, \textit{supra} note 13, at 80 (Gillen refuted the dissent's characterization of peer sexual harassment as "an inescapable part of adolescence," by asserting that "just because this behavior has been tolerated in the past does not mean that it is acceptable." \textit{Id.} (citing \textit{Davis}, 526 U.S. at 675 (Kennedy, J., dissenting))).
  \item \textsuperscript{169} \textit{Id.} at 45.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.} at 82.
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{Id.} at 83.
\end{itemize}
\end{footnotesize}
report harassment, students will begin to recognize that sexual harassment is unacceptable and will not be tolerated. Gillen’s program is an example of a local preventive program that effectively educates children and school employees about the negative consequences of peer sexual harassment.

In addition, Professor Robert J. Shoop and Debra L. Edwards devote a chapter in their book, How to Stop Sexual Harassment in Our Schools, to discussing successful sexual harassment prevention programs in schools. The authors suggest that the South Washington County School District in Cottage Grove, Minnesota is a model of a school system that has successfully implemented a prevention program to eradicate sexual harassment. According to Shoop and Edwards, all employees and students at South Washington County schools receive training about sexual harassment. Furthermore, the schools provide examples of staff-to-student harassment and student-on-student harassment in their policy, which is distributed to all staff and students. The district’s human resources manager reported that the schools’ policy is a more effective approach to creating a safer environment, free of hostility, than seeking redress through the courts or other agencies.

Shoop and Edwards also found that the public schools in Lincoln, Nebraska have established an effective anti-harassment program. After learning that “students were receiving mixed signals about appropriate and inappropriate behavior,” a group of guidance counselors implemented a program to clarify and openly

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174 See infra note 175, at 151 (noting that girls who use assertive communication skills help "stop the sexual harassment they encounter, or at least ... realize that such behavior is not acceptable").

175 ROBERT J. SHOPP & DEBRA L. EDWARDS, HOW TO STOP SEXUAL HARASSMENT IN OUR SCHOOLS: A HANDBOOK AND CURRICULUM GUIDE FOR ADMINISTRATORS AND TEACHERS 141-59 (1994).

176 Id. at 142.

177 Id. at 142-43. Shoop and Edwards note that outside consultants who specialize in sexual harassment matters train school employees. Id. at 143. In addition, principals visit younger elementary school children to discuss issues of sexual harassment in age-appropriate ways, while older elementary school children are often shown a videotape on identifying inappropriate behavior and the need to report it to the proper authority. Id.

178 Id. at 145.

179 Id.

180 Id. at 145-46 (reporting that "the school district and it employees are well treated by this policy, when compared to the costs, delays, notoriety, and stress of going through the courts or other outside agencies").

181 SHOOP & EDWARDS, supra note 175, at 146.
discuss issues of sexual harassment in an age appropriate manner.\textsuperscript{182} Through role playing and question and answer sessions, students learn what types of behavior constitute sexual harassment. These techniques also teach that anyone can be a harasser or the victim of sexual harassment regardless of age, gender, ethnicity or race, and that students have a choice not to harass others.\textsuperscript{183} In addition, the program emphasizes that the school will not tolerate sexual harassment and will discipline harassers for their inappropriate conduct.\textsuperscript{184} Guidance counselors and the assistant principal at one Lincoln public school reported that as a result of the program, students speak more openly about sexual harassment in common language. Consequently, these officials also reported that incidents of sexual harassment occur less frequently, and victims of sexual harassment are more assertive and willing to report inappropriate behavior.\textsuperscript{185} The counselors noted that when problems regarding sexual harassment do arise, they refer to classroom presentations to aid their discussion with students and parents.\textsuperscript{186}

Shoop and Edwards acknowledged that these programs were successful in preventing new incidents of sexual harassment not only because they taught students and staff important facts about sexual harassment, but also because they significantly changed "the belief system of the culture."\textsuperscript{187} Shoop and Edwards propose that the best way to effectuate this new belief system is to change children's attitudes through training and education starting in elementary school.\textsuperscript{188}

The programs discussed by Shoop and Edwards, as well as the OCR publications, demonstrate the significance of alternative methods of preventing student-on-student sexual harassment. First, Shoop and Edwards establish the importance of providing informative training sessions about sexual harassment to all school employees and students.\textsuperscript{189} Second, the authors discuss the positive

\textsuperscript{182} Id.

\textsuperscript{183} Id. at 147.

\textsuperscript{184} Id.

\textsuperscript{185} Id. at 147-48 (noting that the counselors believed that the program resulted in "immediate and long term benefits").

\textsuperscript{186} Id. at 148.

\textsuperscript{187} SHOOP & EDWARDS, supra note 175, at 148-49 (stating that programs aiming to achieve hostility-free environments must redefine group values through "free expression and open discussion of problematic attitudes or behavior").

\textsuperscript{188} Id. at 150. Shoop and Edwards indicated that a study by Jones and Jacklin demonstrated that "training can change students' attitudes about sexual harassment." Id.

\textsuperscript{189} See supra note 176 and accompanying text.
effect of distributing a copy of the school’s anti-harassment policy, which includes examples of different scenarios of sexual harassment, to employees and students.190 Third, they demonstrate that anti-harassment programs using role playing and interactive question and answer sessions create more open communication and a better understanding about sexual harassment.191 Lastly, Shoop and Edwards indicate that when incidents do arise, illustrations and techniques presented in the training programs are effective in assisting discussions with students and their parents.192 As illustrated, by changing the school environment and altering attitudes about sexual harassment through proactive measures, sexual harassment can be remedied without recourse to the courts and before emotional injury occurs.

IV. DISTINGUISHING THE PROACTIVE APPROACH OF PREVENTATIVE PROGRAMS FROM THE REMEDIAL EFFECTS OF DAVIS

Davis demonstrates the seriousness of student-on-student sexual harassment in federally funded schools by requiring schools officials to take corrective action to prevent further harassment after it occurs; however, Davis fails to address the school’s role in utilizing preventive measures to eliminate the harassment before it occurs. The question, then, remains whether Davis precludes federal initiatives to prevent student-on-student sexual harassment.

A. THE COURT’S FOCUS ON CORRECTIVE, AS OPPOSED TO PROTECTIVE, MEASURES IN DAVIS

According to the Court in Davis, proper corrective procedures demonstrate reasonable action required to avoid Title IX liability.193 The standard the Court established requires the federally funded educational institution to “merely respond to known peer harassment in a manner that is not clearly unreasonable.”194 The Court consciously tailored the standard of liability to avoid controversy over issues of federalism—specifically, federal intrusion into a locally sensitive matter.195 The Court, therefore, limited the standard of

190 See supra notes 177-79.
191 See supra notes 181-84.
192 See supra note 185 and accompanying text.
193 See Davis, 526 U.S. at 644-49 (noting that schools must merely respond to an incident of peer sexual harassment after they know of its occurrence).
194 Id. at 648.
195 See supra notes 113-15 and accompanying text; see also supra note 123 and accompanying text.
liability by requiring federally funded schools to take only corrective action in response to known harassment. The Court made no mention of preventive action. In fact, the only reference to preventive action was the Court’s clarification that federally funded recipients cannot avoid liability by solely “purging their schools of actionable peer harassment.”\textsuperscript{196} As the studies discussed in Part III show, sexual harassment is best controlled by school programs incorporating well-publicized, consistently enforced policies and grievance procedures \textit{and} effective, age-appropriate prevention programs.\textsuperscript{197} Thus, according to the studies, the Court is correct in concluding that preventive action, by itself, is not sufficient to eliminate sexual harassment without corrective measures. On the other hand, by failing to address the importance of preventive measures, the Court may imply that corrective action, alone, is sufficient to satisfy the goals of Title IX. The challenge for federal legislators seeking to implement preventive programs on a national level, therefore, is navigating the federalism concerns implicit in the \textit{Davis} opinion.

B. \textit{Instituting Preventative Measures that Comply With The Reasoning of Davis While Maintaining The Federal Balance}

Federal legislation proposing the implementation of preventive programs in federally funded schools would comply with the reasoning set out in \textit{Davis}. First, it would adhere to the standard established in \textit{Davis}.\textsuperscript{198} Second, proposed legislation to implement prevention programs in federally funded schools would not upset the federal balance, a fear addressed by both the majority and the dissent.

Proposed federal legislation to implement preventive programs in federally funded educational institutions would comply with the standard in \textit{Davis}. By implementing federally funded preventive programs on a local level, schools would be reasonably responding to a known national problem of student-on-student sexual harassment.\textsuperscript{199} The majority recognizes that student-on-student

\textsuperscript{196} Id.
\textsuperscript{197} See supra Part III.
\textsuperscript{198} \textit{Davis}, 526 U.S. at 649 (stating that a federally funded recipient must only respond to known student-on-student harassment in a way that is not clearly unreasonable).
\textsuperscript{199} See supra Part III (indicating that sexual harassment is a widespread problem throughout our nation’s schools).
sexual harassment frequently occurs in the school setting.\textsuperscript{200}

Federal legislation implementing prevention programs in federally funded schools would address both the majority's and the dissent's concerns so that student-on-student sexual harassment would no longer be a pervasive problem nor defined as an acceptable part of childhood. Once peer sexual harassment becomes defined as unacceptable conduct, students will become less inclined to interact in a sexually harassing manner, and incidents of peer sexual harassment will decline.\textsuperscript{201} Teaching students proper behavioral skills at an early age, while consistently enforcing grievance procedures, would be a successful means of transforming society's beliefs about peer sexual harassment.\textsuperscript{202} It will take the efforts and cooperation of each local community, however, to create this change in ideology and alleviate a national problem of student-on-student sexual harassment.\textsuperscript{203}

Additionally, federal legislation implementing preventive measures in federally funded schools would not upset the federal balance. Both the majority and the dissent expressed concerns about federalism.\textsuperscript{204} The majority justified the established standard by

\textsuperscript{200} Davis, 526 U.S. at 651-52 (noting that children in the school setting regularly interact in an inappropriate manner with their peers and that students often engage in behavior that is hurtful to other students). The dissent also recognizes the pervasiveness of student-on-student sexual harassment; \textit{id.} at 680 (Kennedy, J., dissenting) (asserting that a large percentage of the millions of students in our country "will, at some point in their school careers, experience something they will consider sexual harassment"); however, the dissent does not characterize it as sexual harassment but rather as an "inescapable part of adolescence." \textit{id.} at 675. (Kennedy, J., dissenting). Thus, the dissent supports the assertion that peer sexual harassment is prevalent in primary and secondary schools, but does not propose preventive measures because the dissent perceives the harassment as a normal part of childhood. This perception bolsters the need for preventive programs to help people understand that sexual harassment should not be deemed acceptable behavior. \textit{id.} at 680 (Kennedy, J., dissenting).

\textsuperscript{201} SHOOP & EDWARDS, supra, note 175, at 141-59 (indicating that one study demonstrated that both male and female students' sexist attitudes changed after the completion of a training session on sexual harassment).

\textsuperscript{202} \textit{id.} at 148-50 (noting the importance of training students at an early age about sexual harassment in order to change attitudes about gender and to deter sexual harassment).

\textsuperscript{203} \textit{id.} at 158 (emphasizing the importance of community support in eradicating sexual harassment in schools); see also supra notes 145, 176 and accompanying text.

\textsuperscript{204} Davis, 526 U.S. at 648-49. The majority recognized that "school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority," but assured that school officials will continue to enjoy flexibility in making disciplinary decisions so long as they are not deemed deliberately indifferent to known acts of peer sexual harassment. \textit{id.} See also supra notes 123-24 and accompanying text (noting that the dissent asserted that the majority threatened
emphasizing that it would not result in an excessive federal intrusion into this traditionally local matter. 205 The dissent, on the other hand, attacked the Davis standard because it feared the majority's decision would result in excessive federal control over local schools' authority to discipline and a flood of litigation generating enormous costs to local school boards. 206

First, federal legislation proposing the implementation of preventive programs in federally funded schools would not create an imbalance between federal and state powers. Although the dissent in Davis expressed concern that requiring schools to implement corrective measures constitutes excessive federal intervention, 207 the Court ensured that the local school boards would have great discretion in determining how those corrective measures would be carried out. 208 Likewise, if federal legislation proposes preventive measures as a means to safeguard a student's Title IX right, the legislation could allow schools discretion in choosing the type of preventive programs they think would best accomplish that goal. In addition, each federally funded school could define sexual harassment according to its local standards. 209

Second, federal legislation to implement preventive programs in federally funded schools would alleviate the dissent's fears of excessive litigation and exorbitant costs to local schools. 210 In fact, the intrusive nature of money damages against local school boards is not an issue in preventive legislation, because preventive programs avoid the problem of damages by eliminating the problem of harassment itself through education. There are two proposals by which federal legislation could eradicate harassment in schools while effectively conserving school funds.

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principles of federalism and interfered with an issue that should be handled by local government and school officials).

205 See supra note 194.

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

207 See supra notes 121-22 and accompanying text.

208 Davis, 526 U.S. at 648 (asserting that "courts should refrain from second-guessing the disciplinary decisions made by school administrators" and ensuring that school officials will have flexibility in making disciplinary decisions) (citing T.L.O., 469 U.S. at 342-43).

209 The dissent asserted that "[d]efining the appropriate role of schools in teaching and supervising children who are beginning to learn their own sexuality and learning how to express it to others is one of the most complex and sensitive issues ours schools face" and are best handled by parents, teachers, and school administrators. Davis, 526 U.S. at 685 (Kennedy, J., dissenting).

210 See supra note 180.
The first proposal utilizes federal funds under the Spending Clause to implement preventive programs consistent with the goals of Title IX. According to Title IX, when a school violates the terms of the statute, the OCR can terminate federal funds to the school district. Rather than taking away money used to educate children when a school violates Title IX, a more effective resolution would be to ensure that those federal funds are allocated to implement preventive programs to eliminate the hostile environment. This does not mean, however, that schools must wait until litigation occurs to implement these important programs. As the statistics show, peer sexual harassment in schools is pervasive throughout the nation, and thus, a national standard of prevention, supported by federal funds, should be established and implemented on a local level.

The second idea to minimize litigation while reducing costs to schools is to cap monetary damages available to the plaintiff and require federally funded schools to use local funds to implement

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211 See supra note 22.
212 In 1993, the American Association of University Women (AAUW) performed an extensive study of the problem of sexual harassment in American public schools. See Anthony M. Lamanna, Peer Sexual Harassment: Holding Educational Institutions to a Higher Standard, 37 DUQ. L. REV. 329, 330-31 (1999) (citing LOUIS HARRIS ET AL., HOSTILE HALLWAYS, THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS (1993)). The study was based on 1,632 questionnaires completed by students in grades eight through eleven from seventy-nine American public schools. Id. at 331 n.9 (citing LOUIS HARRIS ET AL., HOSTILE HALLWAYS, THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA’S SCHOOLS 5 (1993)). The study indicated that eighty-one percent of students “in grades eight through eleven reported that they had been the target of some form of sexual harassment in school.” Id. at 331. Of the eighty-one percent who reported being harassed, seventy-nine percent reported being a victim of peer sexual harassment. Id. The students reported that the harassing acts consisted of “sexual jokes and comment ... touch[ing] or grapp[ling] ... being forced to kiss someone ... being forced to do something other than kissing ... being called gay or lesbian ... and being spied on while dressing or showering.” Id. The AAUW study also found that the peer sexual harassment had a substantial negative impact on students “not only educationally, but also emotionally and behaviorally.” Id. at 331-32; Kaja Clark, School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers, 66 GEO. WASH. L. REV. 353, 353 (1998) (mentioning that “[t]wo landmark studies, one by American Association of University Women and another by Seventeen Magazine, reported that over seventy percent of middle school and high school students stated that they have been sexually harassed at school”). See also Cheng, supra note 13, at 264, 264 n.2 (citing NAN STEIN ET AL., SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 2 (1993)) (noting that a survey of 2,000 girls, ages 9-19, indicated that 89% of the interviewees “reported being subject to sexually suggestive comments, looks, or gestures,” and 83% admitted “being touched, pinched, or grabbed while in school”).
213 See Lamanna, supra note 212, at 351 (suggesting that courts “adopt a standard of liability under Title IX that will promote nationwide decrease in student-student sexual harassment”).
preventive programs. As the dissent suggested, monetary damages in the educational context should be capped, because the litigious costs divert "scarce resources ... from educating our children" and pressure "many school districts, desperate to avoid Title IX peer harassment suits, ... [to] adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them." By capping monetary damages, a school board could then use some of the school's money, which would have otherwise been awarded to the plaintiff, to implement effective training programs aimed at preventing sexual harassment. This approach, therefore, would alleviate the dissent's fears of usurping scarce resources and enacting ineffective school policies. It would also lessen the likelihood of incidents of sexual harassment by using funds to establish prevention programs aimed at teaching students appropriate behavioral skills.

C. Preventive Legislation Furthers the Court's Goals of Teaching Students Respect and Appropriate Behavior Skills Through Instructions Rather Than Punishment

By implementing federally funded preventive programs in primary and secondary schools, the focus would switch from punishment of the harasser and liability of the school board to a positive message of bringing the community together to prevent peer sexual harassment and teach appropriate behavioral skills. Although the dissent in Davis refused to classify a student's unwelcome and persistent sexual advances toward another student as "sexual harassment," instead characterizing it as a normal part of adolescence, the dissent did acknowledge the importance of teaching students the appropriate manner in which to interact with their peers. The majority also recognized that school administrators and teachers are in the best position to influence and control students' behavior. Thus, local schools, with the support of the whole community, can apply their expertise and knowledge to effectively teach students appropriate behavioral skills through preventive measures. This proactive approach creates a national standard, on a local level, consistent with the majority's and dissent's goal: the need to teach student's respect and appropriate behavioral skills.

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214 Davis, 526 U.S. at 657-58 (Kennedy, J., dissenting).
215 Id. at 673 (Kennedy, J., dissenting) (noting that "parents and schools have a moral and ethical responsibility to help students learn to interact with their peers in an appropriate manner").
216 Id. at 646.
D. Davis Would Not Preclude Federal Legislation Proposing the Implementation of Preventive Programs in Federally Funded Schools

Federal legislation to implement preventive programs on a local level would not be precluded by Davis. First, federal legislation would comply with the reasoning supporting Davis without disturbing the federal balance because it would give schools great discretion in how to implement the programs. Second, it would alleviate the dissent’s concerns about excessive costs to local schools, because the preventive programs avoid the problem of damages by eliminating the problem of harassment through education. Furthermore, it would provide schools with initiatives for education, rather than sanctions for violations. Therefore, although the Court in Davis only addresses the importance of corrective measures, federal legislation to implement preventive programs would not be precluded by Davis.

E. A National Standard of Prevention Implemented on a Local Level

Although no national standard of sexual harassment prevention exists, there is currently federal legislation, the Safe Schools Act (SSA), that permits the use of federal funds to coordinate violence prevention programs in federally funded schools on a national level. The SSA, furthermore, grants local schools federal funds to implement, on a local level, projects and activities designed to accomplish the goals of the SSA. In order to receive the federal grant, the educational institution must submit an application to the Secretary of Education, outlining the goals that the school desires to achieve and the process by which the goals will be attained. The

218 Id.
219 20 U.S.C. § 5962. The goal of the Safe Schools Act is to:
[H]elp local school systems achieve Goal Six of the National Educational Goals, which provides that by the year 2000, every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning, by ensuring that all schools are safe and free of violence.
220 20 U.S.C. § 5964. The grant funds may be used for various projects and activities, such as “training school personnel in addressing violence, including violence prevention, conflict resolution, anger management, and peer mediation . . . .” 20 U.S.C. §5965 (a)(4).
application must also specify a detailed plan to establish an advisory committee, comprised of various representatives in the community.\footnote{Eckland, \textit{supra} note 219, at 313 (noting that “since making schools safe is a joint responsibility,” the application “requires the collaboration and cooperation of educators, parents, students, law enforcers, community and business leaders, probation and court representatives, social service and health care providers, and various other youth-serving professionals”).}

The focus of the SSA is preventive action—to stop school violence before it starts.\footnote{\textit{Id.} at 320.} There are some obstacles, however, that interfere with the effectiveness of prevention programs.\footnote{\textit{Id.} at 324.} First, the moral lessons a child learns at school cannot be fully absorbed by the child without further reinforcement by the student’s parents.\footnote{See \textit{id.}.} Often, students go home to their dysfunctional families, who themselves do not display appropriate behavioral skills; the student thereby observes and learns behaviors contrary to those taught in school.\footnote{\textit{See id.} at 324-26.} The programs established by the local schools, therefore, should incorporate strategies to increase family support, so that the students’ parents can help increase the child’s self-esteem and teach the child appropriate behaviors.\footnote{\textit{Id.} at 326.} Second, systemic problems often create a barrier to the success of the program.\footnote{Eckland, \textit{supra} note 219, at 326-27.} The bureaucratic system delays success by making changes difficult, hindering the termination of incompetent teachers, and dealing with political matters.\footnote{\textit{Id.} at 327.} In addition, schools must be careful not to violate students’ individual rights.\footnote{\textit{Id.}} These systemic problems, nonetheless, may be controlled “if lawyers team up with the schools to overcome their bureaucratic systems and educate teachers on the limits of students’ rights.”\footnote{\textit{Id.}}

Although the SSA is designed to prevent violence in schools,\footnote{20 U.S.C. § 5961(b) (stating that the purpose of the Act is to “ensur[e] that all schools are safe and free of violence”).} the concept of creating a proactive community program funded by federal and/or local governments can be applied to programs aimed at preventing peer sexual harassment in schools. As with the SSA, the Secretary of Education could grant federal funds to aid local school districts in preventing sexual harassment and in providing a safer
environment free of hostility. By utilizing this approach, schools will be less susceptible to liability and the community will be better prepared to deal with the issue of sexual harassment. In addition, this kind of federal legislation, if properly executed, will raise national awareness about the problem of sexual harassment in schools.\textsuperscript{232} Alternatively, the federal government may want to expand the goals included in the SSA to include the prevention of sexual harassment. Since the methods described in the SSA are similar to those that would be used to prevent sexual harassment, an easier approach may be to include sexual harassment prevention while teaching violence prevention. Each local educational institution, with the consent of the Secretary of Education, can decide which method would be more effective in achieving its community's goals.

V. CONCLUSION

Peer sexual harassment is a serious problem in our nation's primary and secondary schools. The United States Supreme Court has recognized that federally funded educational institutions are required to take reasonable corrective action to prevent known acts of student-on-student sexual harassment. This standard of liability, however, is not sufficient to remedy the problem of peer sexual harassment in schools, nor to create an environment in which students have equal access to educational opportunities and benefits. A national standard of prevention must be established to create awareness of this problem and to effectively attack the source of the problem before it occurs. Although the federal government may set higher standards and provide federal funds to subsidize anti-harassment programs, each local school board should choose the types of prevention programs that best will achieve its community's anti-harassment goals.

It is essential that students learn the proper behavioral skills while they are young and in the critical stages of social development.\textsuperscript{233} Corrective action, combined with preventive

\textsuperscript{232} See \textsc{National Society for the Study of Education, Gender and Education} 201 (Sari Knopp Biklen & Diane Pollard eds., 1993) (asserting that policymakers should raise national awareness about sexual harassment in schools and "design models for public policy, procedures, regulations, and delivery of services to ensure that children who experience . . . sexual harassment in school settings are heard and protected").

\textsuperscript{233} See supra note 181 and accompanying text.
program involving all members of the community, will effectively change the attitudes of today’s children and the behaviors of our future adults:

By implementing these varied suggestions we can turn fleeting national exposure given to sexual harassment in the workplace into substantive and qualitative changes in the cultures of schools. It is time to recognize that sexual harassment, a pervasive, pernicious problem, is an obstacle to receiving equal educational opportunity. In order to receive real justice for all, we must take action to prevent and eliminate sexual harassment in schools.\textsuperscript{234}

If sexual harassment is not prevented today... tomorrow it may be some form of sexual abuse or sexual victimization. The harasser is likely to carry his attitudes about women and his inappropriate behavior into relationships, which may lead to dating violence, rape, and spousal abuse. The harasser is also likely to continue the harassing behavior when he enters the workplace. Peer sexual harassment perpetuates sexism, gender discrimination, and violence against women throughout society.\textsuperscript{235}

Incorporating preventive programs into our nation’s primary and secondary schools will not only reduce an educational institution’s likelihood of monetary liability for violating the conditions under Title IX, but, more importantly, it will teach school officials, teachers, students, parents, and society that peer sexual harassment is not acceptable and will no longer be considered “an inescapable part of adolescence.”\textsuperscript{236}

\textsuperscript{234} National Society for the Study of Education, Gender and Education, supra note 232, at 201-02.

\textsuperscript{235} Diane M. Welsh, Limiting Liability Through Education: Do School Districts Have a Responsibility to Teach Students about Peer Sexual Harassment?, 6 Am. U. J. Gender & L. 165, nn. 61-64.

\textsuperscript{236} Davis, 526 U.S. at 675 (Kennedy, J., dissenting); see also supra notes 127, 192.