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When student-on-student sexual harassment triggers school district liability under Title IX

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ABSTRACT

WHEN STUDENT-ON-STUDENT SEXUAL HARASSMENT TRIGGERS SCHOOL DISTRICT LIABILITY UNDER TITLE IX

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Title IX of the Education Amendments of 1972 prohibits sex discrimination in education, including K-12 institutions and colleges/universities. The United States Supreme Court has held that Title IX holds schools liable for sex discrimination, including sexual harassment and sexual assault. In the landmark case *Davis v. Monroe County Board of Education*, the Supreme Court identified the criteria in which a school district can be held liable for student-on-student sexual harassment under Title IX. The Supreme Court's criterion is presented in the form of a three-prong test, and all prongs must be satisfied for liability to exist. The first prong is whether or not the harassment was so severe, pervasive, and objectively offensive that the victim was denied access to an educational opportunity. The second prong is whether an official who had the authority to stop the harassment had actual notice of the harassment. Finally, the third prong is whether an official who did have both the authority to stop the harassment and actual notice remained deliberately indifferent.

The goal of this study was to analyze post-*Davis* case law to determine how and when a school can be found liable for student-on-student sexual harassment. This analysis can help school administrators and school boards to develop policies and practices to help prevent Title IX liability for student-on-student sexual harassment.

NORTHERN ILLINOIS UNIVERSITY

DE KALB, ILLINOIS

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WHEN STUDENT-ON-STUDENT SEXUAL HARASSMENT TRIGGERS SCHOOL
DISTRICT LIABILITY UNDER TITLE IX

JOE SALMIERI III

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A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL
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CHAPTER 1

INTRODUCTION

Background

Title IX of the Education Amendments of 1972 is a federal statute that prohibits discrimination and/or harassment on the basis of sex in schools that receive federal funds. All forms of harassment based on sex are prohibited.¹ The forms of harassment based on sex include sexual assault, sexual harassment, and harassment based on a student's failure to conform to gender stereotypes.² Whether the perpetrator intends to harm the victim is inconsequential. Sexual harassment under Title IX can still take place even if the perpetrator and victim are of different sexes, and severe harassment does not automatically require repeated incidents.

Title IX protects every person, not only women, from sex-based harassment in school districts that receive federal funding. School districts violate Title IX when student-on-student sexual harassment is so severe that it effectively denies a student the ability to participate in or benefit from the school or school activities and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.³ If and when a violation occurs, the victim of the alleged sexual harassment may bring suit against the school district to seek a remedy and/or damages for enduring the alleged harassment. Consequently, it is important for school administrators to understand their legal obligations

¹ Title IX of the Education Amendments of 1972 (Title 20 U.S.C. Sections 1681-1688).

² *Id.*

³ National Women's Law Center, *The Next Generation of Title IX: Harassment and Bullying Based on Sex*, 2011 at 1.

under Title IX, not only to protect potential victims but also to protect the school district from being held liable in potential lawsuits.

Statement of the Problem

There are two distinct sides of this problem that should be concerning to school administrators. One is the continued prevalence of student-on-student sexual harassment in schools. The second is the evolution of enforcement, leading to increased litigation for school districts regarding student-on-student sexual harassment, which can prove to be costly.

Regarding the first side of the problem, despite the major efforts to stop student-on-student sexual harassment in school, including sexual assault, these forms of sex discrimination are still a significant problem in K-12 schools throughout the nation. Students begin to experience student-on-student sexual harassment as early as elementary school. In a 2010 nationwide survey of elementary schools, nearly half of all teachers (48%) reported that they have heard students make sexist remarks at their school.⁴ Harassment based on failure to conform to sex stereotypes, which can also be a violation of Title IX, also starts in elementary school. In the same 2010 study, researchers found that one third of students (33%) have heard kids at school say that girls should not do or wear certain things because they are girls, and 38% have heard their peers say that boys should

⁴ *Id.*

not do or wear certain things because they are boys.⁵ Students who do not conform to traditional gender norms are more likely than their peers to say that they are called names, ridiculed, or bullied at school (56% versus 33%).⁶

Sexual harassment changes little as students enter middle and high school. In a nationwide survey of students in Grades 8-11, 81% reported experiencing sexual harassment during their school lives.⁷ In a recent survey of 7th-12th-grade students, nearly half (48%) experienced some form of sexual harassment during the 2010-2011 school year, with a vast majority of those students (87%) reporting that the harassment had a negative effect on them.⁸ Both studies found that girls were more likely than boys to have experienced harassment. Among lesbian, gay, bisexual, and transgender (LGBT) students, the numbers are even higher.⁹ In a study of LGBT students in Grades 6-12, 85% of the respondents reported being verbally harassed, and 40% reported being physically harassed at school because of their sexual orientation.¹⁰ Close to two thirds (64%) were verbally harassed because of their gender expression.¹¹ Another study found that LGBT youth were twice as likely to have been verbally harassed at school as their non-LGBT peers.¹²

⁵ *Id.*

⁶ Gay, Lesbian and Straight Education Network, *Playgrounds and Prejudice: Elementary School Climate in the United States* (2012).

⁷ AAUW Education Foundation, *Hostile Hallways: Bullying, Teasing and Sexual Harassment in School 4* (2001).

⁸ Catherine Hill and Holly Kearl, AAUW, *Crossing the Line: Sexual Harassment at School 2*, (2011).

⁹ National Women's Law Center, *The Next Generation of Title IX: Harassment and Bullying Based on Sex*, 2011 at 1.

¹⁰ *Id.*

¹¹ Gay, Lesbian and Straight Education Network, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in our Nation's School*, (2010).

¹² Human Rights Campaign, *Growing Up LGBT in America: HRC Youth Survey Report Key Findings*, (2012).

Sexual harassment can be extremely devastating for the victims, both in its emotional effect and in its effect on their education.¹³ Experiencing school as an unsafe place has been connected with poor academic performance, skipping school, and dropping out.¹⁴ To demonstrate, a recent survey found that nearly one third (32%) of students who were harassed reported not wanting to go to school as a result of the harassment, and girls were more likely than boys to report that harassment affected them in this way.¹⁵

Females who drop out of school due to sexual harassment experience long-term economic effects, which can be overwhelming. Young women who do not graduate from high school have higher rates of unemployment than do young men who drop out.¹⁶ Female dropouts who do find jobs make considerably lower wages than do male dropouts.¹⁷ Women who do not have a high-school diploma are more likely to rely on safety-net programs than are their male peers or men and women who have graduated from high school and college.¹⁸ It is already known that men at every level of education make more money than women with a similar educational background. This wage gap is particularly high among high-school dropouts. Typically, a woman who starts but does not finish high school is paid only 71% of what her male counterpart is paid.¹⁹ Female dropouts are more likely to live in poverty than both men and women with higher educational achievement.²⁰

¹³ National Women's Law Center, *The Next Generation of Title IX: Harassment and Bullying Based on Sex*, 2011 at 2.

¹⁴ AAUW Education Foundation, *Hostile Hallways: Bullying, Teasing and Sexual Harassment in school 4* (2001).

¹⁵ Catherine Hill and Holly Kearl, AAUW, *Crossing the Line: Sexual Harassment at School 2* (2011).

¹⁶ Bureau of Labor Statistics, *Current Population Study* (2011).

¹⁷ U.S. Census Bureau, *Current Population Survey*, 2011 Annual Social and Economic Survey.

¹⁸ National Women's Law Center, *The Next Generation of Title IX: Harassment and Bullying Based on Sex*, 2011 at 2.

¹⁹ U.S. Census Bureau, *Current Population Survey*, 2011 Annual Social and Economic Survey.

²⁰ *Id.*

Children raised in these situations may find it difficult to escape poverty themselves. As a consequence, the long-term economic impact of sex-based harassment on women and their families can be overwhelming.

The prevalence of student-on-student sexual harassment is so concerning that the Department of Education Office of Civil Rights (OCR) issued a “Dear Colleague” letter in April 2011 regarding sexual harassment. The OCR is the federal agency responsible for enforcing Title IX in schools that receive federal funds from the U.S. Department of Education. The OCR considers this letter a “significant guidance document” that should be followed as best practices when addressing student-on-student sexual harassment. The “Dear Colleague” letter highlights and reminds schools of their responsibilities under the federal statute Title IX of the Education Amendments of 1972.

As stated earlier as the other side of the problem, Title IX as a means of enforcement has evolved since its enactment in 1972. The evolution of Title IX’s enforcement was due mainly to the negative effects that sexual discrimination leaves upon its victims. With this enforcement, as well as known negative effects, comes inevitable litigation brought by the student victims of harassment. Litigation can prove to be costly to school districts. Juries have awarded monetary damages for Title IX liability in the range of \$27,000 to \$300,000 in a number of cases.²¹ These jury decisions can give school districts an idea of what students who can prove Title IX liability can receive.²² Then there

²¹ Juries have awarded damages of the following amounts: \$27,000; \$60,000; \$125,000; \$175,000; \$220,000; and \$300,000. *The Cost of Harassment 1*, ACLU, <http://www.aclu.org/files/pdfs/Igbt/schoolsyouth/costofharassment.pdf> (last visited Aug. 15, 2012) [hereinafter *The Cost of Harassment*]; see also *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258, 264 (6th Cir. 2000).

²² *The Cost of Harassment*, *supra* note 181, at 1.

are the cases that are settled out of court. In one case, the victim student received \$962,000 in the settlement agreement.²³ In another case, the victim student received \$1.1 million in the settlement agreement.²⁴ It should also be noted that there are also cases where victims seek, and are granted, summary judgment because the facts of the case are so one sided they didn't need to be tried.

School administrators need to have a strong understanding of school law and how it pertains to public education. Most administrators get at least one or two school law courses during their formal education. These classes are usually reserved for the more notable cases and most frequently used aspects of school law. Others school administrators learn through experience, which can result in either a positive or negative outcome. This will solely depend on the actions or inactions taken by the school administrator in a particular situation. A lot of times these decisions are made instinctively and are not based upon actual requirements of the law. This can also be the case with Title IX and the legal requirements to address student-on-student sexual harassment.

The framework for legal responsibility under Title IX for student-on-student sexual harassment comes from the 1999 landmark United States Supreme Court case *Davis v. Monroe*.²⁵ In *Davis*, the Supreme Court created a three-prong test intended to guide lower federal courts in the determination of a school district's responsibility for a Title IX violation due to its actions or inactions regarding student-on-student sexual harassment. It

²³ *Student: Know Your Rights*, Southern Poverty Law Center, <http://www.spicenter.org/what-wedo/lgbt-rights/students-know-your-rights> (last visited May 29, 2015).

²⁴ *Id.*

²⁵ *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

is the aim of this research to investigate the application of the *Davis* test and to analyze any patterns and/or findings to help school administrators understand and prevent Title IX liability if taken to court.

Significance of the Study

The Supreme Court decided *Davis* on May 24, 1999. This decision was the culmination of a series of U.S. Supreme Court decisions examining sexual harassment as a form of discrimination under Title IX. Notwithstanding the Supreme Court's attempt to protect children from unwanted sexual situations, through this decision *Davis* may have proven to be more confusing than helpful for lower courts to follow. In deciding *Davis*, the U.S. Supreme Court had to determine when a school district could be found liable for student-on-student sexual harassment under Title IX. Although the Supreme Court has articulated the standard of school liability for student-on-student sexual harassment, the lower federal courts have been left to determine the details according to the standard's substance.

The standard adopted in *Davis* is a three-prong test.²⁶ Each of the prongs must be present for a recipient of federal funds to be found liable for peer sexual harassment under Title IX. The test is:

1. The harassment must be so severe, pervasive and objectively offensive that it denies the victim of educational opportunities and benefits;

²⁶ See Tamar Meyouhas, *Eleventh Annual Review of Gender and Sexuality Law: Educational Law Chapter: Sexual harassment in Education*, 11 *Geo. J. Gender & L.* 297, 306 (2010). The author states that *Davis* formulated a three-factor standard for the school's Title IX liability, applicable in both teacher-student and student-student situations.

²⁶ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999).

2. The school must have actual knowledge of the harassment; and
3. The school must have remained deliberately indifferent to the harassment.

Many questions still remain with the particulars of the three-prong test. For example, how much harassment is required before it is considered “severe, pervasive, and objectively offensive?”²⁷ Who within the school district must have knowledge before the school board is deemed to have “actual knowledge?” Does a teacher with knowledge of the harassment satisfy the actual knowledge standard, or must it be an actual member of the school board? Can the person with knowledge be the principal, a custodian, or a school bus driver? What exactly must a school official do to avoid liability under the deliberate-indifference standard? What constitutes being “deprived of access to the educational opportunities or benefits provided by the school?”

These are just a few of the questions that *Davis* has left to the lower federal courts. At the time of this study, multiple cases concerning student-on-student sexual harassment have been decided since the Supreme Court decision in *Davis*. In each case, the lower federal court has attempted to determine the details of the elements of each standard of liability and fill the gaps left by *Davis*. In all of the cases decided to date, the lower federal courts have grappled with one or more of the three prongs in the *Davis* test in an effort to determine whether a school board should be found liable for student-on-student sexual harassment.

One question that needs to be answered is: How have the lower federal courts interpreted the *Davis* test with regard to school-board liability for student-on-student sexual

²⁷ *Id.*

harassment? This study's purpose is to determine the state of the law in the area of school-district liability for student-on-student sexual harassment under Title IX of the Education Amendments of 1972 since the Supreme Court decision of *Davis v. Monroe County Board of Education*.²⁸ Specifically, this study intends to survey the treatment of such liability in the nation's lower federal courts, specifically the federal court of appeals and federal district courts. Through this study's analysis of this issue, educators can become better able to recognize and address actionable peer sexual harassment in their schools and prevent Title IX liability.

Research Questions

This study investigated the following research questions:

1. How have lower federal courts interpreted the *Davis* decision regarding school-district liability for student-on-student sexual harassment?
2. What inferences can be gleaned from *Davis* and post-*Davis* case law to enable school districts to establish policies to address student-on-student sexual harassment to prevent liability?

²⁸ *Davis v. Monroe County Board of Education*. 526 U.S. 629 (1999).

Delimitations of the Study

This study analyzed judicial decisions focusing upon public schools in the U.S. Furthermore, all the decisions used in this study have come from the U.S. Supreme Court, U.S. circuit courts, and U.S. district courts. The initial search yielded 94 court cases citing the *Davis* decision. Of the 94 cases, 26 were used for this study. These cases were chosen because they met the parameters of this study. The parameters are that each case must have been a federal appellate court case, must have taken place in a K-12 public school, and must have been a case of student-on-student sexual harassment.

Cases from state courts were not included. Although state courts sometimes interpret federal laws, the federal courts' interpretations of federal law generally carry more persuasive weight. Rulings issued by federal courts are more authoritative interpretations of federal laws than those of state courts, and the U.S. Supreme Court has the final definitive say on issues regarding federal civil rights law.

Limitations of the Study

In this study I conducted an extensive search for federal court decisions pertaining to public school officials' and/or school districts' liability for student-on-student sexual harassment. However, because not all court decisions are published, it is possible that there is additional case law on this subject.

CHAPTER 2

LITERATURE REVIEW

A History of School Liability for Sexual Harassment

Sexual Harassment Suits Had Their Origins in the Workplace

Before sexual harassment became a legal issue in school, it first appeared as a legal cause of action in the employment field. The Civil Rights Act of 1964 included Title VII, a clause prohibiting employment discrimination based on race, sex, national origin, or religion.²⁹ Title VII applies to both men and women, but it was initially enacted in part as a way to protect women in the workplace.³⁰ This legislation opened the door for suits brought by women suffering from sexual harassment at work by providing a legal basis for their claims.³¹

In 1980, the Equal Employment Opportunity Commission (EEOC) released guidelines outlining what constituted sexual harassment in the workplace.³² These guidelines stated that sexual harassment was considered to be a form of sexual

²⁹ 42 U.S.C.A. § 2000e-2 (2006).

³⁰ *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

³¹ *Mentor Savings Bank, FSB. v. Vinson*, 477 U.S. 57, 64 (1986).

³² 29 C.F.R. § 1604.11(a) (2008). The regulations define sexual harassment as:

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

discrimination proscribed by Title VII. The EEOC definition of sexual harassment encompasses two types of harassment: *quid pro quo* harassment and hostile environment harassment.³³ *Quid pro quo* harassment exists “when submission to verbal or physical conduct of a sexual nature is an explicit term or condition of employment. It applies when a supervisor conditions a tangible benefit on sexual favors and punishes the subordinate who does not comply.”³⁴ *Quid pro quo* harassment is encompassed in the first two elements of the EEOC definition of sexual harassment.³⁵ The second type of harassment is “hostile-environment” harassment, which occurs when “supervisors and/or co-workers create an atmosphere that is ‘so infused with hostility toward members of one sex’ that it alters the working environment.”³⁶ Hostile-environment harassment is encompassed in the third element of the EEOC definition.³⁷

The Supreme Court in *Meritor Savings Bank v. Vinson* further delineated these two types of sexual harassment.³⁸ In this case, a female bank employee brought a sexual-harassment suit against the bank and her supervisor under Title VII, claiming that her supervisor coerced her into a sexual relationship by threatening her job.³⁹ In addition, the petitioner claimed that her boss “fondled her in front of other employees,” “exposed himself to her” in the women's restroom, and “forcibly raped her on several occasions.”⁴⁰ She

³³ “Quid pro quo” literally translates into “this for that.” Monica L. Sherer, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, n.31 (1993).

³⁴ Amy M. Rubin, *Peer Sexual Harassment: Existing Harassment Doctrine and Its Application to School Children*, 8 Hastings Women's L.J. 141, 143-44 (1997).

³⁵ 29 C.F.R. § 1604.11(a) (2008).

³⁶ Amy M. Rubin, *Peer Sexual Harassment: Existing Harassment Doctrine and Its Application to School Children*, 8 Hastings Women's L. J. 141, 143-44 (1997).

³⁷ n169 29 C.F.R. § 1604.11(a) (2008).

³⁸ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

³⁹ *Id.* at 60.

⁴⁰ *Id.*

stated that her fear of her supervisor prevented her from utilizing the bank's complaint procedure, which actually required her to report the problem to her supervisor, the very individual responsible for the harassment.⁴¹ The supervisor denied the allegations in their entirety.

The district court ultimately denied relief, concluding that there had been no sexual harassment. The holding stated that if there had been a sexual relationship, that relationship had been consensual, and therefore, the woman's job had not been in jeopardy.⁴² The court further explained that even if it had found harassment, the bank, in this instance, was not liable because it had never been notified.⁴³

The Court of Appeals for the District of Columbia Circuit reversed, both on the finding that there had been no harassment and on the determination that the bank was not liable.⁴⁴ The case was remanded based on the fact that the district court had considered only *quid pro quo* harassment and neglected to consider hostile-environment harassment.⁴⁵ Regarding the bank's liability, the appellate court held the bank to a strict liability standard and stated "an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct."⁴⁶

The Supreme Court reiterated the fact that hostile-environment harassment is justified as a cause of action. Loss or threat of loss of a monetary nature--*quid pro quo*

⁴¹ *Id.* at 61.

⁴² *Id.* at 57.

⁴³ *Id.* at 62.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

harassment--is not required for sexual harassment to occur. However, the Court qualified its ruling by stating that in order for the conduct to rise to the level of hostile-environment sexual harassment, “it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.”⁴⁷

Regarding employer liability, the Supreme Court declined to set a “definitive rule” that would hold the employer to a strict liability standard.⁴⁸ Rather, it concurred with the view expressed in the EEOC amicus brief, stating that courts determining employer liability in sexual-harassment suits should “look to agency principles for guidance in this area.”⁴⁹ The EEOC wrote that in cases of hostile-environment harassment, the employer should not be held to a strict liability standard, which would make him or her responsible for any and all harassment on the part of his employees, regardless of knowledge.⁵⁰ Instead, the EEOC recommended that the Court consider whether the employee had the opportunity to seek help and show evidence that the employer had “actual knowledge of the harassment.”⁵¹

Sexual Harassment Expands to the Educational Setting

Sexual-harassment law was extended to the school system by Title IX. Title IX of the Education Amendments of 1972 prohibits sex discrimination in schools that receive federal education funding.⁵² Title IX mirrors the language of Title VI of the Civil Rights

⁴⁷ *Id.* at 67.

⁴⁸ *Id.* at 72.

⁴⁹ *Id.*

⁵⁰ *Id.* at 71.

⁵¹ *Id.*

⁵² U.S. Const. Amend. IX § 1.

Act of 1964.⁵³ The purpose of Title VI was to end discrimination based on race, color, or national origin in any program receiving federal funding, including educational settings. Title IX was enacted to end sex discrimination in educational institutions receiving federal funds. The author of Title IX, Senator Birch Bayh, stated, “Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the 1964 Civil Rights Act, but unfortunately, the prohibition does not apply to discrimination on the basis of sex.”⁵⁴ Bayh said that he wanted to guarantee, through legislation, that all Americans, regardless of race, color, religion, national origin, or sex, could “enjoy the educational opportunity they deserve.”⁵⁵ Bayh also said, “Sex discrimination reaches into all facets of education, including admission, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.”⁵⁶ As it was originally written, Title IX was limited to administrative enforcement actions brought by the federal government.⁵⁷ However, by 1979, the U.S. Supreme Court, in the case *Cannon v. University of Chicago*, recognized that Title IX could be used as a cause of action for employees and students seeking money damages for sexual discrimination in educational programs receiving federal funds.⁵⁸

⁵³ U.S. Const. Amend. VI § 1.

⁵⁴ C. Scott Williams, *Schools, Peer Sexual Harassment, Title IX, and Davis v. Monroe County Board of Education*, 51 *Baylor L. Rev.*, Fall 1999, at 1087, 1091.

⁵⁵ C. Scott Williams, *Schools, Peer Sexual Harassment, Title IX, and Davis v. Monroe County Board of Education*, 51 *Baylor L. Rev.*, Fall 1999, at 1087, 1091.

⁵⁶ C. Scott Williams, *Schools, Peer Sexual Harassment, Title IX, and Davis v. Monroe County Board of Education*, 51 *Baylor L. Rev.*, Fall 1999, at 1087, 1091.

⁵⁷ Paul M. Secunda, *At The Crossroads of Title IX and a New “Idea”*: Why Bullying Need Not Be “A Normal Part of Growing Up” for Special-Education Children, 12 *Duke J. Gender L. & Pol’y*, 2005, at 1, 7.

⁵⁸ Kathy Lee Collins, *Student-to-Student Sexual Harassment Under Title IX: The Legal and Practical Issues*, 46 *Drake L. Rev.*, 1998, at 789, 793.

*Cannon v. University of Chicago*⁵⁹

In *Cannon v. University of Chicago*,⁶⁰ a female student who was denied admission to the medical school at the University of Chicago brought a Title IX claim, stating that the school was discriminating against her on the basis of sex.⁶¹ The U.S. District Court for the Northern District of Illinois dismissed the complaint.⁶² Cannon appealed the district court's decision to the Seventh Circuit Court of Appeals, which affirmed the dismissal by the district court.⁶³ The Seventh Circuit Court held that the plaintiff had no private cause of action under Title IX.⁶⁴ Cannon eventually applied for *certiorari* by the U.S. Supreme Court. The Supreme Court granted *certiorari* and reversed and remanded the holding, stating that a Title IX plaintiff had a private right cause of action.⁶⁵

In coming to its decision, the Supreme Court reviewed the legislative history of Title IX and found that Congress had, first, intended to end the use of federal funds in discriminatory programs and, second, wanted to provide citizens protection from discriminatory practices.⁶⁶ The Supreme Court inferred that Congress had intended to provide a private right of action under Title IX, although the language authorizing a private cause of action was not included in Title IX.

⁵⁹ *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

⁶⁰ *Id.*

⁶¹ *Cannon v. University of Chicago*, 406 F. Supp. 1257, 1258.

⁶² *Id.*

⁶³ *Cannon v. University of Chicago*, 406 F.2d. 1063, 1064.

⁶⁴ *Id.*

⁶⁵ *Cannon v. University of Chicago*, 441 U.S. 677, 695 (1979).

⁶⁶ *Id.* at 694.

The Supreme Court determined that a victim of sexual harassment was a member of the class that Congress had intended to protect with Title IX.⁶⁷ The Court also determined that Congress had patterned Title IX after Title VI, which contained a private-right cause of action, and that a private cause of action would advance the objective of Title IX by ensuring that individual citizens would be protected from sex-based discrimination.⁶⁸ The Supreme Court reasoned that the university received federal funding and the plaintiff had been excluded from the university on the basis of her sex.⁶⁹ These facts were enough to establish a cause of action under Title IX. Therefore, the Supreme Court reversed and remanded the lower court's decision and held that the plaintiff could pursue a private cause of action under Title IX against the university.⁷⁰

*Franklin v. Gwinnett*⁷¹

Thirteen years after *Cannon*, the Supreme Court took the next developmental step in the advancement of Title IX litigation, the actual-knowledge standard.⁷² In *Franklin v. Gwinnett*,⁷³ a female high-school student alleged that she was sexually harassed on at least three occasions by a teacher.⁷⁴ She claimed that the teacher forcibly kissed her in the school parking lot, telephoned her at home, engaged her in sexually explicit conversations,

⁶⁷ *Id.* at 695.

⁶⁸ *Id.* at 702.

⁶⁹ *Id.* at 704.

⁷⁰ *Id.* at 716.

⁷¹ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

⁷² Kathy Lee Collins, *Student-to-Student Sexual Harassment Under Title IX: The Legal and Practical Issues*, 46 Drake L. Rev., 1998, at 789, 793.

⁷³ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

⁷⁴ *Id.* at 63 (1992).

and interrupted one of her classes to take her to a private office, where he sexually assaulted her.⁷⁵ Franklin alleged that other teachers and administrators knew about the harassment but took no action to stop the sexual harassment and discouraged her from pressing charges against the teacher.⁷⁶

In spite of the serious allegations, the U.S. District Court for the Northern District of Georgia dismissed Franklin's complaint, stating that "Title IX does not authorize an award of damages."⁷⁷ Franklin appealed the case to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the lower court's decision.⁷⁸ Franklin then petitioned the U.S. Supreme Court for *certiorari*. The Supreme Court granted *certiorari* and ultimately reversed the circuit court's decision and stated that "where legal rights have been invaded and federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."⁷⁹ Therefore, the Supreme Court recognized that monetary damages were an appropriate remedy for a Title IX violation.

The *Franklin* decision is important, not just because it recognized damages as an appropriate remedy but also because it analogized sexual harassment in the workplace to sexual harassment in the schools. The Supreme Court stated,

Unquestionably, Title IX places on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex. We believe the same rule should apply when a teacher sexually harasses and abuses a student.⁸⁰

⁷⁵ *Id.*

⁷⁶ *Id.* at 64 (1992).

⁷⁷ *Id.*

⁷⁸ *Id.* at 63 (1992).

⁷⁹ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992).

⁸⁰ *Id.*

*Gebser v. Lago Vista*⁸¹

The question that still remains from *Franklin* is how and when a school district is responsible for the sexual harassment of students by a third party. It is possible for a school district to be held liable, but what constitutes liability for teacher-on-student sexual harassment?⁸² In 1998, the Supreme Court finally determined the standard of liability that applies to teacher-on-student sexual harassment in school in *Gebser v. Lago Vista*.⁸³ In this case, Alida Gebser was in eighth grade when she joined a book discussion group led by Frank Waldrop, a teacher at Lago Vista High School.⁸⁴ Gebser alleged that during the discussion sessions Waldrop made sexually suggestive comments.⁸⁵ Upon entering high school, Gebser was enrolled in one of Waldrop's classes. During class, Waldrop continued to make sexually suggestive comments and began to direct the comments toward Gebser.⁸⁶ In the spring of her freshman year, Waldrop kissed and fondled Gebser when visiting her at home.⁸⁷ On a number of occasions throughout the school year, the two had sexual intercourse. This relationship continued into the following year, and although the two often engaged in sexual activity during school hours, it never took place on school property.⁸⁸

⁸¹ Asaf Orr, *Harassment and Hostility: Determining the proper standard of liability for discriminatory peer-to-peer harassment of youth in schools*, 29 Women's Rights L. Rep., Winter/Spring 2008, at 117, 130.

⁸² Callie R. Owen, *Silence Broken: Gebser's new standard of school liability for Title IX sexual harassment*, 87 Ky. L. J., Spring 1998/1999, at 815, 818.

⁸³ Asaf Orr, *Harassment and Hostility: Determining the proper standard of liability for discriminatory peer-to-peer harassment of youth in schools*, 29 Women's Rights L. Rep., Winter/Spring 2008, at 117, 130.

⁸⁴ *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 277. (1998).

⁸⁵ *Id.*

⁸⁶ *Id.* at 278.

⁸⁷ *Id.*

⁸⁸ *Id.*

During this time, parents of other students complained to the administration about what they believed were inappropriate comments made by Waldrop during his courses.⁸⁹ The principal did discuss the complaints with Waldrop, but he failed to notify the school superintendent, who was the school district's Title IX coordinator. A few months later, a police officer discovered Waldrop and Gebser engaged in sexual activity and arrested Waldrop.⁹⁰ In the wake of the arrest, the school immediately terminated Waldrop's employment.

The Gebasers eventually brought a Title IX claim against the school district in the U.S. District Court for the Western District of Texas for the sexual harassment of their daughter. The district court rejected the Title IX claim, stating that in order to be liable, a school district must have actual notice of the alleged harassment.⁹¹ The district court held that in this case "the evidence presented was inadequate to raise a genuine issue on whether the school district had actual or constructive notice that Waldrop was involved in a sexual relationship with a student."⁹² The case was appealed to the Court of Appeals for the Fifth Circuit, which affirmed the district court's opinion and held that a school district is not liable for teacher-on-student sexual harassment under Title IX unless the school board or the proper employee knew or should have known of the abuse and that person had the power to end the abuse and failed to do so.⁹³

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 279.

⁹² *Id.*

⁹³ *Id.*

The case was eventually appealed to the U.S. Supreme Court. The Supreme Court responded to the lower court's decisions, centering its opinion on the question of whether a school should be held liable for the acts of employees when the school itself did not know about the harassment.⁹⁴ In the opinion, the Court distinguished Title IX from Title VII, stating that although Title VII's goal is to "eradicate discrimination throughout the economy" and to compensate victims, "Title IX focuses more on protecting individuals from discriminatory practices carried out by recipients of federal funds."⁹⁵ The Supreme Court held that damages were appropriate only when an official who, at a minimum, has the authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf also has actual knowledge and fails to respond adequately.⁹⁶ Restated, the Supreme Court's decision created a two-prong test to determine liability, and that test states that (a) a qualified school official must have actual knowledge and (b) the school official's failure to stop the harassment must equate to deliberate indifference.⁹⁷

*Davis v. Monroe County Board of Education*⁹⁸

The case law that the Supreme Court had decided to 1998 clearly identified sexual harassment as a form of sex discrimination actionable under Title IX. However, the Supreme Court had not yet decided whether schools could be liable for student-on-student

⁹⁴ Asaf Orr, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 Women's Rights L. Rep., Winter/Spring 2008, at 117, 130.

⁹⁵ *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286-287. (1998).

⁹⁶ *Id.* at 290.

⁹⁷ *Id.* at 291-292.

⁹⁸ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

sexual harassment and under what standard. Not until 1999 did the Supreme Court finally set forth the requisite legal standard in *Davis v. Monroe County Board of Education*⁹⁹ for student-on-student sexual harassment. The lasting impact of the *Davis* opinion is the Supreme Court's three-prong test determining school-district liability for student-on-student sexual harassment that violates Title IX.

The facts of the case are as follows. Lashonda Davis was a fifth-grade student at Hubbard Elementary School in Monroe County, Georgia. According to Lashonda's mother, in December 1992, a classmate named G.F. tried to touch Lashonda's breast and genitals and made inappropriate statements, such as, "I want to get in bed with you" and "I want to feel your boobs."¹⁰⁰ Two more verbal incidents occurred on or around January 4 and January 20, 1993. Lashonda reported the incidents to her mother and her classroom teacher. After hearing about the incidents, Lashonda's mother contacted the teacher. Lashonda's teacher assured the mother that the principal had been told about the incidents, but Lashonda's mother claimed that no action was taken against the boy.¹⁰¹

In February, G.F. allegedly placed a doorstop in his pants and acted in a sexually suggestive manner toward Lashonda during physical education (PE) class.¹⁰² Lashonda told the PE teacher about the incident, but no discipline was issued to the boy. One week later, G.F. again harassed Lashonda in PE under the supervision of another classroom teacher. Lashonda claimed that she again reported the incident to that teacher. Lashonda's

⁹⁹ *Id.* at 633.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 634.

¹⁰² *Id.* at 633.

mother even followed up with both teachers to discuss the incidents. In March, G.F. harassed Lashonda again, but this time it took place in the hallway. Lashonda claimed that he rubbed his body against her in a sexually suggestive manner, and she again reported the incident to her teacher.¹⁰³

The harassment finally ended in mid-May when Lashonda's mother, Davis, pressed charges against G.F. through the police department.¹⁰⁴ Lashonda's mother decided to pursue this course of action because the school failed to prevent the harassment of Lashonda. G.F. was eventually charged and convicted of sexual battery for his misconduct and behavior toward Lashonda.¹⁰⁵ Lashonda alleged that she had been affected in many ways because of the harassment. Lashonda's grades dropped, and her father had discovered a suicide note in April 1993.¹⁰⁶ In May 1994, Davis filed suit against the school district in the U.S. District Court for the Middle District of Georgia for not protecting her daughter from the harassment. In her complaint, she alleged that the district, a recipient of federal funding for purposes of Title IX, was deliberately indifferent to the boy's harassment of Lashonda, creating an intimidating and hostile school environment in violation of Title IX.¹⁰⁷

The U.S. District Court for the Middle District of Georgia dismissed the Title IX claim. In its analysis, the court held that the school could not be held liable for the sexual harassment of Lashonda because the school itself did not commit the sexual harassment.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 634.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 636.

Because another student, and not the school, committed the harassment, there was no connection to Title IX liability.¹⁰⁸

Davis appealed the district court's decision to the U.S. Court of Appeals for the Eleventh Circuit, and a three-judge panel reversed the district court's decision. The court of appeals recognized Title IX as a vehicle for relief when a school official's failure to take action against reported peer sexual harassment creates a hostile environment.¹⁰⁹ The school district filed a motion for rehearing, and the court of appeals sitting *en banc* affirmed the district court's dismissal.¹¹⁰ The court of appeals, *en banc*, determined that Title IX does not provide adequate grounds for damages in a private cause of action, even in situations in which the peer harassment creates a hostile learning environment and school officials knowingly fail to act to prevent the harassment.¹¹¹ In its reasoning, the court of appeals held that Title IX was passed pursuant to Congress's legislative authority under the Spending Clause; therefore, recipients must be provided adequate notice of the conditions they are assuming upon acceptance.¹¹² The court reasoned that the language of Title IX adequately notifies recipients that they must stop employees from engaging in discriminatory conduct, but does not give sufficient notice of a duty to prevent peer sexual harassment.¹¹³

After the *en banc* court of appeals decision, Davis petitioned for *writ of certiorari* to have the U.S. Supreme Court review the court-of-appeals decision. *Certiorari* was granted

¹⁰⁸ *Aurelia D. V. Monroe County Board of Education*, 862 F. Supp. 636, 364 (M.D. Ga. 1994).

¹⁰⁹ *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1195 (11th Cir. 1996).

¹¹⁰ *Id.* at 1188

¹¹¹ *Id.* at 1186.

¹¹² *Id.* at 1399.

¹¹³ *Id.* at 1401.

so the Supreme Court could resolve the conflict in the lower courts regarding two specific matters of law. The first matter of law is whether a recipient of federal education funding can be held liable for damages under Title IX in any circumstances of discrimination in the form of student-on-student sexual harassment.¹¹⁴ The second matter of law is whether a school district's failure to respond to student-on-student sexual harassment in its schools allows a victim to file suit for monetary damages.¹¹⁵

Justice O'Connor wrote the majority opinion for the Court. In a 5-to-4 vote, the majority answered in the affirmative on both issues in question. The majority's opinion focused on the Supreme Court's previous decisions in *Gebser* and *Franklin* regarding claims for Title IX liability, what the purpose of Title IX is, and implications of the language that Title IX puts on recipients. In its conclusion, the Court held that a recipient of federal education funding might be liable for damages for discrimination, under Title IX, for a school's unreasonable response to student-on-student sexual harassment.¹¹⁶

The Court first defined the scope of a recipient's responsibility under Title IX, requiring that schools proactively attempt to cease sexual harassment. Using the "deliberately indifferent" standard the United States Supreme Court applied in *Gebser*, the Court stressed that liability does not stem from the harassment from a third party.¹¹⁷ Liability comes from the federal-funding recipient's own decision to remain deliberately indifferent to student-on-student sexual harassment of which it had actual knowledge.

¹¹⁴ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 639 (1999).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 643.

Deliberate indifference to actual notice of sexual harassment amounts to an intentional violation of Title IX.¹¹⁸

Furthermore, the Court restated that the use of the deliberate-indifference standard should be applied narrowly to instances in which the funding recipient has substantial control over the harasser and the authority to take remedial action.¹¹⁹ The Court pointed out that the custodial nature of the school setting effectively demands school officials to proscribe acceptable norms of conduct that must be adhered to by students, and the adequate disciplinary measures must be taken in response to the conduct that goes against these norms.¹²⁰

The Court also held that a private cause of action can be taken against recipients who fail to fulfill their duty under Title IX.¹²¹ It was stated firmly that the regulatory scheme surrounding Title IX, along with the Department of Education's requirement that recipients monitor the conduct of third parties in order to prevent discrimination, provides funding recipients with adequate notice that they may be liable for failing to respond to discriminatory acts of certain nonagents, such as students.¹²²

In concluding that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment, it was also stressed that the Supreme Court's decision should not force administrators to adhere to rigid disciplinary procedures and directed lower courts to "refrain from second guessing the disciplinary decisions made by school

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 646.

¹²⁰ *Id.* at 643.

¹²¹ *Id.* at 644.

¹²² *Id.* at 641-642.

administrators.”¹²³ The majority rejected directly the dissent’s mischaracterization of the standard as schools needing to provide remedy to victims of peer harassment.¹²⁴ The majority clarified by stating that a recipient’s response should be deemed deliberately indifferent only if it was “clearly unreasonable in light of the known circumstances.”¹²⁵ The majority also criticized the dissent’s¹²⁶ assumption that by providing relief under Title IX, situations would occur in which victims would demand specific action to prevent student-on-student harassment and threaten suits if they were not followed.¹²⁷

Finally, the majority focused on the level of severity to which the harassment must rise before a recipient would be held liable. In deciding this, the Court focused its analysis on the terms of Title IX in order to adhere to its objectives.¹²⁸ The Court stated that Title IX not only protects students from discrimination but it also ensures that they are not excluded from participating in, or denied the benefits of, programs or activities offered by an educational institution.¹²⁹ Consequently, in order to have a claim for damages, the harassment must be so overt and offensive that it physically deprives or “so undermines and detracts from the victims’ education experience” that it effectively causes a denial of equal access to the recipient’s resources.¹³⁰

¹²³ *Id.* at 648.

¹²⁴ *Id.* at 648-649.

¹²⁵ *Id.* at 648.

¹²⁶ In the dissent, Justice Kennedy criticized the majority’s decision for allowing the federal government to intrude and set policy in an area traditionally controlled by states.

¹²⁶ He saw the ruling by the majority more of a threat to the safeguards established in federal laws, rather than a victory for a student subjected to severe harassment as school officials remained deliberately indifferent.

¹²⁷ *Id.*

¹²⁸ *Id.* at 650.

¹²⁹ *Id.*

¹³⁰ *Id.*

In the conclusion, the majority strongly criticized the dissent for failing to appreciate the limits set by the majority, which should not be wrongly interpreted for providing damages for simple name-calling and playground teasing.¹³¹

After the Court communicated the standards established by the majority that determine when a school is liable for student-on-student sexual harassment under Title IX, the Court applied the standards to the facts in *Davis*. The Court determined that Davis sufficiently demonstrated a causal link between the misconduct of G.F. and the severe decline in Lashonda's grades to provide the requisite showing of a potential denial of equal access to survive a dismissal.¹³² The Court remanded the case to the lower court and directed the appellate court to be cautious in applying the standard set by the majority, recognizing its limits when examining whether the pervasiveness, severity of the actions, and the recipients' alleged knowledge and deliberate indifference entitled Lashonda to relief.¹³³

The lasting impact of the *Davis* case is the Supreme Court's three-prong test to determine school-district liability for student-on-student sexual harassment that violates Title IX. All prongs of the test are required to establish liability. The three-prong test is:

1. Was the harassment so severe, pervasive, and objectively offensive that it denied the victim of his/her educational opportunities?
2. Did the school have actual knowledge of the harassment?
3. If the school had knowledge, did it remain deliberately indifferent?

¹³¹ *Id.* at 652.

¹³² *Id.* at 653.

¹³³ *Id.* at 654.

Relevant Case Law Post-*Davis*

Since the ruling in *Davis*, the U.S. Supreme Court has not heard another case of student-on-student sexual harassment. This leaves researchers to look toward the lower federal courts to determine how the standards established in *Davis* have been used to determine Title IX liability. The initial search yielded 94 court cases citing the *Davis* decision. Of the 94 cases, 26 were used for this study. These cases were chosen because they met the parameters of this particular study. The parameters are that they each case had to have been a federal appellate court case, must have taken place in a K-12 public school, and must have been a case of student-on-student sexual harassment. These parameters were chosen because they narrowly identify the types of institutions and administrators that this research aims to assist.

The majority of the following post-*Davis* case law reviewed is from federal appellate court cases applying *Davis* to determine school district liability. It should be noted that there are a number of district court cases that have been decided and reviewed.¹³⁴

¹³⁴ *Mosley v. Beaumont Independent School District*, S.W.2d 934 (1999); *Manfredi v. Mount Vernon Board of Education*, 94 F. Supp. 2d 447 (2000); *Vaird v. School District of Philadelphia*, 2000 WL 576441 (2000); *Clark v. Bibb County BOE*, 174 F. Supp. 2d 1369 (2001); *Johnson v. Independent School District No. 47*, 194 F. Supp. 2d 939 (2001); *Benjamin v. Metropolitan School District*, CAUSE NO. IP00-0891-C-T (2002); *Burwell v. Pekin Community High School*, 213 F. Supp. 2d 917 (2002); *Schroeder v. Maumee BOE*, 296 F. Supp. 2d 869 (2003); *Doe v. Bellefonte Area School District*, No. 4:CV-02-1463 (2003); *Soriano v. City of New York BOE*, 01 CV 4961 (2004); *Theno v. Tonganoxie Unified School Dist. No. 464*, 394 F. Supp. 2d 1299 (2005); *Patenaude v. Salmon River Central School District*, 3:03-CV-1016 (2005); *Doe v. Southeastern Greene School District*, Civil Action No. 03-717 (2006); *Shaposhnikov v. Pacifica School District*, No. C 04-01288 SI (2006); *Drews v. Joint School District No. 393*, CASE NO. CV04-388-N-EJL (2006); *Annamaria v. Napa Valley Unified School District*, No C 03-0101 VRW (2006); *Doe v. Derby Board of Education*, Case No. 3:04cv01452 (2006); *Ricco v. New Haven BOE*, 467 F. Supp. 2d 219 (2006); *Moore v. Marion Community BOE*, CAUSE NO. 1:04-CV-483 (2006); *Martin v. Swartz Creek Community Schools*, 419 F. Supp. 2d 967 (2006); *Bruning v. Carroll Community Schools*, 486 F. Supp. 2d 892 (2007); *Doe v. Brimfield Grade School*, 552 F. Supp. 2d 816 (2008); *Levarge v. Preston BOE*, 552 F. Supp. 2d 248 (2008); *Halvorson v. Independent School District*, 552 F. Supp. 2d 248 (2008); *Doe v. Hamden BOE*, Case No. 3:06-cv-1680 (2008); *M. v. Stamford*, CASE NO. 3:05-cv-0177 (2008); *Roe v. Gustine Unified School District*, 678 F. Supp. 2d 1008 (2009); *Brodsky v. Trumbull*,

These cases were not utilized in this study because these courts must turn to their circuit court of appeals for binding guidance. Federal appellate courts were chosen because they have binding authority over the federal district courts in their circuit, which is why many of those cases are not a part of this literature review.

In addition, at the end of this section, several federal district court cases addressing peer-on-peer gender nonconformity are reviewed because this issue has yet to reach the federal appellate courts.¹³⁵ These cases are significant to review because this is an emerging issue for schools.¹³⁶

The decisions are discussed in chronological order and give a detailed description of the facts in each case. This detailed focus on the facts is significant for school administrators because the application of the *Davis* test is fact-specific.

Civil No. 3:06cv1947 2009; *Doe v. Coventry*, *BOE* 630 F. Supp. 2d 226 (2009); *Sauerhaft v. Board of Education*, 05 Civ. 09087 (PGG) (2009); *Schaefer v. Las Cruces Public School*, 716 F. Supp. 2d 1052 (2010); *Marcum v. BOE of Bloom-Carroll*, 727 F. Supp. 2d 657 (2010); *Mary v. Pittsburgh Public Schools*, CA 9-1082 (2010); *Pratt v. Indian River School District*, 803 F. Supp. 2d 135 (2011); *Tyrrell v. Seaford Union Free School District*, 792 F. Supp. 2d 601 (2011); *Mathis v. Wayne County BOE*, 782 F. Supp. 2d 542 (2011); *Doe v. Trico Community School District*, 2012 U.S. Dist. LEXIS 48349 (S.D. Ill., Apr. 5, 2012); *Carmichael v. Galbraith*, 2012 U.S. Dist. LEXIS 138206 (N.D. Tex., Sept. 26, 2012); *Pemberton v. West Feliciana*, 2010 U.S. Dist. LEXIS 8871 (M.D. La., Jan. 29, 2010); *Doe v. BOE of Prince George's County*, 888 F. Supp. 2d 659 (2012); *Brown v. Cypress Fairbanks School District*, 2012 U.S. Dist. LEXIS 72347 (S.D. Tex., May 23, 2012); *Price v. Scranton School District*, CIVIL ACTION NO. 11-0095 (2012); *P.K. v. Caesar Rodney High School*, C.A. No. 10-cv-783 (GMS) (2012); *KF and AF v. Monroe Woodbury Central District*, 12-CV-2200 (ER) (2012); *Preston v. Hilton Central School District* 876 F. Supp. 2d 235 (2012)

¹³⁵ *Jesse Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081 (2000); *Ray v. Antioch Unified School District*, 107 F. Supp. 2d 1165 (2000); *Joel Snelling and Derek Snelling v. Fall Mountain Regional School District, et al.*, No. Civ. 99-448, 2001 U.S. Dist. LEXIS 3591, at *1 (DNH March, 21, 2001).

¹³⁶ Kathleen Conn, *Bullying and Harassment: A Legal Guide for Educators* 91 (Gene R. Carter ed., ASCD 2004) (2004).

*Adusumilli v. Illinois Institute of Technology*¹³⁷

In an unpublished opinion, the Seventh Circuit Court became the first to hear an appeal of a post-*Davis* peer sexual harassment case. Because this case was unpublished, there are few publicly known facts. The facts that are known are as follows: Adusumilli alleged that on 12 separate occasions, four male professors and six male students (who were also police officers) had subjected her to sexual harassment.¹³⁸ She also alleged that after complaining about the harassment, she was given “unfair grades.”¹³⁹ The district court ruled that she had failed to state a Title IX claim and dismissed her complaint. She appealed.

The four alleged acts of harassment by the professors involved “ogling” and “unwanted touching” of her arm and back.¹⁴⁰ Five of the eight student acts involved similar touching of the hand, shoulder, back and leg. One of the other three incidents involved a kiss on the cheek at graduation. The last two incidents involved touching of the top and bottom of Adusumilli’s breast.¹⁴¹ She complained about only two of the incidents to school officials: the touching of her right shoulder by a student named “Sam” and the touching of her breast by another student.¹⁴² The court stated that the Illinois Institute of Technology (ITT) could have known of the incidents only if Adusumilli had complained about them to school officials, as required under *Gebser* and *Davis*.¹⁴³ Adusumilli never alleged that any

¹³⁷ *Adusumilli v. Illinois Institute of Technology*, 1999 WL 528169 (7th Cir. July 21, 1999).

¹³⁸ *Id.* at 2.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 6.

of the professors were themselves school officials. The court then looked at the two incidents that were actually reported. The court saw those as single incidents of student misconduct. Each incident ceased as soon as it occurred and was not repeated.¹⁴⁴ The court stated that it was convinced that neither incident involved “pervasive” and “offensive” harassment of the type that would be actionable under Title IX.¹⁴⁵

The court also disposed of the retaliation claim by reviewing her complaint and deciding that Adusumilli herself recounted a “variety of grounds” for the poor grades. She had, in essence, pleaded “herself out of court.”¹⁴⁶ The district court’s determination was affirmed.

Murrell v. School District No. 1, Denver, Colorado

The Tenth Circuit Court was next to address a post-*Davis* peer sexual harassment case in *Murrell v. District No. 1 Denver Colorado*,¹⁴⁷ decided in 1999, the same year as *Davis*. The facts of the case are as follows: Penelope Jones was born with spastic cerebral palsy. This disability impaired her ability to use and control the right side of her body. She was also deaf in her left ear, and testing revealed that she was developmentally disabled. Penelope began school at George Washington High School in October 1993, where, because of her special needs, she was placed into the special-education program. Within this special-education program, another special-education student, John Doe, was known to

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 10.

¹⁴⁶ *Id.* at 11.

¹⁴⁷ *Penelope Murrell on behalf of her daughter Penelope Jones v. District No. 1 Denver Colorado*, 186 F.3d 1238, 1243.

have significant disciplinary and behavioral problems, which included sexually inappropriate conduct.¹⁴⁸ Even the boy's mother had conveyed her concerns about her son's potential to harm others to teachers and the principal. She also informed them that he was receiving treatment for his problems. Even with the school's knowledge of John's sexually inappropriate conduct and behavioral problems, the school assigned him to a job within the school as the "janitor's assistant."¹⁴⁹ This job gave him the freedom to move throughout the building freely and gave him access to unsupervised areas in the school.

Beginning in November 1993, the teachers found that John had been displaying sexually inappropriate behavior toward Penelope. According to the lawsuit, John sexually assaulted Penelope on several occasions during this time. It was alleged that John took her to a secluded area of the building and sexually assaulted her.¹⁵⁰ Penelope, who was menstruating at the time, bled and vomited on herself during the assault.¹⁵¹ The janitor walked in on the assault and told John and Penelope to clean up the mess and took them back to class.¹⁵² The janitor informed the teacher of the incident, and the teacher tied clothing around Penelope's waist to cover up the blood. The teacher told her mother that she had menstrual blood on her clothes, but the teacher never told the mother about the assault. Penelope endured another assault by John on at least one other occasion. Penelope even informed the teacher about the assault, but she was told not to tell her mother and to

¹⁴⁸ *Id.*

¹⁴⁹ M. Brent Case, *Warning Bell: The Inherent Difficulties of Responding to Student-On-Student Sexual Harassment in Colorado Middle Schools*, 76 U. Colo. L. Rev., Summer 2005, at 813, 827.

¹⁵⁰ *Penelope Murrell on behalf of her daughter Penelope Jones v. District No. 1 Denver Colorado*, 186 F.3d 1238, 1243.

¹⁵¹ *Id.*

¹⁵² *Penelope Murrell on behalf of her daughter Penelope Jones v. District No. 1 Denver Colorado*, 186 F.3d 1238, 1243.

forget that the incident ever happened.¹⁵³ After the assaults, Penelope began to display suicidal behaviors that eventually led to her placement in a psychiatric hospital. At this point, Penelope's mother found out about the sexual assaults on her daughter by John. Her mother immediately informed the school about the incidents, but the teacher denied that they had ever happened. Penelope's mother even left a message for the principal detailing the assault, but the principal never responded to her call or investigated the allegations.¹⁵⁴

Penelope returned to school in December 1993 after her release from the hospital. Her return was short-lived due to another assault at the hands of John and the teasing she had to endure from other students regarding the incidents. Her mother tried again to contact the principal but was still unsuccessful in eliciting a response. She eventually learned from a teacher that a meeting was taking place with John's mother to discuss the sexual assault on Penelope and that the principal would be attending, and she was able to schedule herself into the meeting.¹⁵⁵ In the meeting, Penelope's mother alleged that the teachers and the principal were hostile toward herself and her daughter and alleged that the principal suggested that the sexual contact between the two students was consensual.¹⁵⁶ However, Penelope was legally incapable of consenting to the conduct with John, and John even admitted assaulting her after she resisted him. Even after the admission by John, the principal declined to investigate the assault. The school district also did not notify law enforcement about the assaults after they were reported.¹⁵⁷

¹⁵³ *Id.* at 1244.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Penelope's mother eventually brought suit against the school district in the U.S. District Court for the District of Colorado on behalf of her daughter Penelope. She claimed that the school district had violated Title IX based on the school districts "alleged knowledge of and failure to remedy the sexual harassment of Penelope by John."¹⁵⁸ Because the Supreme Court's ruling in *Davis* had yet to be decided, the district court based its ruling on the Fifth Circuit Court's opinion in the 1996 case *Rowinsky v. Bryan Independent School District*,¹⁵⁹ which held that agency principles do not apply under Title IX and a school district is not liable for the conduct of a harassing student because the student is not an agent of the school.¹⁶⁰ Subsequently, the case was appealed to the U.S. Court of Appeals for the Tenth Circuit.

After the oral argument on the appeal, the Tenth Circuit Court of Appeals decided to abate the case pending the Supreme Court's review of *Davis*.¹⁶¹ Relying on the Supreme Court's ruling in *Davis*, the Tenth Circuit Court began its analysis by noting that *Davis* states that a recipient of federal funds may be liable in damages under Title IX only for its own misconduct, but liability would only apply if the district remained deliberately indifferent to acts of harassment of which it has actual knowledge.¹⁶² The purpose of the standard is to make a school district liable only when it has made a conscious decision to permit sex discrimination in its programs. Liability would not lie where those with

¹⁵⁸ *Id.* at 1242.

¹⁵⁹ *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996).

¹⁶⁰ *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1011 (5th Cir. 1996).

¹⁶¹ *Penelope Murrell on behalf of her daughter Penelope Jones v. District No. 1 Denver Colorado*, 186 F.3d 1238, 1245.

¹⁶² *Id.* at 1245.

authority to respond to the harassment lacked knowledge of it. Without knowledge, a district can do nothing to remedy the harassment.

The Tenth Circuit Court echoed *Davis* and noted that the deliberate-indifference standard makes sense only to the extent that a funding recipient has some control over the alleged harassment.¹⁶³ Moreover, a recipient's liability is limited to "situations wherein it exercises substantial control over both the harasser and the context in which the known harassment occurs."¹⁶⁴

In summarizing the *Davis* requirements, the court noted that:

A plaintiff must allege three factors to state a claim of school district liability under Title IX. She must allege that the district (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive, and objectively offensive that it deprived the victim of access to the educational benefits or opportunities provided by the school. This limited rule imposes liability only on those school districts that choose to ignore Title IX's mandate for equal educational opportunities.¹⁶⁵

The task, therefore, was to apply this standard to the case at hand.

In light of the district's argument stating that Title IX does not impose an affirmative duty on educational institutions receiving federal financial assistance to prevent students from sexually harassing or assaulting one another, the Tenth Circuit Court noted that this contention "misconstrues the nature of liability Penelope's mother sought to impose."¹⁶⁶ As outlined in *Davis*, a person suing for damages under Title IX must show that a school-district official had actual knowledge of the repeated sexual assault of

¹⁶³ *Penelope Murrell on behalf of her daughter Penelope Jones v. District No. 1 Denver Colorado*, 186 F.3d 1238, 1244.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1247.

¹⁶⁶ *Id.*

Penelope and did nothing to attempt to stop them. Penelope's mother sought exactly what the plaintiff in *Davis* sought: to hold the district liable for its own intentional conduct that violated the clear terms of Title IX.

The Tenth Circuit Court next considered whether the school district had actual knowledge sufficient to hold it liable for peer sexual harassment. It first noted that *Davis* had not expressly determined who within a school district had to have knowledge of the alleged sexual harassment before the district became liable for failing to respond appropriately.¹⁶⁷ However, the court relied on the Supreme Court's declaration that liability would attach if the harassment took place during school activities or under the supervision of school employees.¹⁶⁸ The Tenth Circuit Court further noted the Supreme Court's reference to *Doe v. University of Illinois*, which held that a school district is liable if "a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the harasser and the power to take action that would end such abuse but failed to do so."¹⁶⁹

The court ruled that Ms. Murrell had sufficiently alleged actual knowledge and deliberate indifference. Taking the allegations as true, Ms. Murrell had telephoned the principal to discuss the harassment when her daughter was in the hospital. The principal, therefore, had actual knowledge of the assaults, at least on those occasions, but took no remedial action. In fact, the principal refused to investigate the matter or discipline Doe.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (citing *Doe v. Univ. of Ill.*, 138 F.3d 653, 668 [7th Cir. 1998]).

The court found that there was “little room for doubt that the highest-ranking administrator at the school exercised substantial control of Doe and the school environment during school hours, and so her knowledge could be charged to the school district.”¹⁷⁰ The court concluded that the principal had responded to the harassment unreasonably “in light of known circumstances.”¹⁷¹ Her complete refusal to investigate the claims of sexual harassment constituted deliberate indifference on the part of the district. This would satisfy the “actual notice” and deliberate-indifference standard established by *Davis*.

The Tenth Circuit Court next considered the “severe, pervasive, and objectively offensive/ denial of educational opportunities” standard. Taking Penelope’s allegations as true, the court easily concluded that the harassment was severe, pervasive, and objectively offensive. The court also had little difficulty in concluding that Penelope was denied her educational opportunities because of the school’s deliberate indifference. The court came to this conclusion noting that she had become a danger to herself, she had to leave school to be hospitalized, the principal suspended her, and finally, she became homebound because of the harassment. The Tenth Circuit Court had determined that Murrell had satisfied each of the *Davis* standards to establish school-district liability for student-on-student sexual harassment and reversed the district court’s decision.

¹⁷⁰ *Murrell*, 186 F.3d at 1247.

¹⁷¹ *Id.* at 1248.

Soper v. Hoben

During the same year, 1999, the Sixth Circuit Court was the next court to decide a post-*Davis* student-on-student sexual harassment case. *Soper v. Hoben*, similar to *Murrell*, involved the harassment, sexual molestation, and rape of a female special-education student by her classmates.¹⁷² This case took place at Oxbow Elementary and Muir Middle School of the Huron Valley Public Schools (HVPS). The plaintiff in this case was a little girl named Renee. Renee was a mentally retarded foster child. She received special-education services under the label of “educable mentally impaired” (EMI) because of her disabilities.¹⁷³ In 1993, when Renee was a student at Oxbow, Renee reported to her mother that she and one of her male classmates left the school boundaries and he kissed her. Ms. Soper, Renee’s mother, reported the incident to the classroom teacher.

In May 1994, during Renee’s individual education plan (IEP) meeting before entering Muir Middle School, it was decided that Renee should continue in the EMI program.¹⁷⁴ Ms. Soper claimed that she informed the new teacher about the incident with the boy at Oxbow, but the teacher denied she was ever told. In August 1994, at the beginning of the school year, Ms. Soper attended an initial meeting with the teacher. During this meeting, Ms. Soper expressed further concern about the same boy and claimed that the boy had an abusive family background.¹⁷⁵ She requested that her daughter not be left alone with the boy. The school denied that the boy was a risk because of outcomes of

¹⁷² *Soper v. Hoben*, 195 F.3d 845, 848 (6th Cir. 1999).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 849.

psychological evaluations and prior observations. During a parent-teacher conference on the evening of October 6, 1994, Ms. Soper raised some concerns she had regarding her daughter. When Ms. Soper returned home, Renee told her that two other boys had fondled her breasts and vagina at school in the back of the classroom when the teacher was outside in the hallway.¹⁷⁶ She also told her mother that the two boys were fondling her on the bus. Most alarming, Renee told her mother that the boy from the Oxbow incident had raped her at school.¹⁷⁷

Ms. Soper reported the incidents to the teacher and the principal. She also reported the incidents to the police. The teacher reported the incidents to Child Protective Services and Renee's other teachers. The school conducted an investigation and created a plan to protect Renee in school. Part of this plan was to increase supervision, install windows in the door in the classroom, put an extra aide in the classroom, create a hall-pass system, and provide an aide on the bus. All three boys in the incidents were required to attend counseling on how to function socially with the opposite sex.¹⁷⁸ The police conducted a criminal investigation that ended in criminal charges against the boy who had raped Renee but not the two other boys. Upon receiving this information, the school suspended the boy who had raped Renee but did not punish the other two boys.¹⁷⁹ Renee's parents then filed a lawsuit with the U.S. District Court for the Eastern District of Michigan against the teacher, principal, and school district for violating Title IX.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 850.

¹⁷⁹ *Id.* at 850.

At trial, the district court granted the school district's motion for summary judgment. Soper appealed. The court of appeals noted that to prevail on a claim of student-on-student sexual harassment, a plaintiff must meet the standards established in *Davis*.

The court of appeals determined that the rape, sexual abuse, and harassment that Renee allegedly endured did meet "severe, pervasive, and objectively offensive/denial of educational opportunities" standards.¹⁸⁰ However, on the other prongs of the *Davis* test, the court determined that the school did not have actual knowledge of the harassment until after the fact. Additionally, the Sopers failed to show that, once the school knew of the harassment, the school acted with deliberate indifference.

Once they did learn of the incidents, they quickly and effectively corrected the situation. Defendants immediately contacted the proper authorities, investigated the incidents themselves, installed windows in the doors of the special-education classroom, placed an aide in Harmala's classroom, and created student counseling sessions concerning how to function socially with the opposite sex. Prior to ascertaining the results of the internal investigations and police criminal investigation, defendants offered to increase the supervision of Renee while in school and provide her an escort. However, Ms. Soper chose to keep Renee at home. Ultimately, when defendants were advised of the results of the criminal investigation, they expelled Boy A. Regardless of Ms. Soper's choice not to allow Renee to return to school despite the accommodations, the HVPS District and the HVPS Board did correct the situation as soon as they had notice of the incidents.¹⁸¹

In its explanation, the court next noted that the plaintiff in *Davis* was able to show that the school district subjected her to discrimination because it failed to respond in any way over a period of five months to complaints of in-school misconduct perpetrated by a

¹⁸⁰ *Id.* at 855.

¹⁸¹ *Id.*

fellow student.¹⁸² In comparison, the prompt and thorough response by school officials to the Sopers' complaint was not clearly unreasonable in light of the known circumstances.¹⁸³ Accordingly, the court of appeals affirmed the district court's granting of summary judgment for the school district.¹⁸⁴

*Reese v. Jefferson School District No. 14J*¹⁸⁵

In March 2000, the Ninth Circuit had its opportunity to apply the *Davis* test. The facts are as follows: On Tuesday, May 27, 1997, four days after the last day of classes for seniors, Jefferson High School sponsored "senior skip day" and transported members of the senior class to a local state park.¹⁸⁶ While at the park, the plaintiffs Monica Reese, Janel Reese, Cassi Harr, and Corina Pruett hid in the stalls of the boys' bathroom. When a group of senior boys came into the bathroom to change clothes, the four girls ran out of the stalls and threw water balloons at the boys.¹⁸⁷

Prior to skip day, the school administrators had warned the students that if anyone behaved inappropriately on the trip their participation in commencement would be jeopardized.¹⁸⁸ The commencement was scheduled for Friday, May 30. The vice principal suspended the girls on May 28 after he received several complaints and after interviewing several students about the incident.¹⁸⁹

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Reese v. Jefferson School District No. 14J*, 208 F.3d (9th Cir. 2000).

¹⁸⁶ *Id.* at 739.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

The school board held a special meeting on the morning of May 30, which the girls attended and where they were joined by parents and counsel. The girls admitted hiding in the boys' bathroom but argued that they were retaliating for several acts of harassment committed by the boys during the school year.¹⁹⁰ Prior to May 28, the plaintiffs had never reported any harassment, and there was no evidence that the school district actually knew prior to May 28 of the boys' alleged harassment of the girls.¹⁹¹ The boys did not admit to any misconduct, and the school district conducted no further investigation. The school board concluded the special meeting by upholding the suspension of the girls.

The girls filed their claims under Title IX, alleging that the school district was liable for the harassment allegedly committed by the boys during the year and for excluding the plaintiffs from commencement. The U.S. District Court for the District of Oregon granted summary judgment because the plaintiffs did not raise a genuine issue of material fact.¹⁹² The plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit.

In March 2000, the Ninth Circuit Court held that Jefferson School District was not liable for the alleged harassment of female students by male students. The school district was "not deliberately indifferent to sexual harassment of which it had actual knowledge" in such a way as to "cause the plaintiffs to undergo harassment or make them liable or vulnerable to it."¹⁹³

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 740.

The girls admitted that they had not reported the harassment to anyone in authority until May 28, 1997, after they themselves were threatened with disciplinary action.¹⁹⁴ By that time, the school year had ended. There was no evidence that any harassment occurred after the school district learned of the girls' allegations. Under *Davis*, the school district cannot be deemed to have "subjected" the plaintiffs to the harassment.¹⁹⁵ The Ninth Circuit Court also determined that the district court did not err in concluding that evidence of an alleged threat by one female student to one of the girls, which was purportedly witnessed by a teacher, did not raise an issue of material fact.¹⁹⁶ This incident did not put the school district on actual notice that the male students were committing worse and ongoing alleged harassment or that the plaintiffs were being harassed so severely as to be deprived of educational benefits.¹⁹⁷

*Vance v. Spencer County Public School District*¹⁹⁸

As if *Soper v. Hoben* had not offered the Sixth Circuit Court enough of a challenge in the post-*Davis* era, it was faced, once again, with another peer sexual harassment case in *Vance v. Spencer County Public School District*,¹⁹⁹ which took place the same year, 2000. Alma McGowen enrolled as a sixth grader in the Spencer County Public School District in

¹⁹⁴ *Id.*

¹⁹⁵ See also *Burtner v. Hiram College*, 9 F. Supp. 2d 852, 857 (N.D. Ohio 1998) (holding that school was not deliberately indifferent by failing to act on report of harassment filed two days before graduation).

¹⁹⁶ *Id.* at 740.

¹⁹⁷ See also *Gebser*, 524 U.S. at 279 (holding that the school district's actual knowledge of inappropriate teacher comments did not put school district on actual notice that teacher had sexual relations with student).

¹⁹⁸ *Vance v. Spencer County Public School Dist.*, 231 F.3d 253 (6th Cir. 2000).

¹⁹⁹ *Id.*

November 1992. The sexual harassment and bullying began for Alma at Spencer School from the beginning of the year. During her second day of school, Alma alleged that a group of first graders yelled, “Oh there’s that German gay girl.”²⁰⁰ Alma reported the incident to a school counselor, who then spoke with the students and gave a presentation on accepting others. During the same school year, Alma was the focus of another reported taunt. When she was riding on the bus, a high-school student asked her to describe oral sex to him. Alma immediately told her mother and the school counselor. The school counselor reported the incident to the principal, who then suspended the student from the bus.²⁰¹

The following year, her seventh-grade year, the harassment and taunts reportedly continued for Alma. In school, a student who was identified as the school principal’s nephew approached Alma in front of other students and asked her if she was gay.²⁰² Alma reported the incident to the assistant principal, who tried to explain the incident away. He claimed that the boys thought she was cute and suggested that she should just be friendly.²⁰³ On top of this, Alma was repeatedly shoved into walls, her book bag was grabbed, and students stole and destroyed her homework. All these incidents were reported to the academic counselor, who referred Alma to the youth advocate. The youth advocate told Alma that he would see what could be done about the situation. However, there was nothing he could do.

²⁰⁰ Susan Hanley Kosse and Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 Duke J. Gender L. & Pol’y, Spring 2005, at 53, 60.

²⁰¹ *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 256 (6th Cir. 2000).

²⁰² *Id.*

²⁰³ *Id.*

During the fall of the same year, in gym class, a male classmate called her and other female students “whores” and “motherfuckers,” hit them, snapped their bras, and grabbed their buttocks.²⁰⁴ The same boy took materials from Alma’s bag. In one incident, Alma tried to get her pen back from the student, and he stabbed her in the hand with the pen.²⁰⁵ This incident was reported to the gym teacher, but the boy, who was a school board member’s son, was not disciplined.²⁰⁶

In the spring semester of Alma’s seventh-grade year, she was approached by a group of students during a bathroom break. Two of the students in this group held her hands as the others grabbed her hair and tried to pull off her skirt.²⁰⁷ During this assault, one of the students told Alma that he was going to have sex with her, and he began to take off his pants.²⁰⁸ Another student intervened and helped Alma. Alma did not report the incident to a teacher this time, but when she went home that evening, she explained the incident to her mother. Her mother wrote a letter to the principal explaining what happened. The principal’s response was to have the classroom teacher speak to Alma and the five students involved in the incident. Beyond having the meeting, no other disciplinary action was taken against the students.²⁰⁹

²⁰⁴ Julie A. Klusas, *Providing Students with the Protection They Deserve: Amending the Office of Civil Rights’ Guidance or Title IX to Protect Students from Peer Sexual Harassment in Schools*, 8 Tex. F. on C.L. & C.R., Spring 2003, at 91, 91.

²⁰⁵ *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 256 (6th Cir. 2000).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Julie A. Klusas, *Providing Students with the Protection They Deserve: Amending the Office of Civil Rights’ Guidance or Title IX to Protect Students from Peer Sexual Harassment in Schools*, 8 Tex. F. on C.L. & C.R., Spring 2003, at 91, 91.

²⁰⁹ *Vance v. Spencer County Public School Dist.*, 231 F.3d 253, 257 (6th Cir. 2000).

During the fall of her eighth-grade year, Alma continued to be harassed by other students. Alma took it upon herself to notify the principal of her harassment. The principal had the youth advocate meet with her to discuss the situation. During this meeting, Alma gave the youth advocate a list of students who were consistently harassing her. The youth advocate met with these students, but the harassment still continued. It reached a point where Alma claimed she was propositioned or touched inappropriately in virtually every class.²¹⁰

On August 31, 1995, Alma withdrew from school. She had been diagnosed with depression, and there had been no sign of the harassment stopping at school. On July 1, 1996, Alma's family filed her complaint in the District Court for the Western District of Kentucky. They alleged that the school district subjected her to intentional sexual discrimination as a result of peer conduct in violation of Title IX of the Education Amendments of 1972.²¹¹ The district was granted summary judgment. The case would be heard by the Sixth Circuit Court on appeal.

Comparing the facts in *Davis* to those before it, the Sixth Circuit Court stated that, "as in *Davis*, Alma had submitted abundant evidence of both verbal and physical sexual harassment."²¹² According to the court, Alma had not only demonstrated several instances of severe and pervasive harassment, but she had also shown circumstances of being denied an education. Specifically, the Sixth Circuit Court pointed to the examples of Alma being stabbed in the hand and having her shirt yanked off and her hair pulled.²¹³ The court also

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 258.

²¹³ *Id.*

noted that other students had attempted to disrobe her. This evidence, declared the court, satisfied the severity and pervasiveness requirement of *Davis*.²¹⁴

Moving to the notice requirement, the Sixth Circuit Court found this prong satisfied because the district had irrefutable knowledge of Alma's harassment, as both she and her mother had made repeated numerous reports to the district's teachers and principals.²¹⁵

With regard to the question of deliberate indifference, the court held that the district had not responded reasonably to known acts of harassment. As an example, the court cited the fact that a student had stabbed Alma in the hand and the only response by the district had been a lecture to the offending student.²¹⁶ The court also noted that two male students had held Alma as another took off his pants and others had pulled her hair and tried to rip off her clothes, and the district's response had been a lecture and no report of the incident to law enforcement.²¹⁷ These three incidents alone, not to mention the fact that the district had continued to use the same ineffective methods, apparently to no avail, reflected a deliberate indifference in light of the known circumstances.²¹⁸

Ultimately, the Sixth Circuit Court found that Alma had shown that she had experienced sexual harassment so severe, pervasive, and objectively offensive that it deprived her of education opportunities. She had also shown that the district had actual knowledge of the harassment and responded with deliberate indifference. Thus, the court held, Alma should have prevailed on her Title IX claim.²¹⁹

²¹⁴ *Id.*

²¹⁵ *Id.* at 261-262.

²¹⁶ *Id.* at 262.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

*Gabrielle v. Park Forest*²²⁰

Three years later, the U.S. Court of Appeals for the Seventh Circuit heard *Gabrielle v. Park Forest*. The facts of the case are as follows: Gabrielle M. began kindergarten in Mrs. Rosellie's classroom at Beacon Hill School in the Park Forest-Chicago Heights School District on August 31, 1998.

Gabrielle alleged that Jason L., another student in her class, began "bothering" her on the first day of class.²²¹ Gabrielle did not tell the teacher, principal or her parents about Jason's behavior. Starting in September, Gabrielle's parent recognized that Gabrielle did not want to go to school and was crying at the door when it was time to go.²²² Her parents also claimed that she began wetting her bed and having nightmares at this time as well.²²³

Beginning in October, the teaching assistant in Gabrielle's class saw Jason jump on Gabrielle's back at recess. She separated the two, and Jason was suspended from recess for the rest of the week.²²⁴ Later in the month, Mrs. Roselli saw Jason lean against Gabrielle with his hands on his crotch.²²⁵ In response to the incident, Mrs. Roselli removed Jason from the room and took him to the principal's office.²²⁶ The principal was not in his office, so Mrs. Roselli put Jason in time out, away from other students, and described Jason's behavior to the teaching assistant. Later that day, a student told a teaching assistant that Jason unzipped his pants and showed other students his underwear while her back was

²²⁰ *Gabrielle v. Park Forest*, 315 F.3d 817.

²²¹ *Id.* at 818.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 819.

²²⁵ *Id.*

²²⁶ *Id.*

turned.²²⁷ Again, Mrs. Roselli again took Jason to the principal's office and informed the principal of both incidents that had occurred that day.²²⁸ The principal told Jason that his behavior was inappropriate and told him not to do it again.²²⁹ Mrs. Roselli and Jason then returned to class, and again, Jason was separated from the other students. When school was over, the teaching assistant called Jason's mother and told her to call the principal about the incidents that day.²³⁰

During the same week, Jason again unzipped his pants in class. The teaching assistant separated Jason from the rest of the class. This time, Jason left his seat and unzipped his pants in front of other boys.²³¹ Jason was taken to the principal's office, and the principal called Jason's mother. As a consequence for the behavior, Jason received a half hour of after-school detention.²³²

A week later the teaching assistant noticed that Jason and a classmate had their hands down each other's pants during story time.²³³ The teaching assistant immediately called the students over to her. At this time, the teaching assistant learned that another girl was also putting her hands down other students' pants. After the teaching assistant learned of this, the students were sent to the school psychologist, and during the meeting with the school psychologist, the students were told that their behavior was inappropriate and that they should tell their parents or teachers when such things occurred.²³⁴

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

The next day, Gabrielle's mother went to the school to talk with the principal. After the meeting, Gabrielle's mother took her to lunch to speak with her privately, at which time Gabrielle told her she did not want to go back to school because Jason had been doing "nasty stuff" to her since her first day.²³⁵

After returning to school, Gabrielle's mother told the teaching assistant about her conversation and that Gabrielle had recently developed problems with nightmares and bedwetting.²³⁶ That day, she also asked the principal to move Gabrielle to a different classroom. Not only did the principal move Gabrielle, but he also suspended Jason from school for two days.²³⁷ The next day, Gabrielle's mother asked the principal that Jason switch classrooms instead of Gabrielle. Initially the principal resisted, but eventually transferred Jason after the mother threatened to remove Gabrielle from the school.²³⁸ It was also agreed that Jason would have different lunch and recess times.

Jason was separated from the other students by lunch supervisors for a total of two weeks.²³⁹ After that, Jason returned from isolation and rejoined the other students for lunch, which included Gabrielle's class. Jason and Gabrielle never ate together.²⁴⁰ Despite this effort, it was alleged that during lunch, Jason told Gabrielle that he "wanted to play with her funny ways" at recess.²⁴¹ Gabrielle alleged that she also told her teacher and principal that Jason continued to bother her. Gabrielle's mother also alleged that she

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 820.

²⁴¹ *Id.*

complained to the principal. According to the principal, he promptly rescheduled lunch for Gabrielle's class so that Jason and Gabrielle would not go to lunch or recess at the same time.²⁴²

In early November, Gabrielle was experiencing bedwetting, insomnia, nightmares, and loss of appetite, so her parents took her to her pediatrician.²⁴³ The doctor referred her to a counselor, who diagnosed Gabrielle with acute stress disorder and separation anxiety due to Jason's behavior toward her.²⁴⁴

Sometime in the spring of 1999, Gabrielle's parents asked the school district to transfer her to another school. The school district agreed, and Gabrielle began first grade at Algonquin School.²⁴⁵

At this time, Gabrielle's parents brought suit in the U.S. District Court for the Northern District of Illinois, Eastern Division, against the principal for intentional infliction of emotional distress and her school district under Title IX of the Education Amendments of 1972, alleging that that Jason's conduct amounted to sexual harassment.

The court evaluated the district's response to Jason's behavior and found the response to be adequate.²⁴⁶ The court found, therefore, that summary judgment was appropriate on Gabrielle's federal claim.

Gabrielle appealed her case to the U.S. Court of Appeals for the Seventh Circuit. On appeal, Gabrielle argued that the district court improperly granted summary judgment

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 821.

on her Title IX sexual harassment claim. Before the appeals court evaluated whether the school district's actions amounted to deliberate indifference, *Davis* required them to examine the student-on-student harassing conduct itself to determine whether it was "so severe, pervasive, and objectively offensive" that it had a "concrete, negative effect" on the victim's access to education.²⁴⁷ The court identified a threshold question in this case of whether a five- or six-year-old kindergartner can ever engage in conduct constituting "sexual harassment" or "gender discrimination" under Title IX.²⁴⁸ The court stated that common sense, at least, would reject any such extension of Title IX. Nevertheless, it is not necessary to determine whether six-year-old Jason should carry the label of "sexual harasser" as it can be assumed *arguendo* that Jason's conduct was "sexual harassment."²⁴⁹

Assuming that Jason's conduct amounted to "sexual harassment," bringing it within the realm of Title IX, the court stated that an action under this statute "will lie only for sexual harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to educational opportunity or benefit."²⁵⁰ In its analysis, the court determined that most of the conduct alleged by Gabrielle was "so vague and unspecific that it could not provide a basis to determine whether that conduct was severe, pervasive, and objectively offensive harassment."²⁵¹ Consequently, the court asserted, Gabrielle could not avoid summary judgment by asserting general allegations that Jason "bothered" her by doing "nasty stuff."²⁵² The court concluded, "In the context of peer harassment between

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 822.

²⁵¹ *Id.*

²⁵² *Id.*

five- and six-year-olds, such allegations are as indicative of teasing and name-calling as they are of potentially actionable harassment, and thus, they provided no support for Gabrielle’s claim.”²⁵³ The court also did not believe that she avoided summary judgment because of the “unspecific testimony” that Jason wanted to play with her “funny ways” at recess.²⁵⁴ Specific details are “necessary to evaluate the severity and pervasiveness of the conduct, not to mention other requisite elements of a Title IX deliberate-indifference claim, such as actual knowledge.”²⁵⁵

The court then turned to the specific instances of inappropriate conduct alleged by Gabrielle and reported to school officials. This included Jason’s jumping on Gabrielle’s and other students’ backs and kissing each other, Jason pulling his pants down in front of other students, the computer-room incident, and the story-time incident.²⁵⁶ The court ruled that the evidence in the record showed that the students involved were unaware of the sexual nature of their behavior.²⁵⁷ This was confirmed by the school psychologist, who determined that the children were “unaware of the seriousness” of their actions.²⁵⁸ In turn, the courts determined that the children, then, were not engaging in knowingly sexual acts, a fact that at a minimum detracts from the severity and offensiveness of their actions.²⁵⁹

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See, e.g., *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 454-55 (S.D.N.Y. 2000) (finding a single incident of offensive touching between first graders insufficient to rise to the level of severe, pervasive, and objectively offensive conduct given the *Davis* cautionary statement that it was “unlikely Congress would have thought such behavior sufficient . . . in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment” [citing *Davis*, 526 U.S. at 652-53]).

²⁵⁶ *Id.* at 823.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

Furthermore, an action under Title IX exists when the harassment alleged denies a victim equal access to education. For example, the harassment must have a “concrete, negative effect” on the victim’s education.²⁶⁰ Some of the examples listed by the court include “dropping grades, becoming homebound or hospitalized due to harassment, or physical violence.”²⁶¹ Here, the court concluded that “there was no evidence that Gabrielle was denied access to an education. Although she was diagnosed with some psychological problems, the record showed that her grades remained steady and her absenteeism from school did not increase.”²⁶²

The court stated that “if they were to decide Jason’s actions were severe, pervasive, and objectively offensive sexual harassment that had a concrete, negative effect on Gabrielle’s access to education, they were not convinced that the school district’s response to known harassment was clearly unreasonable.”²⁶³ Examining the school district’s response to the alleged conduct, the court agreed with the district court’s conclusion that the school district’s actions were not clearly unreasonable and therefore did not equate to deliberate indifference.²⁶⁴

The record revealed that the school district’s response to known incidents of Jason’s inappropriate conduct was not clearly unreasonable.²⁶⁵ Jason was disciplined after each reported or observed instance, and steps were taken to prevent future inappropriate

²⁶⁰ *Id.*

²⁶¹ See *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248-49 (10th Cir. 1999); see *Vance v. Spencer County Public Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 824.

conduct.²⁶⁶ Gabrielle, however, claimed that the actions taken by the school were insufficient to protect her from further unwanted contact with Jason during lunch and recess.²⁶⁷ Gabrielle argued that in order for the school not to act with deliberate indifference, the school district must have effectively ended all interaction between the two students to prevent conclusively any further harassment.²⁶⁸ The court reiterated that *Davis* does not require funding recipients to remedy peer harassment. All that *Davis* requires is to show that the school had not acted clearly unreasonably in response to known instances of harassment. Each disciplinary action and intervention the school district took in response to Jason's conduct, most notably the decisions to move him to another class and eventually to grant Gabrielle's request for a school transfer, were not clearly unreasonable as a matter of law.²⁶⁹

The court concluded, "Taking into account the ages of the children involved, their apparent lack of knowledge of the nature of their actions, and the lack of impact on Gabrielle's ability to attend and perform at school, the court found that the alleged harassment was not so severe, pervasive, and objectively offensive that it denied Gabrielle access to educational opportunities."²⁷⁰ Even if it was, the school district's response was not so clearly unreasonable as to render it liable under Title IX.²⁷¹ The judgment of the district court therefore was affirmed.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

*Hawkins v. Sarasota County School Board*²⁷²

In the same year, 2003, the U.S. Court of Appeals for the Eleventh Circuit would decide a similar case, *Hawkins v. Sarasota County School Board*. The facts are as follows: Jane Doe I and Jane Doe II were second-grade students in Barbara Cyphers's class at North Toledo Blade Elementary School at the start of the 1998-99 school year.²⁷³ Jane Doe III joined the class in January 1999. During that year, William T. Coulson was the principal of North Toledo.

John Doe, the alleged harasser, apparently was expelled from a private school for striking a female student.²⁷⁴ At this point, he was enrolled by his parents at Toledo Blade. He was placed in Cyphers's class in November 1998. As soon as he joined the class, John Doe allegedly began a pattern of harassing conduct toward the girls.²⁷⁵

It was alleged that not long after he joined the class, John Doe would cross his hands, gesture to his genitals, and tell the three girls to "suck it."²⁷⁶ In the lunchroom, he would hold two fingers up to the girls, which apparently meant "meet me in bed in two seconds."²⁷⁷ He also made comments that he wanted to "suck the girls' breasts till the milk came out," that he wanted the girls to "suck the juice from his penis," and that "he wanted the girls to have sex with him."²⁷⁸ On the playground, John would chase the girls and try to touch them on their chests and to kiss them.²⁷⁹ He also would try to grab Jane Doe III and

²⁷² *Hawkins v. Sarasota County School Board*, 322 F.3d 1279.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1281.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 1282.

²⁷⁹ *Id.*

look up her skirt while at the bus stop. He would also jump onto her and rub his body on hers.²⁸⁰ The girls claimed that this conduct took place over a period of several months.²⁸¹ Although none of the girls' grades appeared to suffer, two of them said that on four or five occasions they faked being sick in order not to go to school.²⁸² Their parents testified that they cried more frequently, appeared anxious, and were reluctant to go to school.²⁸³

School personnel admitted that they had received complaints about John Doe, but none of the staff stated that they saw him engage in behavior that was sexual.²⁸⁴ Cyphers testified that she received complaints that he was being "annoying" to the other children, tapping his pencil, and distracting them from doing their work.²⁸⁵ Cyphers testified that "some time near the end of the school year, three girls, Jane Doe II and two girls not involved with this suit, told me that John Doe was being 'disgusting.'"²⁸⁶ Cyphers stated that "John Doe had been saying 'I love you' and 'will you marry me' to the girls," and she referred to the conduct as "natural things in second grade."²⁸⁷ She also stated that "it was not until she had spoken with Jane Doe III's mother that [she] had been informed of any of the explicit things John Doe had said or done."²⁸⁸

The three girls testified that they had consistently described John Doe's behavior to Cyphers and were ignored by Cyphers. Jane Doe I stated that she "told Cyphers that John

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

Doe was being ‘nasty’ not long after he first exhibited harassing behavior.”²⁸⁹ Jane Doe II stated that, “Early in the year, I told Cyphers that John Doe was being ‘disgusting’ and asked to have my seat moved.”²⁹⁰

Jane Doe III testified that one day after she arrived at Toledo Blade she informed Cyphers that John Doe had been following her. She also alleged that during recess that day she had told Cyphers that John Doe was being gross, referring to him touching her groin.²⁹¹ She also alleged that she told Cyphers that John Doe had told her to “suck his dick” on a separate occasion, to which she was told to sit down.²⁹²

Jane Doe III’s mother contacted both Coulson and Cyphers, and in this conversation, Cyphers told her that the school was aware of John Doe’s behavior and that they were working with John Doe’s parents to try to resolve the issues.²⁹³ Upon learning of the harassment of Jane by John, Coulson contacted John Zoretich, director of Sarasota County Elementary Schools, and was told to “follow through” on the allegations.²⁹⁴ For the harassment, John Doe was suspended for a week and, upon his return, had a week of “in-school” suspension, for which he sat at a desk in the office and had escorts take him to the lunchroom and bus at the end of the day.²⁹⁵

In June 1999, Coulson received notification from an attorney representing the three girls’ families that the school had not rectified John Doe’s conduct and they had filed suit

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 1283.

²⁹⁵ *Id.*

with the U.S. District Court for the Middle District of Florida for violating the girls' rights under Title IX. The district court granted summary judgment in favor of the school board ruling that the complaints of Jane Doe I and Jane Doe II were too general to provide notice of the sexual nature of John Doe's harassment.²⁹⁶ On the other hand, the court did believe Jane Doe III, accepting the testimony as truth, in that she expressly and repeatedly told her classroom teacher about the specifics of the behavior; the district judge believed that notice to the teacher constituted actual knowledge on the part of the school board.²⁹⁷ Confirming that actual notice was present, the court found that the teacher and other school personnel were not deliberately indifferent to the harassment and that the girls were not deprived of access to the educational opportunities or benefits provided by the school.²⁹⁸ In arriving at his decision concerning notice, the district judge relied upon language from the Tenth Circuit Court's opinion in *Murrell v. Sch. Dist. No. 1, Denver, Colorado*.²⁹⁹ The parents appealed the district court's decision.

²⁹⁶ *Id.* at 1285.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ The complaint in *Murrell* alleged that the school principal had actual notice of the harassment and, applying *Davis*, the Tenth Circuit Court stated that it found little room for doubt that the principal's knowledge could be charged to the school district. The court then noted that the complaint also alleged that the girl's teachers had actual knowledge of the harassment and not only refused to remedy it but participated in concealing it by telling her not to tell her mother and failing to tell the girl's mother themselves. The court stated that "it is possible that these teachers would also meet the definition of 'appropriate persons' for the purposes of Title IX liability if they exercised control over the harasser and the context in which the harassment occurred." As it was reviewing the granting of a motion to dismiss, the Tenth Circuit Court accepted as true the allegation that the teachers were invested with the authority to halt the sexually assaultive behavior. The dissent in *Murrell* viewed the majority's analysis as "unnecessarily broad" inasmuch as it implied that a single teacher's inaction might in some circumstances be enough to trigger Title IX liability (Anderson, J. dissenting). Pointing out that a single teacher's misconduct was not enough to subject a recipient to liability in *Gebser*, the *Murrell* dissent considered it "an open question after *Davis* whether a single teacher's indifference is ever sufficient for recipient liability" *Id.*

The Eleventh Circuit Court began its review by exploring the issue of whether notice to a teacher constitutes actual knowledge on the part of a school board. To find an answer to the question, the court examined how Florida organizes its public schools, the authority and responsibility granted by state law to administrators and teachers, the school district's discrimination policies and procedures, and the facts and circumstances of the particular case.³⁰⁰ In its examination, the court stated that in the context of student-peer harassment, delineation of the notice requirement may prove to be difficult.³⁰¹ However, when it comes to harassment by teachers or staff, the Supreme Court's requirement of actual notice is limited to an easily identifiable number of school administrators.³⁰² The court then acknowledged that a much broader number of administrators and employees could conceivably exercise at least some control over student behavior.³⁰³

The court stated:

These issues were not fully briefed or argued on appeal. The notice issue was raised only in a footnote in appellee's brief, and appellants did not respond to it in their reply. It would be helpful to have the issues fully presented in an adversarial setting. This is particularly true where there is little guidance from Congress, the Supreme Court, or the other Courts of Appeal. It is always difficult to determine Congress' intent when dealing with the elements of an implied cause of action because the text and legislative history of a statute that does not expressly create a cause of action is typically silent as to the parameters of the action. In *Davis*, the Supreme Court majority did not directly address who must have notice even in the face of Justice Kennedy's dissent, and there is scant persuasive authority from the other circuits.³⁰⁴

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at. 1287.

³⁰³ *Id.*

³⁰⁴ *Id.*

The court also determined that the deliberate indifference issue was intertwined with whether or not actual notice was given and, if actual notice was given, whether the school's actions were clearly unreasonable.³⁰⁵ The court decided that the better course is to not answer the notice and deliberate-indifference issues involved in the first question and to rest its opinion on the denial of access issue.³⁰⁶

The court also tried to determine if the sexual harassment was so severe, pervasive, and objectively offensive that it deprived the victims of access to the educational opportunities of the school.³⁰⁷ In this case, the conduct was frequent and persistent and took place over several months.³⁰⁸ The harassment ranged from sexually explicit and vulgar language to acts of offensive touching, and even though the children involved did not fully understand its ramifications, the harassment was unwelcome and intimidating.³⁰⁹

The court stated that even if the behavior was assumed to be severe, pervasive, and objectively offensive, it was not so severe, pervasive, and objectively offensive that it denied the girls equal access to education.³¹⁰ As the Supreme Court stated, the most obvious example of student-on-student harassment that could deny a victim access to education would involve a physical denial of access to school resources.³¹¹ The behavior must also be severe enough to have a "systemic" effect of denying the victim equal access

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ A demonstration of physical exclusion, however, is not the sole means by which a plaintiff can demonstrate deprivation of an educational opportunity. Rather, a plaintiff need only establish that the behavior so undermines and detracts from the victim's educational experience that the student has effectively been denied access to an institution's resources and opportunities.

to an educational program or activity.³¹² The court took this to mean that discrimination must be more widespread than a single instance of one-on-one peer harassment and that the effects of the harassment touch the whole or entirety of an educational program or activity.³¹³

The court determined that there was no evidence of a concrete, negative effect on the victim's ability to receive an education or access to educational programs or opportunities.³¹⁴ In fact, the girls testified that they were merely upset about the harassment. Two of the girls said that they faked being sick four or five times in order not to go to school, which does not establish a systemic effect of denying access to an educational program or activity.³¹⁵ In this case, the harassment was not so severe, pervasive, and objectively offensive that it systemically deprived the victims of access to the educational opportunities of the school. The judgment of the district court was affirmed.

*Porto v. Town of Tewksbury*³¹⁶

The First Circuit Court of Appeals was the next circuit court to utilize the *Davis* three-prong test, in *Porto v. Town of Tewksbury* in 2006. The facts of the case are: SC entered the Tewksbury public schools when he was eight years old. Even though he was considered to have special needs by the Massachusetts Department of Education, he was

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 1289.

³¹⁵ *Id.*

³¹⁶ *Porto v. Town of Tewksbury*, 488 F.3d 67.

initially placed in a standard first-grade class. SC's teacher eventually had SC placed in special-education classes.

SC met another boy, RC, in his first-grade special-education class. Between first and fifth grade, SC reported to Ann Marie Porto, the foster mother, a number of sexual types of incidents with RC.³¹⁷ Porto alleged that she reported these incidents to teachers and administrators.³¹⁸ In 1999, SC was demonstrating inappropriate sexual behavior at home, which prompted the Portos to take him to a psychologist.³¹⁹ After speaking with the psychologist, it was learned that SC and RC had been engaging in oral sex on the school bus for about a year.³²⁰ The Portos reported this to the school administrators and to the Massachusetts Department of Social Services.³²¹ As a result, SC and RC were put on different buses. Teachers and school aides were also directed to keep SC and RC separated at all times.³²²

In 2000, the next school year, school officials confirmed that there were three incidents in October 2000 that involved inappropriate touching between RC and SC.³²³ The incidents occurred in the life-skills classroom, which included RC touching SC's leg twice when they were sitting next to each other.³²⁴ When the third incident occurred, the two boys were sent to the guidance counselor. The guidance counselor told the boys that this type of behavior was inappropriate, and then the boys apologized and told him that they

³¹⁷ *Id.* at 69.

³¹⁸ *Id.*

³¹⁹ *Id.* at 70.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

would not do it again.³²⁵ In testimony, the counselor explained that he thought the boys understood the discussion. The counselor also reiterated to the teachers and aides that they must monitor them and keep them separated.³²⁶ No additional incidents were reported to the school until January.

On the morning of January 11, 2001, RC was excused to go to the bathroom, and a short time later, SC asked Edelstein, the teacher, if he could get a book from his locker.³²⁷ Two or three minutes had passed when Edelstein realized that neither of the boys had returned, so she stepped out into the hall to find them but did not see where they were.³²⁸ When looking in the hall, Edelstein saw Robert Ware, the behavior management facilitator at Wynn Middle School, and asked him to go into the bathroom to investigate.³²⁹ Upon entering the bathroom, he saw SC and RC in a stall, pulling their pants up.³³⁰ At this point, he took both students to his office and asked them what they had been doing, and SC told Ware that he had sexual intercourse with RC and that they had been touching each other on a weekly basis for some time.³³¹ At this time, Ware informed James McGuire, the principal, about the incident, who then called SC's parents, told them what had happened, and asked them to pick up SC from school.³³²

SC did not return to school after this incident, and he remained at home and received 10 hours of tutoring per week. The Portos filed suit against the school in the U.S.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 71.

³³² *Id.*

District Court for the District of Massachusetts, alleging it was deliberately indifferent to RC's sexual harassment of SC, violating Title IX. The case proceeded to a jury trial. After one day of deliberations, the jury returned a verdict in favor of the Portos, awarding \$250,000 in compensatory damages and \$1 in punitive damages.³³³ Tewksbury appealed to the U.S. Court of Appeals for the First Circuit.³³⁴

For the purposes of the appeal, the court assumed that SC was subject to severe, pervasive, and objectively offensive harassment by RC and that Tewksbury was a funding recipient who had actual knowledge in 2001 of at least some prior incidents of inappropriate sexual behavior.³³⁵ It was also assumed that the harassment deprived SC of educational opportunities or benefits.³³⁶ Even with these assumptions, the court did not think that the Portos presented sufficient evidence that a rational jury could have concluded that Tewksbury was deliberately indifferent to the harassment.³³⁷

The problem, stated the court, with the Portos' argument was that they suggested that Tewksbury should have done more to prevent RC from sexually harassing SC.³³⁸ Claiming that a school district could or should have done more is insufficient to establish deliberate indifference under Title IX. "Funding recipients are deemed deliberately indifferent to acts of student-on-student harassment only where the recipient's response to

³³³ *Id.*

³³⁴ *Id.* at 72.

³³⁵ *Id.* at 73.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”³³⁹

The Portos did not claim that Tewksbury did nothing to address RC’s sexual harassment of SC.³⁴⁰ They acknowledged that Tewksbury separated SC and RC after each episode of sexual harassment and later had the school guidance counselor intervene.³⁴¹ The Portos claimed that these interventions were ineffective. The court concluded that there is no doubt that the bathroom incident was evidence that RC’s inappropriate sexual behavior was not stopped.³⁴² However, the fact that the interventions designed to stop harassment were ultimately ineffective did not establish that the steps taken by the school were clearly unreasonable in light of the circumstances.³⁴³ The test for whether a school should be liable under Title IX for student-on-student harassment is not one of effectiveness by hindsight, claimed the court.³⁴⁴ Therefore, this is not a case in which a school “continued to use the same ineffective methods to no acknowledged avail.”³⁴⁵ In fact, it appeared that Tewksbury’s methods were working up until the bathroom incident.³⁴⁶ The court ruled that the evidence shows that after the counselor’s intervention, the school believed that it had been successful in stopping RC’s inappropriate behavior.³⁴⁷ Because continued sexual

³³⁹ *Id.*

³⁴⁰ *Id.* at 74.

³⁴¹ *Id.* at 74 comparing with *Doe ex rel. A.N. v. E. Haven Bd. of Educ.*, 200 F. App’x 46, 49 (2d Cir. 2006), (unpublished) (finding deliberate indifference where “alleged victim of a rape complained of verbal harassment based on her sex and related to the rape for five weeks before authorities took concrete action to get the perpetrators of the harassment to stop”).

³⁴² *Id.* at 74.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 74 citing *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000).

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 74.

harassment was not a “known or obvious consequence” of the school’s inaction, as in *Vance*, Tewksbury cannot have been deliberately indifferent to SC’s plight.³⁴⁸

The court found that Tewksbury acted reasonably in responding to RC’s inappropriate touching by separating RC and SC and sending them to the guidance counselor.³⁴⁹ For these reasons, the First Circuit reversed the judgment of the district court and remanded with instructions to the district court to enter judgment in favor of Tewksbury.

*Fitzgerald v. Barnstable School Committee*³⁵⁰

One year later, in 2007, the First Circuit Court was again asked to apply the *Davis* test to another student-on-student sexual harassment case. The harassment started on February 14, 2001. Jacqueline Fitzgerald, a kindergarten student, informed her parents, Lisa Ryan and Robert Fitzgerald, that each time she wore a dress to school, an older student on her school bus would bully her into lifting her skirt.³⁵¹ Lisa Ryan Fitzgerald believed

³⁴⁸ *Id.* at 76. More analogous to the situation in this case is *Gabrielle M. v. Park Forest-Chicago Heights, Illinois School District* 163, 315 F.3d 817 (7th Cir. 2003). In *Gabrielle M.*, school officials initially suspended a boy who had been sexually harassing female classmates. After the boy returned to school, administrators eventually allowed the boy to return to lunchtime and recess with the classmates but asked aides to keep an eye on him. The Seventh Circuit Court held that this was not an unreasonable response to the known risk that the boy might harass his classmates again. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)] does not require funding recipients to remedy peer harassment. *Davis* disapproved of a standard that would force funding recipients to suspend or expel every student accused of misconduct. All that *Davis* requires is that the school not act clearly unreasonably in response to known instances of harassment. Here, in light of each of the immediate disciplinary and preventative steps the school district had already taken in response to Jason's conduct, including most prominently the decisions to move him to another class entirely, and eventually to grant Gabrielle's request for a school transfer, it was not clearly unreasonable as a matter of law initially to assign an instructor to oversee a communal recess and lunch period instead of immediately rescheduling the lunch and recess period for a whole kindergarten class.

³⁴⁹ *Id.* at 76.

³⁵⁰ *Fitzgerald v. Barnstable School Committee*, 504 F.3d 165.

³⁵¹ *Id.* at 168.

that these incidents were the reasons that Jacqueline's behavior changed.³⁵² She immediately called the principal, Frederick Scully, to report the incident.

The school had a prevention specialist on staff, Lynda Day, whose responsibilities included responding to reports of inappropriate student behavior and issuing discipline as necessary. School officials had a hard time identifying the alleged perpetrator from Jacqueline's story, so they arranged for her to observe students exiting the school bus. This took place over the next two days.³⁵³ Finally, Jacqueline identified the perpetrator as Briton Oleson, a third grader. That same day, Scully and Day questioned Briton, who denied the allegations. Day also interviewed the bus driver and most of the students who regularly rode the bus. The interviews did not yield anyone who was unable to corroborate Jacqueline's version of the relevant events.³⁵⁴

Shortly after the initial investigation, the Fitzgeralds told Scully that Jacqueline had remembered additional details about her ordeal. She recalled that in addition to persuading her to lift her dress, Briton had bullied her into pulling down her underpants and spreading her legs.³⁵⁵ A meeting was immediately held with the Fitzgeralds in order to discuss this new information. The principal, Scully, also interviewed Briton again and followed up on some of the interviews that Day had conducted.

Concurrent with the school's investigation, the local police department had launched an investigation as well. The police department found Briton credible and

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

decided ultimately that there was insufficient evidence to proceed criminally against him.³⁵⁶

Relying in part on this decision and in part on the results of the school's own investigation, Scully reached a similar conclusion as to disciplinary measures.³⁵⁷

While the investigations were taking place, the Fitzgeralds had been driving Jacqueline to and from school. The school offered to place her on a different bus or to leave rows of empty seats between the kindergarten students and the older students on the original bus. The Fitzgeralds rejected these suggestions. The Fitzgeralds were angered by the school's primary suggestion of switching buses. They believed the school was punishing Jacqueline rather than Briton, who would continue to ride the original bus. The Fitzgeralds offered a number of other alternatives, such as placing a monitor on the bus or transferring Briton to a different bus. The superintendent of the school system, Russell Dever, declined these suggestions.

Even with her parents taking her to school, Jacqueline claimed that she had several disturbing interactions with Briton as the school year progressed.³⁵⁸ Some were casual encounters in the hallways, but one occurred during a mixed-grade gym class. In this encounter, the gym teacher randomly required Jacqueline to give Briton a "high five."³⁵⁹

Each incident was acknowledged by Scully as soon as it was reported, and there was no claim that Scully failed to address these incidents. The result was that Jacqueline stopped participating in gym class and began to miss school with increasing frequency.³⁶⁰

³⁵⁶ *Id.* at 170.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

In April 2002, the Fitzgeralds sued the school district in the U.S. District Court for the District of Massachusetts. Their complaint claimed that the school district was in violation of their daughter's rights under Title IX for being deliberately indifferent to the student-on-student sexual harassment. The district court granted summary judgment to the school. The parents appealed to the U.S. Court of Appeals for the First Circuit.

The First Circuit Court began its analysis by exploring the deliberate-indifference prong of the *Davis* test. The court stated that Title IX did not make an educational institution the insurer either of a student's safety or of a parent's peace of mind.³⁶¹ Using the language in *Davis*, the court held that deliberate indifference requires more than a showing that the institution's response to harassment was less than ideal; it must show that the institution's response was "clearly unreasonable in light of the known circumstances."³⁶²

Looking at the case at hand, the court explained that there were three basic points that were not in dispute. First, it was understood that the school district was a recipient of federal funds and, therefore, legally bound to comply with the rules of Title IX.³⁶³ Second, everyone agreed that the school had actual knowledge of the school-bus harassment on February 14, 2001.³⁶⁴ Third, it could not be denied that, if true, Jacqueline's allegation that she was forced to pull up her skirt, drop her underpants, and spread her legs constituted severe, pervasive, and objectively offensive harassment.³⁶⁵ What was left to determine was

³⁶¹ *Id.* at 171.

³⁶² *Id.* at 171, citing *Davis*, 526 U.S. at 648.

³⁶³ *Id.* at 172.

³⁶⁴ *Id.* at 173.

³⁶⁵ *Id.*

whether the school acted with deliberate indifference to the known harassment. The court turned to the facts of the case to make this determination.

The Fitzgeralds themselves admitted that Scully met with them on the very morning that they notified the school of Jacqueline's plight.³⁶⁶ They also admitted that Scully immediately launched an investigation.³⁶⁷ This investigation consisted of multiple interviews with Jacqueline and Briton, an interview of the bus driver, and individual interviews of between 35 and 50 other students on the bus.³⁶⁸ The school also cooperated fully in an investigation undertaken by the local police.³⁶⁹ The results of that investigation were taken into account in considering disciplinary options. Within two weeks after the initial report of harassment, the school offered to change Jacqueline's bus so she would not have to interact with Briton.³⁷⁰

These actions may not have constituted an ideal response to the complaint of harassment. In hindsight, stated the court, there may have been other and better avenues that the school district could have explored or other and better questions that could have been asked during the interviews.³⁷¹ But Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents.³⁷² The test, claimed the court, was objective, whether the institution's response, evaluated in light of the known circumstances, was so

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 174

³⁷² *Id.*

deficient as to be clearly unreasonable.³⁷³ The court stated that the response by school officials in the case could not be reasonably characterized in that manner.³⁷⁴ The court concluded that due to the facts and the law, no rational fact-finder could supportably conclude that the school district acted with deliberate indifference in this case.³⁷⁵ It found that the district court appropriately granted summary judgment in favor of the school district on the Title IX claim.

*Doe v. East Haven Board of Education*³⁷⁶

During the 2001-02 academic year, Doe was a 14-year-old freshman at East Haven High School. On or about January 1, 2002, Doe was sexually assaulted by two East Haven High School seniors, Jonathan Toro and Robert Demars.³⁷⁷ Doe did not report what had happened until March 25, 2002, when rumors surfaced at East Haven High School that two seniors had slept with a freshman girl.³⁷⁸ Doe then gave a statement to East Haven High School administrators and the East Haven Police Department that she had been raped by Toro and Demars.³⁷⁹ Doe claimed that immediately after she disclosed the details of her sexual assault, she began to suffer sexual harassment at school by many students, including some of her former friends, as well as the friends and girlfriends of Toro and Demars.³⁸⁰ This harassment was mostly verbal, though in one instance, a student threw a tennis ball at

³⁷³ *Id.*

³⁷⁴ *Id.* at 175.

³⁷⁵ *Id.*

³⁷⁶ *Doe v. E. Haven Bd. of Educ.*, 430 F. Supp. 2d 54.

³⁷⁷ *Id.* at 56.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

Doe's head. In another, a male student barked like a dog at Doe as she walked down a school hallway to her locker. Doe began not to attend certain classes in an attempt to avoid the harassment; instead, she would sit in the guidance office during those periods and complete her classwork independently.³⁸¹

Toro and Demars continued to attend East Haven High after the incident and after their subsequent arrest on charges of sexual assault.³⁸² Eventually, they were given homebound instruction, beginning in May 2002. In March 2003, Toro and Demars pled guilty to charges of sexual assault in the third degree.³⁸³ Doe filed suit against the school district for violating Title IX on May 6, 2002, in the U.S. District Court for the District of Connecticut. The district court ruled in favor of Doe. The school district appealed to the U.S. Court of Appeals for the Second Circuit.

The Second Circuit Court affirmed the district court's decision. It held that a reasonable fact-finder could have concluded that, when the 14-year-old girl reported the rape and then was persistently subjected by other students to verbal abuse reflecting sex-based stereotypes and questions regarding the veracity of her story, the harassment would not have occurred but for the girl's sex.³⁸⁴ Further, a reasonable fact-finder could have concluded that school officials actually knew of the sexual harassment. Moreover, a reasonable fact-finder could have concluded that the girl was subjected to a disparately hostile educational environment that deprived her of educational benefits and

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.* at 64.

opportunities.³⁸⁵ Finally, a reasonable fact-finder could have concluded that school authorities acted in an unreasonable fashion by waiting five weeks to take concrete action to stop the harassment.³⁸⁶

*Rost v. Steamboat Springs*³⁸⁷

Rost v. Steamboat Springs was the next student-on-student sexual harassment case decided by a court of appeals, taking place in the Tenth Circuit Court in 2008. The facts were in 2000, K.C. was enrolled in Steamboat Springs Middle School as a seventh-grader who received special-education services. Allegedly, at the beginning of her seventh grade and continuing into eighth grade, K.C. was coerced into performing various sexual acts with a number of boys.³⁸⁸ Apparently, the boys pestered her continuously for oral sex, called her “retard” and stupid, threatened to spread rumors that she frequently engaged in sexual conduct with others, and threatened to distribute naked photographs of her.³⁸⁹ The police report documented that the incidents occurred in a variety of private locations and social settings, and a few of the incidents appeared to be “consensual.”³⁹⁰

Ms. Rost, K.C.’s mother, became aware of the sexual harassment when K.C. reported the incidents to school officials on January 16, 2003.³⁹¹ However, Ms. Rost claimed that she asked school officials to talk to K.C. during the spring and fall of 2002

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Rost v. Steamboat Springs*, 511 F.3d 1114.

³⁸⁸ *Id.* at 1117.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

because she thought something was wrong.³⁹² Her concerns started in the spring of 2002 because K.C. did not want to go to school anymore. Her mother asked the school counselor, Margie Briggs-Casson, to find out what was bothering K.C.³⁹³ Tim Bishop, principal of the middle school, was also notified at this time by Ms. Rost about K.C. and what she perceived as Ms. Briggs-Casson's lack of responsiveness.³⁹⁴ She also informed the principal that the same boys tried to break into her house to find pain medication. Ms. Briggs-Casson eventually met with K.C.. During this meeting, K.C. told her about the harassment, saying that "these boys were bothering me."³⁹⁵ Due to her special needs, K.C. did not know how to use the word "assault," and she did not use specific details when discussing the incidents.³⁹⁶

In 2001, during K.C.'s freshman year at Steamboat Springs High School, she continued to experience the harassment. Ms. Rost allegedly reported the harassment to the principal, telling him that K.C. said "the boys were bothering her and calling her retarded, she hated school and was afraid to go to school, she was afraid to go to her math class that she had with one of the boys, and she was being teased for having an aide."³⁹⁷ The principal and Ms. Rost met several times, and the outcome of these meetings resulted in an aide being assigned to sit in the back of the math class instead of being next to K.C.³⁹⁸ At

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

this point no one knew of the sexual harassment. Ms. Rost and the principal thought she was experiencing general name-calling.³⁹⁹

Shortly thereafter, K.C. told Ann Boler, the high school counselor, that one of the boys repeatedly called her to ask for oral sex.⁴⁰⁰ She also said that two of the boys bullied her into sexual behavior by threatening to show others naked pictures of her if she didn't.⁴⁰¹ Upon learning of this incident, Ms. Boler immediately contacted Officer Jason Patrick, the school resource officer, because she could not find the principal or vice principal.⁴⁰² When Principal Schmidt was finally found, a call was made, with Officer Patrick, about K.C.'s statement.⁴⁰³

After talking with K.C., it was determined that none of the incidents took place on school grounds; in fact, the incidents happened before any of the students were enrolled in high school.⁴⁰⁴ With this information, the school district did not investigate the assaults.⁴⁰⁵ Principal Schmidt stayed in contact with Officer Patrick, who was investigating the sexual assault for the police department. The school assisted him by pulling students together for interviews during the investigation.⁴⁰⁶

The investigation was not effective because Ms. Rost refused to communicate with the school or law enforcement regarding the incident on the advice of counsel.⁴⁰⁷ The

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 1118.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

district attorney did not pursue the case based on Officer Patrick's report. The district attorney believed that it would be difficult to prove that the activity was not consensual and the trial would expose K.C. to tremendous trauma.⁴⁰⁸

A couple of weeks after K.C. reported the incident, she suffered an acute psychotic episode that required hospitalization.⁴⁰⁹ In an effort to transition K.C. back to school, Ms. Rost met with school officials before K.C. was discharged to discuss educational alternatives for her daughter.⁴¹⁰ Ms. Rost was accepting of having a private tutor for her daughter but refused any option that had K.C. returning to the high school.⁴¹¹ Mediation took place between the school and Ms. Rost the following year, and the final outcome was that K.C. attended a school other than Steamboat Springs High School.⁴¹²

Ms. Rost filed suit against the school district in the U.S. District Court for the District of Colorado alleging violations under Title IX. The district court granted summary judgment for the district on the federal claims. The Rosts appealed the district court's ruling to the U.S. Court of Appeals for the Tenth Circuit.

On review, the appeals court first reviewed the actual notice-standard of the *Davis* test. Regarding the facts of the case, K.C. testified that she told Margie Briggs-Casson in the spring of 2002 about the assaults.⁴¹³ She also stated that she did not know to use the word "assault."⁴¹⁴ When asked what she told Ms. Briggs-Casson, K.C. stated that "these

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

boys were bothering me and no one understood me in town.” K.C.’s statement that the boys were bothering her was insufficient to give the district notice that she was being sexually harassed.⁴¹⁵ Ms. Rost argued that the “district court mischaracterized the testimony and failed to consider ambiguities in the light most favorable to her,” but the Tenth Circuit Court determined that there was no reading of the testimony that would establish that the school district had actual notice of the harassment based on K.C.’s lack of details.⁴¹⁶

Ms. Rost also claimed that the district received actual knowledge of the sexual harassment in the fall of 2002. She explained that she had met with Principal Schmidt early in the fall of 2002 to discuss the following concerns: K.C. was afraid to attend her math class; K.C. did not want an aide in the math class anymore; and K.C. said that the boys were bothering her.⁴¹⁷ Ms. Rost was not more specific in her report because K.C. was unable to communicate her concerns to her more specifically.⁴¹⁸ As a result of these meetings, an aide was assigned to sit in the back of the class to monitor the behavior.⁴¹⁹ No one, at that time, knew that K.C. was being sexually harassed.⁴²⁰ The Tenth Circuit Court determined that the school did not receive actual notice of any sexual harassment during those meetings in the fall of 2002.⁴²¹

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 1120.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

The court then analyzed the deliberate-indifference standard of the *Davis* test. According to the facts of the case, it was undisputed that K.C. told Ms. Boler about the sexual harassment on January 16, 2003, and therefore, this meeting gave the district actual notice of the harassment.⁴²² The next question the court needed to answer was whether the school district was “deliberately indifferent to acts of harassment of which it had actual knowledge.”⁴²³ The court did not respond to Ms. Rost’s complaint that the district had been deliberately indifferent to the harassment because they concluded that the district had no knowledge of the harassment until January 2003.⁴²⁴ Ms. Rost also claimed in her appeal that the district’s response to the notice of the harassment was clearly unreasonable because the district did not investigate the incidents, and neither did they interview the alleged harassers and K.C or appropriately discipline the boys involved.⁴²⁵ She argued that the school’s deliberate indifference deprived her daughter of an equal educational opportunity after January 2003. She supported this claim with K.C.’s doctor’s visit in which she and K.C. were advised not to return to Steamboat Springs High School due to the trauma K.C. had endured.⁴²⁶

In its analysis, the court determined that when K.C. had told Ms. Boler about the harassment, Ms. Boler immediately contacted Officer Patrick, the school resource officer, who immediately questioned K.C. about the harassment.⁴²⁷ When Principal Schmidt had learned of the incident, he determined that because none of the incidents took place at

⁴²² *Id.* at 1121.

⁴²³ *Id.*, see *Murrell*, 186 F.3d at 1246; *Davis*, 526 U.S. at 644-645.

⁴²⁴ *Id.* at 1121.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

school and the incidents occurred before any of the students were students at the high school, it would be more appropriate for Officer Patrick to investigate the sexual assaults.⁴²⁸ Officer Patrick worked with the school to arrange for the interviews of the students to find out what had happened.⁴²⁹ In fact, there were approximately 50 conversations between the two regarding the investigation, and in the end, the school received a copy of Officer Patrick's report. The court did not think that it should be held against the district for letting Officer Patrick take the lead in this situation.⁴³⁰ Officer Patrick and the school believed that the harassment happened off school grounds and criminal charges were a possibility.⁴³¹ As a result, the court held that the district's response was not clearly unreasonable. The school officials immediately contacted law enforcement officials, cooperated fully in the investigation, and were kept informed of the investigation.⁴³² The district reasonably believed it did not have control over the incidents, and just because the principal thought that the school might be able to discipline students for conduct off school grounds did not reveal anything about whether it was appropriate, given the seriousness of the situation.⁴³³

In this case, the school district relied on the fact that it could not determine which conduct was not consensual because there were other admitted consensual acts in the police

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.* See *Davis*, 526 U.S. at 645 (noting harassment creating liability under Title IX “must occur ‘under’ the operations of a funding recipient, . . . [meaning that] the harassment must take place in a context subject to the school district’s control”) (quoting 20 U.S.C. § 1681(a); § 1687). This is not a situation in which a school district learned of a problem and did nothing. See *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000) (school district only spoke to the supposed perpetrators after a female student was intentionally and repeatedly sexually harassed); *Murrell*, 186 F.3d at 1243-44 (teachers did not inform the plaintiff’s parent of sexual assaults on plaintiff at school and did not inform law enforcement, investigate, or discipline the offending student).

report.⁴³⁴ The court ruled that this conclusion was not clearly unreasonable, and therefore, the school district would not be deliberately indifferent in making a judgment that it would be difficult to sort out conflicting facts, especially when the victim had not provided descriptive details to school officials.⁴³⁵

Finally, just because the school did not punish the boys involved did not equate to a “clearly unreasonable” act.⁴³⁶ Ms. Rost wanted the district to expel the four boys so that her daughter could go back to the school.⁴³⁷ Relying on the Supreme Court decision in *Davis*, the court noted that schools do not need to expel every student accused of sexual harassment to protect them from liability and “victims of peer harassment do not have a Title IX right to make particular remedial demands.”⁴³⁸ Under this standard, schools are not responsible for stopping the harassment; they “must merely respond to known peer harassment in a manner that is not clearly unreasonable.”⁴³⁹

Many factors in the case supported the school’s decision not to discipline the boys; for this reason, the district’s decision not to pursue discipline was not clearly unreasonable or deliberately indifferent.⁴⁴⁰ Discipline was not issued because Principal Schmidt determined that most of the incidents did not take place in school and the district did not believe that it had responsibility or control over the incidents.⁴⁴¹ It was also determined by the district attorney that it would be difficult to prove that the conduct was not

⁴³⁴ *Id.* at 1122.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 1123.

⁴³⁷ *Id.*

⁴³⁸ *Davis*, 526 U.S. at 648.

⁴³⁹ *Id.* at 648-649.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

consensual.⁴⁴² To make matters worse, Officer Patrick's and Principal Schmidt's investigation was halted because Ms. Rost and K.C. refused to communicate with them on the advice of counsel.⁴⁴³ For these reasons, it would be difficult to discipline students when the facts were so unclear as to which conduct was consensual, given that the victim did not clarify details of the incidents.⁴⁴⁴

The court finally determined that the district's response was not so clearly unreasonable so as to be deliberately indifferent to the harassment. For all these reasons, the court concluded that summary judgment was appropriate on the Title IX claim.

*Phassen v. Merrill Community School District*⁴⁴⁵

Phassen v. Merrill Community School District was heard by the Sixth Circuit Court of Appeals in 2008. The facts were: during the fall of 2007, Jane Doe was a student at Merrill Middle School and John Doe was a student at Merrill High School. The two schools were housed in the same building but in different wings of the building. At the beginning of the 2007-2008 school year, John was a ninth-grade special-education student and Jane was in eighth grade.⁴⁴⁶

Phassen claimed that John sexually harassed Jane three times during the beginning of the school year.⁴⁴⁷ First, John shoved Jane into a locker because she was talking to

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Phassen v. Merrill Community School District*, 668 F.3d 356 (2012).

⁴⁴⁶ *Id.* at 360.

⁴⁴⁷ *Id.*

another boy and he “got jealous.”⁴⁴⁸ Second, John told Jane that “if she wanted to hang out with him anymore, she would have to perform oral sex on him.”⁴⁴⁹ Finally, John made “obscene sexual gestures” toward Jane during a school basketball game in which she was playing, and these gestures were witnessed by the crowd.⁴⁵⁰

Mr. Phassen contacted the school after the basketball game to inform them about the game’s events and John’s request for oral sex.⁴⁵¹ He also told the school that he had spoken with Jane about John’s gestures during the basketball game and that “she just replied that he was a teenage boy and that Mr. Phassen wouldn’t understand.”⁴⁵² At this point, Mr. Phassen made the statement, “I believe John is a volcano waiting to erupt, and when he does, someone will be hurt, student or staff.”⁴⁵³

Merrill convened an IEP team to create a plan to supervise John during school for the next 30 days.⁴⁵⁴ The team would reconvene after 30 days to review the plan and discuss possible adjustments if needed. During this time, John did not commit any acts of sexual harassment.⁴⁵⁵

On December 20, 2007, John sexually assaulted Jane on school grounds shortly after school had ended.⁴⁵⁶ On January 16, 2008, Merrill Superintendent John Searles

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

recommended John's expulsion because of the sexual assault, and the expulsion was approved by the school board on January 30, 2008.⁴⁵⁷

On April 10, 2008, Jane's family filed suit against Merrill and Merrill administrators, alleging violations of Title IX. The U.S. District Court for the Eastern District of Michigan at Bay City granted summary judgment in favor of the defendants. Phassen appealed the decision to the U.S. Court of Appeals for the Sixth Circuit.

The Sixth Circuit Court supported strongly the district court's finding that the school district did not violate Title IX. The court conceded that the sexual harassment definitely took place; however, Phassen could not prove that Merrill's response to the sexual harassment was "deliberately indifferent."⁴⁵⁸ Even taking into consideration all of John Doe's incidents of misbehavior and his frequency to engage in sexual harassment, Phassen could not show that Merrill's responses were deliberately indifferent.⁴⁵⁹ In fact, Phassen conceded that Merrill's response to the rape was not deliberately indifferent.⁴⁶⁰ Although John Doe appeared to engage in more serious misconduct outside of Merrill, the court ruled that Merrill had authority only to discipline John for the locker incident, the comments regarding a sexual act, and the sexual gestures at the basketball game.⁴⁶¹ Merrill went as far as to create a supervision plan for John, which resulted in no further incident while it was in place.⁴⁶² The Sixth Circuit Court upheld the district court's decision based upon these facts.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 364.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

*Patterson v. Hudson Area Schools*⁴⁶³

In 2009, the Sixth Circuit Court again decided a case of student-on-student sexual harassment. In 2002, during DP's sixth-grade year, a number of his peers began to tease him, call him names, and push and shove him in the hallways.⁴⁶⁴ DP claimed that he reported some of these instances to the school and was told that "kids will be kids; it's middle school."⁴⁶⁵ Due to the harassment, DP began to receive psychological treatment from Dr. Gretchen.⁴⁶⁶

The harassment that DP experienced in sixth grade became much worse in DP's seventh-grade year; he was called names such as "fat," "faggot," "gay," "queer," "pig," and "man boobs" on a daily basis.⁴⁶⁷ He was also pushed in the hallways and was called "Mr. Clean," a derogatory term that referred to DP's lack of pubic hair.⁴⁶⁸

In one situation, DP attempted to stop a female classmate, BC, from harassing another student and, in return, BC slapped DP.⁴⁶⁹ The band teacher, Crystal Bough, was the first to learn about the incident, and it was alleged that she told DP that she "would take care of it."⁴⁷⁰ The Pattersons claimed that they were never contacted by the school and Ms. Bough did not report the incident to the principal.⁴⁷¹ Later in the same day, the geography teacher, John Redding, asked DP, "How does it feel to be hit by a girl?"⁴⁷²

⁴⁶³ *Patterson v. Hudson Area Schools*, 551 F.3d 438.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 440.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

A special education referral form was filled out by Tammy Cates, the social worker, during the summer between DP's seventh-grade and eighth-grade years for DP to be evaluated for special-education services.⁴⁷³ The evaluation determined that DP was emotionally impaired. An IEP team was convened, and an IEP was developed. DP was placed in teacher Ted Adams's resource room for one period of the day during his eighth-grade year.⁴⁷⁴ Mr. Adams was helpful in teaching DP how to cope with his peers, which led to a successful eighth-grade year.⁴⁷⁵

Unfortunately for DP, his ninth-grade year was not as successful. This led to an adjustment in the IEP by Hudson High School. DP was also not allowed to continue in Mr. Adams resource room because Mr. Adams was a middle-school teacher and DP was in high school. This decision was made by Hudson High School Principal Michael Osborne.⁴⁷⁶ Principal Osborne also "didn't think that the high school resource room was the best place for DP."⁴⁷⁷ The Pattersons pleaded with Hudson to allow DP to continue in Mr. Adams's resource room because he had been so successful in eighth grade.

The beginning of his ninth-grade year was a repeat of the type of harassment DP faced in sixth and seventh grades. DP's peers called him "gay," "fat," "fag," and "queer," and he was pushed and shoved in the hallways daily.⁴⁷⁸ It was also in ninth grade when DP began to experience new types of harassment. During a presentation in front of his history class, another student, SE, wrote a series of words that, when put together, said, "DP is

⁴⁷³ *Id.* at 441.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

fag.”⁴⁷⁹ This all happened in front of the entire class because he used the cards for his presentation, and this made the students laugh at DP.⁴⁸⁰ Ms. Mansfield and the history teacher found out that SE wrote the phrase, and SE was verbally reprimanded.⁴⁸¹ Not long after this incident, another student, JR, vandalized DP’s planner with the sexual phrases: “I HEART penis,” “I lick it in the Ass,” “I HEART cock,” and “I’m a mamma’s boy/I suck on her Nipple,” as well as drawings of buttocks and a penis.⁴⁸² The student was reported to the teacher and Principal Osborne, who issued JR a verbal reprimand, and the student did not bother DP again after this.⁴⁸³

The final incident of harassment occurred in late May of 2005 at the end of a junior-varsity baseball practice. DP alleged that he was sexually assaulted by a teammate, LP, in the locker room.⁴⁸⁴ LP stripped naked, forced DP into a corner, jumped on DP’s shoulders, and rubbed his penis and scrotum on DP’s neck and face.⁴⁸⁵ As this happened, another student, NH, blocked the exit and prevented DP from leaving.⁴⁸⁶ As soon as he got home, DP informed the Pattersons about the assault. He also told Andy Wade, who was his older brother and coach of the junior-varsity baseball team.⁴⁸⁷ The family reported the assault to Principal Osborne on Saturday during a baseball double-header.⁴⁸⁸

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 442.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

The varsity baseball coach, Jeremy Beal, held a team meeting with both the junior-varsity and the varsity baseball players after he learned about the incident. In this meeting, the teams were told that they should “not joke around with guys who can’t take a man joke” when DP was in the room.⁴⁸⁹

The harassment and sexual assault took a toll on DP, and he claimed that he had been psychologically unable to enter the school since the end of his ninth-grade year.⁴⁹⁰ This claim prompted another modification to his IEP. For his 10th-grade year, DP received instruction at Sacred Heart School, and the instruction was provided by Hudson. Sacred Heart School was a Pre K-6 Catholic elementary school.⁴⁹¹ His teachers would visit him at Sacred Heart to discuss assignments. DP alleged that the visits were on occasion and that the teachers would not respond to e-mails or phone calls made by him.⁴⁹² Finally for his 11th- and 12th-grade years, Hudson allowed DP to take college placement courses at the local college.⁴⁹³

The Pattersons filed suit against the school district in the U.S. District Court for the Eastern District of Michigan for violating DP’s rights under Title IX. The school moved for summary judgment, which the district court granted. The district court applied the three-part test expressed in *Davis* and articulated by that court in *Vance*.⁴⁹⁴ The district court determined that the Pattersons had proved that the school had “actual notice” and the

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 443.

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

harassment was “severe and pervasive.”⁴⁹⁵ The Pattersons could not prove that Hudson’s responses to DP’s attacks were “clearly unreasonable in light of known circumstances.”⁴⁹⁶ The district court concluded that there was a failure to prove that the school’s response was clearly unreasonable and that the Pattersons could not prove that the school was “deliberately indifferent,” and it granted summary judgment.⁴⁹⁷ The parents appealed the case to the U.S. Court of Appeals for the Sixth Circuit.

Because the district court had found that the Pattersons met their burden with regard to Parts 1 and 2 of the test, the only issue on appeal was whether Hudson did or did not act with deliberate indifference.⁴⁹⁸ Viewing the evidence in the light most favorable to the Pattersons, the Sixth Circuit Court determined that the Pattersons had demonstrated a genuine issue of material fact regarding whether Hudson’s actions were deliberately indifferent.⁴⁹⁹

The Sixth Circuit Court noted that one district court relied on language from *Vance* and *Davis*,⁵⁰⁰ in the case *Theno v. Tonganoxie Unified Sch. Dist. No. 46*, about a student

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.* at 444.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* at 446.

⁵⁰⁰ A recipient of federal funds that remains “deliberately indifferent to known acts of harassment” is liable for damages under Title IX. *Vance*, 231 F.3d at 260. “The deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.” *Id.* (quoting *Davis*, 526 U.S. at 645) (first alteration in *Vance*, second alteration in *Davis*). “A plaintiff may demonstrate [a] defendant’s deliberate indifference to discrimination ‘only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.’” *Vance*, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648). A recipient need not “[purge its] schools of actionable peer harassment” or “engage in particular disciplinary action” to avoid Title IX liability. *Vance*, 231 F.3d at 260. “Furthermore, courts should not second guess the disciplinary decisions that school administrators make.” However, when a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. When a school district has actual knowledge that its efforts to remediate are ineffective, and it

who experienced four years of harassment from a number of students and a school district's "tactic of merely talking to and warning students who harassed plaintiff." Occasional investigation into "some of the more significant incidents and even eventually proactively speaking to students and teachers in an effort to prevent further incidents raised a genuine issue of material fact sufficient to withstand summary judgment."⁵⁰¹ *Theno* is illustrative, concluded the court.⁵⁰²

The school district in *Theno* argued that its response to the harassment could not be seen as clearly unreasonable. The district court disagreed with the school, explaining that this was a case that involved a few discrete incidents of harassment.⁵⁰³ The harassment was severe and pervasive harassment and took place over four years. It also included multiple students who engaged in the same form of harassment after those who were counseled had stopped, and the school rarely took any disciplinary measures above and beyond a lecture and warning to the harassers.⁵⁰⁴

The school did try different interventions in the later years, but the district court determined that this was too little too late, that the harassment had been going on for a

continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

⁵⁰¹ *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966 (D. Kan. 2005).

⁵⁰² In *Theno*, the plaintiff was repeatedly harassed beginning in his seventh-grade year and ending only when he left school during his 11th-grade year. The harassment consisted of name-calling ("faggot," "queer," "pussy," "jack-off boy," etc.), persistent joking regarding plaintiff being caught masturbating in the school bathroom (which was untrue), and some physical altercations (pushing, shoving, tripping, fistfights). *Id.* Most student harassers were given merely verbal warnings or reprimanded by the school; however, a few of the more serious offenders were more severely disciplined. *Id.* Importantly, "each time the school disciplined a known harasser, to the best of the school's knowledge, that particular harasser ceased harassing plaintiff (with limited exceptions)." The school also began to speak proactively with students and teachers regarding harassment during the plaintiff's 10th-grade year.

⁵⁰³ *Id.* at 447.

⁵⁰⁴ *Id.*

number of years without the school handing out any meaningful disciplinary measures to deter other students from perpetuating the cycle of harassment.⁵⁰⁵ Schools are not legally obligated to end harassment, but in this case, a reasonable jury could conclude that at some point during the four-year period of harassment, the school district's ineffective response to the harassment became clearly unreasonable.⁵⁰⁶ The district court cited *Vance* to support this determination. It also concluded that *Vance* supported a finding that "whether the school's belatedly stepped-up efforts were 'too little, too late' is a question for the jury."⁵⁰⁷

When viewing the facts in the light most favorable to the Pattersons, the court concluded that there were strong similarities between this case and *Theno*.⁵⁰⁸ In this case, like *Theno*, the victim was repeatedly harassed over a number of years.⁵⁰⁹ Hudson's response to the harassment usually concluded with verbal reprimands to the harassing students.⁵¹⁰ In most of the cases, the reprimands stopped the harassment by the harassing student, but it did not stop other students from harassing DP.⁵¹¹ The harassment was so pervasive that it actually became criminal sexual assault in one incident. The school knew that the reprimands were not preventing the overall harassment of DP.⁵¹² There was no argument that DP continued to have problems with other students, even after some were reprimanded or even disciplined, and DP reported those continuing problems to Hudson.⁵¹³

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 455.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Id.*

The school's argument was that they had dealt successfully with each identified perpetrator and, therefore, they could not be liable under Title IX as a matter of law.⁵¹⁴ This argument missed the point, claimed the court. As explained earlier, "Hudson's success with individual students did not prevent the overall and continuing harassment of DP, a fact of which Hudson was fully aware, and thus, Hudson's isolated success with individual perpetrators could not shield Hudson from liability as a matter of law."⁵¹⁵ It was for a jury to decide whether Hudson's actions were "clearly unreasonable."⁵¹⁶

*Sanchez v. Carrollton-Farmers Branch School District*⁵¹⁷

Two years later, in 2011, the Fifth Circuit Court had its first opportunity to apply the *Davis* standard in a student-on-student sexual harassment case. Sanchez was a student at Creekview High School in the Carrollton-Farmers Branch Independent School District (ISD). She alleged that she had been sexually harassed by J.H, who was also a Creekview senior and female cheerleader.⁵¹⁸

Problems between the two girls started in March 2008, when J.H. was suspended from cheerleading for one week for posting inappropriate Facebook photos.⁵¹⁹ J.H. was upset with Sanchez because she thought Sanchez's mother, Liz Laningham, had given the Facebook photos to Creekview administrators, so J.H. threatened to "get even" with

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ *Sanchez v. Carrollton-Farmers Branch School District*, 647 F.3d 156 (2011).

⁵¹⁸ *Id.* at 159.

⁵¹⁹ *Id.*

Sanchez.⁵²⁰ As soon as Laningham found out about the threat, she notified Cyndi Boyd, Creekview's principal, about J.H.'s comments.⁵²¹ Boyd had the assistant principal, Lisa Leadabrand, to meet with J.H. and her mother to find out what happened.⁵²²

On the same day that Laningham emailed Boyd and Leadabrand about J.H.'s threats, she also sent three additional emails alleging hazing and violations of Sanchez's rights.⁵²³

On March 26, J.H. found out that Sanchez was dating her ex-boyfriend, C.P., which began during spring break.⁵²⁴ J.H. was upset and called Sanchez a "ho" and threatened to beat her up.⁵²⁵ Laningham notified the administration about the threat, and the school administration immediately investigated the incident.⁵²⁶ The investigation did not yield enough evidence to discipline J.H., but, to be proactive, the school switched J.H. to a different sixth-period class within five days.⁵²⁷

Laningham was also concerned that the older girls would sabotage her daughter in the upcoming cheerleader tryouts.⁵²⁸ Laningham had her lawyer contact the superintendent, Annette Griffin, to notify her of several incidents, such as Laningham's belief that Creekview favored J.H., K.O., and M.W. over Sanchez; problems with the booster club; Laningham's conflict with the administration over the end-of-year video; and other alleged

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ *Id.* at 160.

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

wrongs.⁵²⁹ The school district responded by having its attorney write a letter stating that “the District takes all such allegations seriously and, with advice and assistance from this firm, intends in due course to fully and thoroughly review such matters and the requested categories of relief.”⁵³⁰

Sanchez did not make the varsity cheerleading squad and this made her upset. Laningham sent three emails to Boyd after the tryouts, complaining that J.H. sexually harassed her daughter.⁵³¹ She claimed: (1) that on April 11, J.H. had overheard Sanchez in the locker room discussing a rash on Sanchez’s breast, then J.H. started a rumor that Sanchez “had a hickey on her boob”;⁵³² (2) that on April 15, J.H. “cornered” Sanchez in the hallway during a passing period, “told her that she [J.H.] was having sex with C.P.,” and “physically touched her by wiping the tears from Sanchez’s eyes”; and (3) that on April 22, J.H. slapped C.P.’s buttock as she walked by Sanchez and C.P. and stated that “your ass is so cute, and you and Sanchez are so cute!”⁵³³ Laningham made sure to point out in her emails that the first incident occurred on “the last school day prior to tryout week,” the second on “the second day of tryout week.”⁵³⁴

All these incidents were investigated by Boyd. In the investigation, it was discovered that J.H. was not in the locker room when Sanchez discussed the mark on her breast, and therefore, J.H. could not have overheard Sanchez.⁵³⁵ It was also discovered that

⁵²⁹ *Id.*

⁵³⁰ *Id.* at 161.

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *Id.* at 162.

⁵³⁴ *Id.*

⁵³⁵ *Id.*

Sanchez was the one who started the conversation about her rash in front of other girls.⁵³⁶

Regarding the hallway incident, J.H. did admit to talking to Sanchez in the hallway and wiping away her tears. She claimed that she was trying to comfort Sanchez because her ex-boyfriend was “playing” both of them.⁵³⁷ Regarding the butt-slap incident, J.H. also admitted to the butt-slap claim, but C.P. did not find the action objectionable, so no action was taken.⁵³⁸

Sanchez was not satisfied with the school’s response, so she sued the district in the U.S. District Court for the Northern District of Texas, claiming it had violated Title IX because it had been deliberately indifferent to her alleged harassment. The magistrate judge granted the district summary judgment on only the harassment claims under Title IX. Sanchez appealed the summary judgment ruling.⁵³⁹

On appeal, the U.S. Court of Appeals for the Fifth Circuit stated that same-sex sexual harassment is actionable under Title IX. However, the actions must be based on sex, according to the words of Title IX, and “not merely tinged with offensive sexual connotations.”⁵⁴⁰ J.H. called Sanchez a “ho” once, and the comment was not even made directly to her.⁵⁴¹ The court held that this behavior was not comparable to the harassment experienced in *Davis* and it by no means qualified as harassment at all.⁵⁴²

⁵³⁶ *Id.*

⁵³⁷ *Id.* at 163.

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 164.

⁵⁴⁰ *Id.* at 165.

⁵⁴¹ *Id.*

⁵⁴² *Id.*

The court also concluded that the rest of J.H.'s behavior was not based on Sanchez's sex.⁵⁴³ J.H. was mad at Sanchez because she was dating her ex-boyfriend, and she was mad because she thought the mother turned her in for the Facebook photos.⁵⁴⁴ J.H.'s behavior appeared to be motivated out of personal hatred for Sanchez and not based on sex.⁵⁴⁵ J.H.'s conduct was more like teasing or bullying than it was sexual harassment.⁵⁴⁶ Because harassment "on the basis of sex is the crux of a Title IX sexual harassment case and a failure to plead that element is crucial," the Fifth Circuit Court held that the district was entitled to summary judgment on the Title IX claim.⁵⁴⁷

As can be seen by the previously reviewed federal appellate court cases, each court has to take many facts into consideration when determining the liability of a school for student-on-student harassment. A further analysis of how the courts have interpreted the facts is presented in Chapter 3 of this study. However, as stated earlier in the chapter, the next section focuses on only a few district court cases that address gender nonconformity and Title IX. It should be noted that there are a number of district court cases that have been decided and reviewed.⁵⁴⁸ These cases were not utilized in this study because these

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 166.

⁵⁴⁸ *Mosley v. Beaumont Independent School District*, S.W.2d 934 (1999); *Manfredi v. Mount Vernon Board of Education*, 94 F. Supp. 2d 447 (2000); *Vaird v. School District of Philadelphia*, 2000 WL 576441 (2000); *Clark v. Bibb County BOE*, 174 F. Supp. 2d 1369 (2001); *Johnson v. Independent School District No. 47*, 194 F. Supp. 2d 939 (2001); *Benjamin v. Metropolitan School District*, CAUSE NO. IP00-0891-C-T (2002); *Burwell v. Pekin Community High School*, 213 F. Supp. 2d 917 (2002); *Schroeder v. Maumee BOE*, 296 F. Supp. 2d 869 (2003); *Doe v. Bellefonte Area School District*, No. 4:CV-02-1463 (2003); *Soriano v. City of New York BOE*, 01 CV 4961 (2004); *Theno v. Tonganoxie Unified School Dist. No. 464*, 394 F. Supp. 2d 1299 (2005); *Patenaude v. Salmon River Central School District*, 3:03-CV-1016 (2005); *Doe v. Southeastern Greene School District*, Civil Action No. 03-717 (2006); *Shaposhnikov v. Pacifica School District*, No. C 04-01288 SI (2006); *Drews v. Joint School District No. 393*, CASE NO. CV04-388-N-EJL (2006); *Annamaria v. Napa Valley Unified School District*, No C 03-0101 VRW

courts must turn to their circuit court of appeals for binding guidance. This was the purpose of focusing on court of appeals cases.

Relevant District Court Cases

Montgomery v. Independent School District No. 709

First, in 2000, the U.S. District Court for the District of Minnesota heard *Jesse Montgomery v. Independent School District No. 709*.⁵⁴⁹ Jesse Montgomery attended the ISD in Duluth, Minnesota, from kindergarten through 10th grade. Jesse claimed that when he attended ISD he was subject to frequent verbal and physical harassment, beginning in kindergarten and continuing into high school, when it happened daily. ISD did not dispute the fact that he was harassed. Some of the verbal harassment directed at Jesse was based

(2006); *Doe v. Derby Board of Education*, Case No. 3:04cv01452 (2006); *Ricco v. New Haven BOE*, 467 F. Supp. 2d 219 (2006); *Moore v. Marion Community BOE*, CAUSE NO. 1:04-CV-483 (2006); *Martin v. Swartz Creek Community Schools*, 419 F. Supp. 2d 967 (2006); *Bruning v. Carroll Community Schools*, 486 F. Supp. 2d 892 (2007); *Doe v. Brimfield Grade School*, 552 F. Supp. 2d 816 (2008); *Levarge v. Preston BOE*, 552 F. Supp. 2d 248 (2008); *Halvorson v. Independent School District*, 552 F. Supp. 2d 248 (2008); *Doe v. Hamden BOE*, Case No. 3:06-cv-1680 (2008); *M. v. Stamford*, CASE NO. 3:05-cv-0177 (2008); *Roe v. Gustine Unified School District*, 678 F. Supp. 2d 1008 (2009); *Brodsky v. Trumbull*, Civil No. 3:06cv1947 2009; *Doe v. Coventry*, BOE 630 F. Supp. 2d 226 (2009); *Sauerhaft v. Board of Education*, 05 Civ. 09087 (PGG) (2009); *Schaefer v. Las Cruces Public School*, 716 F. Supp. 2d 1052 (2010); *Marcum v. BOE of Bloom-Carroll*, 727 F. Supp. 2d 657 (2010); *Mary v. Pittsburgh Public Schools*, CA 9-1082 (2010); *Pratt v. Indian River School District*, 803 F. Supp. 2d 135 (2011); *Tyrrell v. Seaford Union Free School District*, 792 F. Supp. 2d 601 (2011); *Mathis v. Wayne County BOE*, 782 F. Supp. 2d 542 (2011); *Doe v. Trico Community School District*, 2012 U.S. Dist. LEXIS 48349 (S.D. Ill., Apr. 5, 2012); *Carmichael v. Galbraith*, 2012 U.S. Dist. LEXIS 138206 (N.D. Tex., Sept. 26, 2012); *Pemberton v. West Feliciana*, 2010 U.S. Dist. LEXIS 8871 (M.D. La., Jan. 29, 2010); *Doe v. BOE of Prince George's County*, 888 F. Supp. 2d 659 (2012); *Brown v. Cypress Fairbanks School District*, 2012 U.S. Dist. LEXIS 72347 (S.D. Tex., May 23, 2012); *Price v. Scranton School District*, CIVIL ACTION NO. 11-0095 (2012); *P.K. v. Caesar Rodney High School*, C.A. No. 10-cv-783 (GMS) (2012); *KF and AF v. Monroe Woodbury Central District*, 12-CV-2200 (ER) (2012); *Preston v. Hilton Central School District* 876 F. Supp. 2d 235 (2012).

⁵⁴⁹ *Jesse Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081.

upon what others perceived his sexual orientation to be. Taunts included “faggot,” “fag,” “gay boy,” “lesbian,” “femme boy,” and “bitch.”⁵⁵⁰

According to Jesse, as he moved from middle school to high school, the verbal taunts started to become physical threats. He claimed that several students punched him, kicked him, and knocked him down on the playground.⁵⁵¹ He also claimed that students pushed him down in the hallway, unzipped his backpack, and threw objects at him. When he told school officials about the harassment, the students were issued verbal reprimands. On some occasions, the threats and assaults that Jesse experienced were more sexual in nature. One student in middle school grabbed his legs, inner thighs, chest, and crotch.⁵⁵² This student also grabbed his buttocks on several occasions. The same student asked Jesse if he could see him naked after gym class. This same kind of harassment continued in high school. In choir, Jesse claimed that students in his class put their arms around him and grabbed his inner thigh and buttocks, taunting him about being gay. One student went so far as to grab his own genitalia while squeezing Jesse’s buttocks. He would even stand behind Jesse and grind his penis into Jesse’s backside. This same student pretended to rape Jesse anally. All of this took place in front of other students who laughed as they watched. Teachers did not see this take place, but Jesse did tell teachers about the incidents. The teachers’ responses to the harassment varied. They either gave a verbal reprimand, or they sent the offending student to the principal’s office.⁵⁵³

⁵⁵⁰ Claire Williams, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 J. Legal Aspects of Sport, Summer 2007, at 253, 263.

⁵⁵¹ *Jesse Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081, 1084.

⁵⁵² *Id.* at 1085.

⁵⁵³ *Id.*

Jesse stated that, over the years, he reported the harassment to school administrators, teachers, and other staff. When he was in middle school, his parents reported the harassment to the superintendent on several occasions. One way in which school officials responded to the complaints was to have Jesse visit school counselors and attend group sessions with other boys to talk about how to handle harassment.⁵⁵⁴ Discipline was applied to the offending students, but most of the discipline was no more than a verbal reprimand.

On only one occasion did students who harassed Jesse receive discipline that was more severe than merely verbal. In this particular incident, because of Jesse's repeated complaints, the school principal referred his parents and him to the school-district human resource director to determine if he had been sexually harassed. The human resource director conducted an investigation and ruled that two fellow classmates had sexually harassed him. One of the students was issued a five-day out-of-school suspension, and the other received a one-day out-of-school suspension. The school district also suspended both students from the bus for the remainder of the school year, and the students had to attend a seminar on sexual harassment. One week after the students were punished (and despite the bus suspension), one of the students was allowed to ride the bus because the father complained to the principal that it was a hardship to drive him back and forth. Once Jesse and his parents found out about the reverse in discipline, Jesse stopped riding the bus completely without notifying the school of the reason. Shortly thereafter, the Montgomerys filed suit with the U.S. District Court for the District of Minnesota, alleging that ISD had violated Jesse's rights under Title IX.

⁵⁵⁴ *Id.* at 1086.

First the court turned to the school district's arguments that the harassment Jesse experienced was not sufficiently severe and pervasive, it did not result in a denial of education opportunities, there was insufficient evidence of deliberate indifference, and the school lacked sufficient notice of the harassment to be found liable under Title IX.

With regard to whether the harassment was severe, pervasive, and objectively offensive, the court held that the "explicitly sexual acts" perpetrated by other students constituted "more than ordinary juvenile bullying and was sufficiently severe and extraordinarily frequent and pervasive."⁵⁵⁵

Regarding the district's argument that the harassment that Jesse experienced did not deny him of any educational opportunities or benefits, the court held that the activities that he was excluded from due to his fear was an exclusion of his benefits. He was afraid to use the bathroom and the lunchroom, ride the bus, and participate in intramurals, and most importantly, he transferred to another district.⁵⁵⁶

In discussing the school district's argument that Jesse had presented insufficient evidence of deliberate indifference, the court noted that he complained several times to no avail.⁵⁵⁷ The only example of a response was when the district suspended several students in response to Jesse's formal complaints. The court viewed the action to be too little in light of the harassment he endured over 10 years and was ample evidence of deliberate indifference on the part of the school district.⁵⁵⁸

⁵⁵⁵ *Id.* at 1094.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* at 1095.

⁵⁵⁸ *Id.*

Finally, in response to the school district's contention that the school lacked sufficient notice of the harassment to be found liable under Title IX, the court stated simply that the district's "actual knowledge of the harassment cannot be seriously disputed. . . . Jesse had made hundreds of complaints about the harassment to school teachers, cafeteria and playground monitors, bus drivers, principals, assistant principals, locker room attendants, counselors, and even the superintendent."⁵⁵⁹ The court found that the district did have actual knowledge and ultimately denied the district's motion for summary judgment.

*Ray v. Antioch Unified School District*⁵⁶⁰

The case of *Ray v. Antioch Unified School District*⁵⁶¹ tested the boundaries of a school district's liability for a Title IX violation under gender nonconformity harassment. Daniel Ray was an eighth-grade student at Antioch Middle School. Daniel's mother was a transgender female in the process of gender transformation. Daniel alleged that between January and February 1999, one of his classmates, Jonathon Carr, and other students repeatedly threatened and verbally abused him during the school day and school activities.⁵⁶² Daniel claimed that the harassment took place because the other students thought he was a homosexual. The students came to this conclusion because Daniel's mother was a transgender female. Daniel also alleged that the teachers and administrators at Antioch were aware of the harassment and that everyone believed he was a homosexual.

⁵⁵⁹ *Id.*

⁵⁶⁰ *Ray v. Antioch Unified School District*, 107 F. Supp. 2d 1165.

⁵⁶¹ *Id.*

⁵⁶² *Id.* at 1167.

In fact, Daniel claims that he reported the harassment by Jonathan and the other students to the Antioch administrators, who were responsible for the safety of the students.⁵⁶³ He even asked for protection from the harassment when attending school and school activities.

According to Daniel, the administration and staff at Antioch took no action to prevent the harassing conduct. Daniel also alleged that the school should have known that Jonathan was a danger because of his violent history and his attacks on others.⁵⁶⁴

On February 23, 1999, Jonathon assaulted and battered Daniel on his way home from school. Jonathan allegedly struck Daniel in the head, causing a concussion, hearing impairment in one ear, severe and permanent headaches, and severe psychological injury.⁵⁶⁵

Daniel believed that this attack and the harassment that he endured was a direct result of Antioch Unified School District's indifference to his physical safety and well-being. He also claimed that their indifference created an environment of harassment so severe and pervasive that Daniel's access to an education opportunity was affected.⁵⁶⁶

The Ray family filed a lawsuit with the U.S. District Court for the Northern District of California against Antioch Unified School District under Title IX for sex discrimination. The Ray family claimed that the school district showed deliberate indifference to their son's complaints of severe sexual perception-based harassment. The district court first had to determine whether the Rays could proceed with a Title IX claim. After reviewing the facts of the case, the court ruled:

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ Justin Wieland, *Peer-on-Peer hate Crime and Hate-Motivated Incidents Involving Children in California's Public Schools: Contemporary Issues in Prevalence, Response and Prevention*, 11 UC Davis Journal of Juvenile Law and Policy, Summer 2007, at 235, 259.

[A]lthough Ray's complaint makes no specific characterization of the harassing conduct as "sexual" in nature, it is reasonable to infer that the basis of the attacks was a perceived belief about Ray's sexuality, i.e., that Ray was harassed *on the basis of sex*. The court found no material difference between the instance in which a female student is subject to unwelcome sexual comments and advances due to her harasser's perception that she is a sexual object and the instance in which a male student is insulted and abused due to his harasser's perception of the victim's sexuality and is not distinguishable to this court.⁵⁶⁷

Once the district court decided that the school district could be held liable for Title IX sex discrimination, the court then applied the Title IX three-prong test set forth by the Supreme Court in *Davis*. In applying *Davis*, the court first turned to the issue of whether the school had responded with deliberate indifference to Daniel's report. Taking Daniel's allegations as true, the court ruled that he stated a claim. The court referred to the allegations that Daniel had informed his teachers and school officials of the harassment, threats, and intimidation and these employees acted with deliberate indifference to these known acts.⁵⁶⁸ The employees of the school had taken no apparent action to curtail the harassing conduct, even though they knew that Carr presented a specific threat to Daniel's safety.⁵⁶⁹

The court next examined whether the school had actual knowledge of the sexual harassment. Because Daniel informed his teachers and school officials of the harassment, the court had no problem holding that Daniel had met this burden on the face of the complaint.⁵⁷⁰

⁵⁶⁷ *Ray v. Antioch Unified School District*, 107 F. Supp. 2d 1165, 1170.

⁵⁶⁸ *Id.* at 1169-1170.

⁵⁶⁹ *Id.* at 1170.

⁵⁷⁰ *Id.*

With regard to whether the sexual harassment was severe, pervasive, and objectively offensive, the court concluded that such harassment had occurred. Accepting all of the allegations by Daniel as true, the court could infer that the harassing conduct was severe, pervasive, and objectively offensive.⁵⁷¹

Finally, the court turned to the issue of whether the harassment had deprived access to the educational benefits or opportunities provided by the school. Again, accepting the allegations as true that Daniel was afraid for his safety and well-being, it could be concluded that he was denied access to his educational opportunities and benefits.⁵⁷²

*Snelling v. Fall Mountain Regional School District*⁵⁷³

Another case regarding sexual orientation and perceived sexual orientation harassment and bullying took place also in 2001. The case was *Snelling v. Fall Mountain Regional School District*.⁵⁷⁴ Derek Snelling began his freshman year at Fall Mountain Regional High School in 1994. Before trying out for the basketball team, Derek had heard a rumor that the coaches preferred to play students from Walpole and not from Charlestown, which was Derek's hometown. Derek made the team, but he soon realized that the students from Walpole made friends with each other exclusively and admittedly did not like Derek for reasons he did not know.

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ *Joel Snelling and Derek Snelling v. Fall Mountain Regional School District, et al.*, No. Civ. 99-448, 2001 U.S. Dist. LEXIS 3591, at *1 (DNH March, 21, 2001).

⁵⁷⁴ *Id.*

The first incident of harassment occurred on November 16, 1994. After practice that day, Derek was the only person who took a shower. The next day, the players from Walpole approached Derek at school and said, “How are you, Stiffy? I saw you in the showers last night with another guy, and you had a stiffy.”⁵⁷⁵ From this point forward, Derek was called “Stiffy” by his teammates, and they even began to call him “fag,” “Jew boy,” and “homo.”⁵⁷⁶ Derek was even confronted by team members asking him why he was dating a girl and suggested he was just trying to cover up his sexual preference.

According to Derek, it was more than just the students harassing him; he also claimed that the coaches treated him unfairly. In one incident at an away game, as Derek came off the court and passed the coach, the coach grabbed him by the shirt, swung him around, and shouted at him never to run by again. The coaches also allowed teammates to be unnecessarily rough with Derek during practices.⁵⁷⁷

Joel Snelling, Derek’s younger brother, entered Fall Mountain Regional High School in the fall of 1995. By this time, it was more than the basketball players harassing Derek. The whole school had caught on and was also verbally harassing Derek. Joel did not experience much harassment at first, but eventually the other students began to call him “Little Stiffy” and “fag boy.”⁵⁷⁸ Joel joined the basketball team as well, and he began to experience the same unfair treatment from the coaches as his brother had. One instance of

⁵⁷⁵ *Id.*

⁵⁷⁶ Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 Colum. Human Rights L. Rev., Fall 2005, at 189, 228.

⁵⁷⁷ *Joel Snelling and Derek Snelling v. Fall Mountain Regional School District, et al.*, No. Civ. 99-448, 2001 U.S. Dist. LEXIS 3591, at *5 (DNH March, 21, 2001).

⁵⁷⁸ Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 Colum. Human Rights L. Rev., Fall 2005, at 189, 228.

this treatment was when Derek and Joel brought weight vests to wear during practice to improve their jumping ability. One of the coaches made a comment that Derek could take his “bra” off faster than Joel could, referring to the weight vest.⁵⁷⁹ Derek had informed the principal in the past about the harassment, but no action had been taken. After this incident, he decided to speak to the assistant principal. The assistant principal had Derek file a sexual harassment complaint against the coach. During an investigation, the coach denied making the “bra” comments, and several players backed up the coach’s story. After the investigation, the assistant principal informed Derek that no action could be taken against the coach because they could not prove Derek’s claims.⁵⁸⁰

The verbal abuse escalated after Derek made the sexual harassment complaint against the coach. Eventually, Mr. and Mrs. Snelling met with the superintendent of the school district in March 1997. After the meeting, the school district lawyer drafted a letter for the Snellings, outlining the course of action the district planned to take based upon their complaints. In this letter, the Snellings were told that the basketball coaches would not be rehired next year and that the assistant principal, principal, and athletic director had been informed of the district’s sexual harassment policy and that they were responsible for the safety and proper treatment of the children.⁵⁸¹

The harassment still continued even after the meeting with the superintendent and school lawyer. The boys were still harassed at school, basketball practice, and basketball games. Due to the persistent and pervasive harassment, the boys claimed that their grades

⁵⁷⁹ *Joel Snelling and Derek Snelling v. Fall Mountain Regional School District, et al.*, No. Civ. 99-448, 2001 U.S. Dist. LEXIS 3591, at *6 (DNH March, 21, 2001).

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

suffered and that they had experienced emotional and physical distress. The Snellings decided to file suit against the Fall Mountain Regional School District with the U.S. District Court for the District of New Hampshire, alleging a violation of Title IX.

In the court's analysis, the court determined that the harassment was widespread and that some of the harassment came from coaches; however, a trial-worthy issue remained as to whether the harassment was sufficiently severe, pervasive, and objectively offensive to be actionable under Title IX.⁵⁸²

Moving to the questions of actual knowledge and deliberate indifference, the court recognized that the Supreme Court left no clear indication of which school officials must receive notice on behalf of the funding recipient to constitute actual notice.⁵⁸³ The court decided to follow the persuasive authority of other jurisdictions and held that "if an official has authority to take corrective action and is sufficiently high in the school's command chain, his official actions constitute an official action by the funding recipient."⁵⁸⁴ Because the district did not claim that those who received notice of the alleged harassment lacked authority to act on its behalf, the court found that the question of notice also remained a trial-worthy issue.

Next, the court determined whether the districts response to the harassment was clearly unreasonable. The district asserted that the Snellings' meeting with the superintendent in March 1997 constituted its initial notice of the harassment, and the court accepted the Snellings' reliance on the notice given to the school principal in the spring of

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

1996. Because nothing was done when the principal received the report of harassment, the court concluded that the district's lack of response demonstrated deliberate indifference to the harassment Derek experienced.⁵⁸⁵ The court determined that a trial-worthy issue also remained regarding deliberate indifference.

⁵⁸⁵ *Id.*

CHAPTER 3

DESCRIPTIVE LEGAL ANALYSIS

In order to provide school district leaders with a relevant legal history of student-on-student sexual harassment, a descriptive legal analysis was employed for this study. Research included an extensive search for relevant sources of law, including federal regulations, case law, related law review articles, scholarly publications, and other documents. Legal opinions of student-on-student sexual harassment cases were also studied and considered. Using deductive analysis and triangulation, these sources were reviewed, analyzed, and synthesized to construct a historical perspective on the development of school district liability for student-on-student sexual harassment. The most up-to-date legal issues were considered with the purpose of formulating a recommendation to school district leaders. By employing an exhaustive examination of all relevant information, the conclusions used to prepare these recommendations are designed to be fully informed and topically definitive.

Utilizing these methods, it was discovered that since the *Davis* ruling the federal circuit courts have reviewed multiple student-on-student sexual harassment cases. How the federal circuits have defined and applied each of these standards has varied. The following analysis brings forth the federal circuit courts' application of the *Davis* test prongs and some indication of how each of these circuits is interpreting when a school district can be liable for a Title IX violation for student-on-student sexual harassment.

Severe, Pervasive, and Objectively Offensive and Deprivation
of Educational Opportunities/Benefits

The first prong of the *Davis* test requires student-on-student sexual harassment to be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁵⁸⁶ In analyzing the case law from Chapter 2, the Sixth, Seventh and Tenth Circuit Courts defined a threshold that makes sexual harassment into actionable harassment under Title IX.

The Seventh Circuit Court, in *Adusumilli v. Illinois Institute of Technology*,⁵⁸⁷ stated that actionable conduct must be “severe and repeated . . . and must have a systemic effect on the student.”⁵⁸⁸ The student in this case did not experience severe and repeated harassment that had a systemic effect on her; therefore, it did not satisfy the first prong.

In *Adusumilli*, a Title IX suit was brought against the university by a student for being subjected to sexual harassment on 12 separate occasions by four professors and six students.⁵⁸⁹ Although the court described most of the incidents as “ogling” and “unwanted touching,” there were two incidents in which the harassers touched her breast.⁵⁹⁰ Only 2 of the 12 incidents were reported to school officials by the student.⁵⁹¹ Because the student did not report all the incidents, the Seventh Circuit Court declined to address whether or not the nonreported incidents were severe.⁵⁹² The incidents that were analyzed based on the *Davis*

⁵⁸⁶ *Davis*, 526 U.S. at 650.

⁵⁸⁷ 1999 U.S. App. LEXIS 17954, at *4.

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.* at *1.

⁵⁹⁰ *Id.* at *2.

⁵⁹¹ *Id.*

⁵⁹² *Id.*

severity prong were the touching of her shoulder by one student and the touching of her breast by another student.⁵⁹³

In the court's analysis, it was found that the two reported incidents were each single occurrences and they were not severe and did not invade the student's educational experience.⁵⁹⁴ Because there were no incidents that took place after the report, the effect of the harassment stopped, and there was no action the school needed to take.⁵⁹⁵

Analyzing the Seventh Circuit Court's interpretation of the *Davis* severity prong, once a report of the harassment is made, there must be more than one occurrence of sexual harassment, by the same person, for the harassment to be "severe and repeated" enough to cause a "systemic effect."⁵⁹⁶

The federal circuit courts that have found student-on-student sexual harassment to be severe and pervasive enough to satisfy this prong of the *Davis* test are the Sixth and Tenth Circuit Courts. In the Sixth Circuit Court case, *Vance v. Spencer County Public School District*, a student, Alma McGowen, reported physical and verbal sexual harassment over several years.⁵⁹⁷ It was alleged that she had been stabbed in the hand, on one occasion had been held by several classmates as others tried to rip off her clothes, and had been subjected to continuous verbal sexual comments.⁵⁹⁸ This all took place after a complaint had been filed with the school's Title IX coordinator.⁵⁹⁹ After the harassment was reported

⁵⁹³ *Id.* at *4.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.*

⁵⁹⁹ 231 F.3d 253 (6th Cir. 2000).

to the school official, no investigation took place.⁶⁰⁰ The only action taken was a discussion with the perpetrators, which proved ineffective.⁶⁰¹ In fact, the harassment usually escalated after the discussions.⁶⁰²

In the Tenth Circuit Court's case, *Murrell v. School District No. 1*, a developmentally and physically disabled student, Penelope Jones, experienced extensive sexual harassment over the course of a month, including sexual assault and battery.⁶⁰³ The mother of the harassing student had warned the school of her son's sexually aggressive tendencies.⁶⁰⁴ After the teachers were warned of this behavior, they discovered that he was engaging in sexually aggressive behavior toward Penelope. Even with the knowledge of the harassing student behavior, the school allowed him to act as a janitor's assistant, which granted him access to unsupervised areas of the school.⁶⁰⁵ While acting as the janitor's assistant, he took Penelope to a secluded area in the school and sexually assaulted her.⁶⁰⁶ The harassment took a toll on Penelope, and she became self-destructive and suicidal and entered a psychiatric hospital.⁶⁰⁷ After some time in the hospital, Penelope did return back to school. It was only one day before she was battered by the same harassing student and made fun of by the other students who knew about the earlier sexual attacks.⁶⁰⁸

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* at 256. The court seems to imply that the lack of reaction may have stemmed from one of the perpetrators being a school board member's son.

⁶⁰² *Id.*

⁶⁰³ 186 F.3d 1238, 1243 (10th Cir. 1999) (construing the facts as true to review the lower court's granting of a motion to dismiss).

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.* at 1244.

Similar to facts in *Davis*, those in *Vance* and *Murrell* had patterns of increasing sexual harassment committed by the same person. The harassment that these students endured ended in a serious concrete physical effect on the victims. The concrete effects that the students endured are as follows: In *Davis*, Lashonda's grades had dropped and she had written a suicide note.⁶⁰⁹ In *Vance*, Alma had to complete her schoolwork at home after being diagnosed with depression;⁶¹⁰ and in *Murrell*, Penelope suffered self-destructive and suicidal tendencies that eventually caused her to stay in a psychiatric hospital.⁶¹¹ In these cases, neither the Sixth nor the Tenth Circuit Courts had difficulty identifying them as severe.⁶¹²

Several conclusions can be drawn from these cases. First, single incidents of minor student misconduct, such as name-calling, ogling and unwanted touching, are unlikely to be seen as having a systemic effect on its victim.⁶¹³ These types of actions are also less likely to be considered severe, pervasive and objectively offensive. Finally, if the harassing student misconduct stops as soon as it happens and is not repeated, it is not likely to be

⁶⁰⁹ 526 U.S. 629, 634 (1999).

⁶¹⁰ 231 F.3d 253, 257 (6th Cir. 2000).

⁶¹¹ 186 F.3d at 1244.

⁶¹² See 186 F.3d at 1244. The court analyzed whether the harassment inflicted upon Ms. Jones was sufficiently "severe, pervasive, and objectively offensive" to satisfy *Davis*. Ms. Murrell had alleged that over the course of about a month, Mr. Doe repeatedly took Ms. Jones to a secluded area and battered, undressed, and sexually assaulted her. Although Mr. Doe's behavior did not last as long as the harassment in *Davis*, it is easily concluded that Ms. Murrell had alleged wrongdoing "sufficiently severe, pervasive, and objectively offensive" to state a claim. See 231 F.3d 253 (6th Cir. 2000). The court determined that Alma submitted abundant evidence of both verbal and physical sexual harassment. Although one incident can satisfy a claim, Alma presented several instances that reflect not only severity and pervasiveness but also circumstances that effectively denied her education.

⁶¹³ *Adusumilli*, 1999 WL 528169; *Sanchez v. Carrollton-Farmers Branch School District*, 647 F.3d 156 (2011).

considered the type of pervasive and offensive harassment that is actionable under Title IX.⁶¹⁴

On the other hand, if a student is battered, undressed, and/or sexually assaulted, a court is likely to find that he/she has been subject to severe, pervasive and objectively offensive harassment.⁶¹⁵ If a student is constantly subjected to threats, insults, taunts, and abuse during the school day and during activities, especially if such harassment ends in an assault and battery, a court is likely to find the harassment as severe, pervasive, and objectively offensive.⁶¹⁶ There is no clear line that exists between harassment and merely unpleasant conduct.⁶¹⁷ Absent extreme severity or egregiousness, simple teasing, offhand comments, and isolated comments are not likely to give rise to an actionable claim for Title IX harassment.⁶¹⁸

Davis also requires that the victim demonstrate that the sexual harassment they experienced denied him or her access to educational opportunity. The cases analyzed revealed that the victim is not required to show physical exclusion to demonstrate that

⁶¹⁴ *Id.*

⁶¹⁵ See *Murrell*, 186 F. 3d at 1248; see also *Soper*, 195 F.3d at 855d 67. (The court assumed that one incident of rape subjected the minor to severe, pervasive, and objectively offensive harassment.)

⁶¹⁶ *Ray*, 107 F. Supp.2d at 1171; see also *Murrell*, 186 F.3d at 1244 (stating that the student left school, engaged in self-destructive and suicidal behavior, and entered a psychiatric hospital; see *Snelling v. Fall Mountain Regional School District*, 2001 DNH 57. (Evidence showed they suffered widespread peer harassment; a jury could reasonably conclude that it went far beyond mere teasing and was sufficiently severe, pervasive, and objectively offensive to be actionable under Title IX.) See also *Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081 (in which sexual favors and verbal conduct of a sexual nature were aimed at the victim).

⁶¹⁷ Anne-Marie Harris and Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 9 Am. U.L. Gender, Soc. Pol'y & L., 575, supra note 839 at 1325 (2000).

⁶¹⁸ See *Gabrielle v. Park Forest*, 315 F. 3d 1279. (Most of the conduct the girl complained about was so vague that it did not provide a basis to determine whether that conduct was severe, pervasive, and objectively offensive harassment.). See *Rost v. Steamboat Springs*, 511 F.3d 1114 (the complaints by the student that the boys were “bothering” her do not meet the level of sexual harassment).

he/she has been deprived of those opportunities.⁶¹⁹ This requirement confirms congressional intent that Congress stated explicitly that no one shall be subjected to discrimination in a federally funded educational program.⁶²⁰ It also finds support in the fact that Congress, in enacting Title IX, made no reference to a requirement that sexual harassment, as a form of sex discrimination, is actionable only when it results in a lack of participation in, or a denial of, benefits of a federally funded program. In light of this finding, courts still require that a victim show that sexual harassment has, at a minimum, undermined and detracted from his or her educational experience to the extent that the victim is effectively denied equal access to educational opportunities.⁶²¹

If a student becomes a danger to him/herself, must be hospitalized, is suspended for reporting harassment, is raped and/or sexually abused and harassed, or is placed into a home-schooling environment because of the sexual harassment, a court is likely to find that the student has been deprived of an educational opportunity.⁶²² When the harassment renders its victim afraid to take advantage of even the most basic of educational opportunities, a deprivation is most likely to be found. For example, if a student claims that the harassment is so severe, pervasive, and objectively offensive that he/she is afraid to use the bathroom, avoids eating in the cafeteria, avoids the school bus, and does not participate in extracurricular activities, a court is likely to find that he/she has been deprived access to

⁶¹⁹ *Ray*, 107 F.Supp.2d at 1171; see, e.g. *Bodensteiner*, supra note 1 at 38-39.

⁶²⁰ See 20 U.S.C.A. § 1681; see also *Safier*, supra note 839, at 1326.

⁶²¹ *Ray*, 107 F. Supp.2d at 1171.

⁶²² See, e.g., *Murrell*, 186 F.3d at 1248-49 (reporting harassment); *Soper*, 195 F.3d at 855 (discussing rape and sexual abuse and harassment); *Vance*, 231 F. 3d at 259 (involving a victim of harassment that resulted in her being home schooled).

educational opportunities protected by Title IX.⁶²³ Being diagnosed with depression may also demonstrate the deprivation of an educational opportunity, as demonstrated in *Vance*.

Actual Notice

For a school district to be found liable for a Title IX student-on-student sexual harassment claim, there must be actual notice to an official with the power to address the complaint. The primary question raised by *Davis* is exactly who in a school's hierarchy must have actual knowledge of the sexual harassment before a school district itself can be said to have actual knowledge of the harassment.

The Sixth and Tenth Circuit Courts have decided cases in which there was clear and ample actual notice to a high-ranking school administrator.⁶²⁴ The Eighth and Ninth Circuit Courts have ruled on cases of what constitutes actual notice when it was not clear in the facts.⁶²⁵

The Eighth and Ninth Circuit Courts decided to analyze whether or not the school district exercised substantial control over both the harasser and where the harassment occurred as another factor simultaneously analyzed with the actual-notice prong.⁶²⁶ This is unique because most of the other circuits have not taken this factor into consideration for the actual-notice prong in the *Davis* test.⁶²⁷ However, for the majority of the court in *Davis*,

⁶²³ *Montgomery*, 109 F. Supp. 2d at 1094. Jesse Montgomery, the victim in this case, eventually transferred to an entirely different school district. This contributed to the court's decision that Jesse's harassment had deprived him of an educational opportunity.

⁶²⁴ 186 F.3d 1238, 1243 (10th Cir. 1999); 231 F.3d 253 (6th Cir. 2000).

⁶²⁵ 265 F.3d 653 (8th Cir. 2001); 208 F.3d 736, 740-41 (9th Cir. 2000).

⁶²⁶ *Id.*

⁶²⁷ See F.3d 1006; 94 F. Supp. 2d 447; 315 F.3d 817; 322 F.3d 1279; 488 F.3d 67; 504 F.3d 165; 647 F.3d 156.

“deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.”⁶²⁸

The Ninth Circuit Court defined the actual-notice requirement narrowly. In the Ninth Circuit, direct reporting to an official with the authority to correct the situation has to take place. In the other circuits, the courts have grappled with the question of whether or not notice to a teacher, who, in many instances, has some control to address the behavior or can report it to an administrator, is enough to satisfy the actual-notice requirement. The Ninth Circuit’s approach is stricter, and it has determined that actual notice is an essential standard. The Ninth Circuit Court, in *Reese v. Jefferson School District No. 14J*, addressed the students who brought suit against the district but had not given actual notice to school officials who had the power to remedy the harassment.⁶²⁹ When the students brought suit, they had already graduated from school, yet they still wanted to hold the school liable for harassment experienced by a group of male peers.⁶³⁰ The Ninth Circuit Court held that, even though there was some evidence that a teacher observed the harassment, it was not sufficient to establish that actual notice had been given to an official with the power to correct the harassment.⁶³¹

⁶²⁸ 526 U.S. at 644.

⁶²⁹ 208 F.3d 736, 740-41 (9th Cir. 2000).

⁶³⁰ *Id.* at 738.

⁶³¹ *Id.* at 740.

The Eighth Circuit Court took an even narrower view of the *Davis* actual-notice prong in its analysis in *P.H. v. School District of Kansas City*.⁶³² In this case, the student sued the school district for a sexual relationship she had with a teacher over the course of two years. The Eighth Circuit Court defined actual notice as follows: “A school district must have had actual notice of a teacher’s sexual harassment of a student, and the school district must have made an official decision not to remedy the violation in order for liability to attach to the school district.”⁶³³ P.H. argued that the actual-notice standard had not yet been clearly defined and tried to make the case that in some instances teachers have the necessary control to address the harassment. The Eighth Circuit Court held that constructive notice was not acceptable under *Davis*; they held that notice must be actually given to a school official.⁶³⁴

Based on the post-*Davis* cases, one can assume that the courts do not identify exact job titles within a school district when attempting to make this determination.⁶³⁵ As one court noted, “School districts contain a number of layers below the school board: superintendents, principals, vice principals, and teachers and coaches, not to mention specialized counselors such as Title IX coordinators. Different school districts may assign different duties to these positions or even reject the traditional hierarchical structure altogether.”⁶³⁶

⁶³² 265 F.3d 653 (8th Cir. 2001).

⁶³³ *Id.* at 661.

⁶³⁴ *Id.* at 663.

⁶³⁵ See *Murrell*, 186 F.3d at 1247.

⁶³⁶ *Id.* (citing *Rosa H.*, 106 F.3d at 660).

However, a court is likely to find actual knowledge on the part of a school district when a school official who possesses the requisite control over a situation involving sexual harassment has actual knowledge of the harassment.⁶³⁷ When the highest ranking administrator, who has substantial control over students and the school environment during school hours, has actual knowledge of allegations of sexual harassment, a court imputes his/her knowledge to the school board.⁶³⁸

In a majority of the cases analyzed in which a student complains about peer sexual harassment that occurs during school hours and on school grounds, teachers possess the requisite control to take corrective action to end the discrimination.⁶³⁹ In these circumstances, teachers ordinarily maintain a sufficient level of disciplinary control over their students during school hours.⁶⁴⁰ When a student victim or parents inform teachers and school administrators of harassment based on sex, a court may find that actual knowledge did exist.⁶⁴¹ Actual notice can come in the form of a note or can be done verbally. It can also come in the form of a formal Title IX complaint.⁶⁴²

One scholar noted, “Many students and parents will not always report the incident to the most powerful official at the school, but instead are more likely to report harassment to someone at the school with whom they feel comfortable, or who has direct control over the

⁶³⁷ *Montgomery*, 109 F. Supp.2d at 1099; see also *Snelling*, 2001 WL 276975, *5; see also Kathleen A. Sullivan and Perry A. Zirkel, *Student to Student Sexual Harassment: Which Tack Will the Supreme Court Take in a See of Analysis?*, 132 West Educ. L. Rep., 609, 611 (1999).

⁶³⁸ See *Murrell*, 186 F.3d at 1247; see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274,277 (1998).

⁶³⁹ See *Murrell*, 186 F.3d at 1248; see also *Manfredi*, 94 F. Supp.2d at 453.

⁶⁴⁰ *Montgomery*, 109 F. Supp. 2d at 1099.

⁶⁴¹ *Ray*, 107 F. Supp.2d at 1169; *Montgomery*, 109 F. Supp.2d at 1099; *Vance*, 231 F.3d at 259.

⁶⁴² See, e.g., *Vance*, 231 F.3d at 529 (finding actual knowledge in cases in which a victim had verbally informed school officials of harassment and her mother had done so in writing).

classroom.”⁶⁴³ If a school district believes that the individual alleged to have actual knowledge of the harassment lacks the authority to take corrective action or to act on behalf of the school board, the school board should document this position. One district court has determined that failure to do so would create a trial-worthy issue that allows a case to survive pretrial motions to dismiss.⁶⁴⁴

Some scholars even contend that the actual-notice standard provides schools with little incentive to develop antiharassment policies and procedures and may work against those students who do report harassment.⁶⁴⁵ Some even argue that the Supreme Court’s reliance on the actual-notice standard does not make sense.⁶⁴⁶ At best, the *Davis* decision expects schools only to react to claims of student-on-student sexual harassment rather than to take preventive steps to keep them from happening. At worst, the actual-notice standard invites school districts to purposefully remain ignorant of sexual harassment in their schools.⁶⁴⁷

Those who oppose the actual-notice standard argue that students look to teachers not only for guidance but for protection from harm by other students.⁶⁴⁸ Adults have the ability

⁶⁴³ Heather D. Redmond, *Davis v. Monroe County Bd. Of Educ.*: Scant Protection for the Student Body, 18 *Law & Ineq.* 393, 414-15 (2000).

⁶⁴⁴ *Snelling*, 2001 WL 276975, *6.

⁶⁴⁵ Kristen Safier, *A Request for Congressional Action: Deconstructing the Supreme Court’s (In) Activism in Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998) and *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 68 U. Cin. L. Rev. 1309, 1323 (2000); see also *Redmond*, supra note 837, at 415 (stating that the actual-knowledge standard “fails to provide students with equal educational opportunities as promised in Title IX, especially considering that the victims in these cases are schoolchildren, who do not often report even the most severe harassment.”)

⁶⁴⁶ Fermeen Fazal, *Is Actual Notice An Actual Remedy? A Critique of Gebser v. Lago Vista Independent School District*, 36 *Hous. L. Rev.* 1047 (1999).

⁶⁴⁷ See Amy K. Graham, *Gebser v. Lago Vista Independent School District: The Supreme Court’s Determination that Children Deserve Less Protection than Adults from Sexual Harassment*, 30 *Loyola Loy. U. Chi. L.J.* 551 at supra note 84 (1999).

⁶⁴⁸ *Fazal*, supra note 841, at 1047 (citing *Davis*, 74 F.3d at 1193, rev’d, 526 U.S. 629 [1999]).

to leave the workplace to avoid sexual harassment, but students have little opportunity to leave their school.⁶⁴⁹ The harm caused by the student-on-student sexual harassment usually has a greater and longer-lasting impact on child victims. It can also institutionalize sexual harassment as normal behavior.⁶⁵⁰ By approving what some believe is an unfair standard, many argue that the Supreme Court has hindered active Title IX enforcement and has offered immunity to all school districts that claim that no one with remedial authority had knowledge of the harassment.⁶⁵¹

Those in opposition to the actual-notice standard believe that it is unreasonable to place the burden of reporting sexual harassment on the student when society recognizes that children are not prepared to make such decisions.⁶⁵² The Supreme Court's requirement that a victim of sexual harassment report the incident to a person who is in a position of authority over the harasser presents problems for the victim because he/she may have difficulty determining to whom the report should be made.⁶⁵³ For example, a third-grade victim experiencing peer sexual harassment on the playground each day may believe that the appropriate person to inform is the playground supervisor, whom she thinks has the authority to remove the student from the playground, but it is not clear that the supervisor is "an official of the recipient entity with authority to take corrective action to end the

⁶⁴⁹ *Id.*; see also *Davis*, 526 U.S. at 651-52.

⁶⁵⁰ *Davis*, 74 F.3d at 1193.

⁶⁵¹ Sara A. Peckham, *Title IX Standards in Teacher-Student Sexual Harassment: What Are We Teaching the Teachers? – Gebser v. Lago Vista Independent School District*, 32 Creighton L. Rev. 1805, 1840 (1999) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 300-301 (1998)).

⁶⁵² See *Fazan*, supra, note 579, at 1059 n.174 (citing Margo L. Ely, *Bare Majority Strips Students of Sex-Harassment Shield*, Chi Daily L. Bull., Aug. 10 1998, at 6 (noting "the inability of a minor to consent to sexual activity" is well accepted).

⁶⁵³ *Fazan*, supra, note 579, at 1057 n.163 (citing authorities for this assertion).

discrimination.”⁶⁵⁴ Consequently, it is unlikely that a victim in this situation could prevail under Title IX because the school district is likely to be viewed as having no knowledge of the harassment because the playground supervisor is not the proper authority.

Other scholars support the actual-notice standard. These supporters have argued that the actual-knowledge standard is appropriate because school districts cannot be expected to adequately respond to allegations of sexual harassment unless a high-level school official has received notice of the harassment.⁶⁵⁵ This is especially true of student-on-student, as opposed to teacher-on-student, sexual harassment because children are more prone to inappropriate behavior than adults.

Deliberate Indifference

The *Davis*-defined deliberate-indifference standard has been challenging for the courts to define. However, *Davis* defines it as acting “clearly unreasonably.”⁶⁵⁶ In two cases in which the students prevailed, the courts interpreted the phrase “deliberate indifference” as a two-step inquiry into (1) whether a school took any steps to address the complaint of sexual harassment and, if so, (2) whether the steps taken were not clearly unreasonable steps to address the complaint of sexual harassment.⁶⁵⁷

⁶⁵⁴ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (requiring that someone with authority to rectify the situation be informed of the harassment); see also *Davis*, 526 U.S. at 644 (same).

⁶⁵⁵ See *Hutchinson*, supra note 614, at 510.

⁶⁵⁶ 526 U.S. at 630.

⁶⁵⁷ See *Murrell*, 186 F.3d at 1248 (stating that the school “had actual knowledge . . . from almost the moment it began to occur, and not only refused to remedy the harassment but actively participated in concealing it”).

See *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000) (“Spencer continued to use the same ineffective methods to no acknowledged avail. Although ‘talking to the offenders’ produced no results, Spencer continued to employ this ineffective method. . . . However, the harassing conduct not only continued but also increased as a result.”).

Using this two-step inquiry, the Sixth Circuit Court granted summary judgment to the school district because the court looked to see only if the school took any remedial steps. The effectiveness or timing of the remedial steps was not taken into consideration.⁶⁵⁸ The Sixth Circuit Court, in *Soper v. Hoben*, a case in which a special-education student was raped at school and on the bus by three of her peers, ruled in favor of the school district because remedial steps were taken when they received notice.⁶⁵⁹ The majority's opinion in the *Soper* stated:

Plaintiffs have failed to present any evidence of deliberate indifference attributable to defendants. Once they did learn of the incidents, they quickly and effectively corrected the situation. Defendants immediately contacted the proper authorities, investigated the incidents themselves, installed windows in the doors of the special-education classroom, placed an aide in Harmala's classroom, and created student counseling sessions concerning how to function socially with the opposite sex.⁶⁶⁰

Another way a school can be found deliberately indifferent for sexual harassment is if they do not respond to the harassment because they fail to recognize that the harassment is based on sex. Although Title IX does not prohibit discrimination on the basis of perceived orientation, in some cases harassment based on gender identity or orientation (even perceived orientation) may occur "because of" sex and, therefore, be sexual harassment prohibited by Title IX. According to a number of federal district courts, harassment of students may constitute the type of sex discrimination prohibited by Title IX if it arises out of sex-based stereotyping or out of the student's failure to conform to

⁶⁵⁸ See, e.g., *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999).

⁶⁵⁹ 195 F.3d 845 (6th Cir. 1999).

⁶⁶⁰ *Id.* at 855.

stereotypical notions of masculinity and femininity.⁶⁶¹ In 2000, in *Ray v. Antioch Unified School District*, the U.S. District Court for the Northern District of California became one of the first to recognize that gender nonconformity harassment may be actionable under Title IX.⁶⁶² Just one month later, in *Montgomery v. Independent School District No. 709*, the U.S. District Court for the District of Minnesota did the same.⁶⁶³ There, a student brought an action based on Title IX, claiming that a variety of school district officials, including teachers, bus drivers, principals, assistant principals, playground and cafeteria monitors, locker-room attendants, school counselors, and even the school district superintendent inadequately and inconsistently responded to the bullying he suffered over many years due to his perceived sexual orientation.⁶⁶⁴ The inadequate and inconsistent response equated to deliberate indifference. In both cases, the defendants sought summary judgment on the grounds that any Title IX claims should be dismissed because Title IX did not protect individuals from discrimination based on sexual orientation or perceived sexual orientation. In both cases, the defendants' motions for summary judgment were denied.

The lessons and conclusions from these cases are as follows: when a school administrator receives a complaint concerning student-on-student sexual harassment, an investigation into the allegations must be done immediately. The term “deliberate

⁶⁶¹ *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001 WL 276975, at *4 (D.N.H. 2001) (holding that harassment based on “sex-based stereotypes of masculinity” is actionable under Title IX); *Theno v. Tonganoxie Unified School District No. 464*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (holding that plaintiff had raised a genuine issue of material fact with respect to his Title IX claim in which the evidence “reflects that plaintiff’s harassers believed that he did not conform to male stereotypes . . . i.e., that he did not act as a man should act”).

⁶⁶² 107 F. Supp. 2d 1165 (N.D. Cal. 2000).

⁶⁶³ 109 F. Supp. 2d 1081, 1093 (D. Minn. 2000).

⁶⁶⁴ *Id.*

indifference” describes an official decision by the school not to remedy the alleged sexual harassment.⁶⁶⁵ This can be somewhat misleading because school administrators do not need to eradicate the sexual harassment from their school to be free from liability under Title IX.⁶⁶⁶ As stated earlier, they must respond to known peer harassment in a manner that is not clearly unreasonable.

When a person with sufficient authority completely refuses to investigate known claims of sexual harassment, a court may find that the school responded with deliberate indifference.⁶⁶⁷ Responding to a formal complaint of harassment by suspending the offending students but failing to respond to several previous complaints of harassment by the same student might be considered tantamount to not responding at all.⁶⁶⁸ The implication is that a school’s response to claims of harassment must be considered in light of the number of complaints not addressed.⁶⁶⁹

The best example for school administrators to study is found in a previously mentioned case, *Soper v. Hoben*.⁶⁷⁰ In response to allegations of rape and sexual abuse, the school quickly and effectively corrected the situation.⁶⁷¹ The school contacted the authorities, investigated the allegations themselves, installed windows in the doors of the rooms, placed an aide in each classroom, and provided counseling to the offending

⁶⁶⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998).

⁶⁶⁶ See, e.g., *Vance*, 231 F.3d at 260.

⁶⁶⁷ See *Murrell*, 186 F.3d at 1248; see also *Manfredi*, 94 F. Supp.2d at 453; *Ray*, 107 F.Supp.2d at 1170.

⁶⁶⁸ *Montgomery*, 109 F. Supp.2d at 1095; see also *Snelling*, 2001 WL 276975, at *6-7.

⁶⁶⁹ See *Montgomery*, 109 F. Supp.2d at 1095 (stating that the school’s “single response must be considered in light of more than 10 years of constant harassment and reports to school officials of such harassment”).

⁶⁷⁰ 195 F.3d 845, 855 (6th Cir. 1999).

⁶⁷¹ *Soper*, 195 F.3d at 855.

student.⁶⁷² When the rape and sexual harassment and abuse had been confirmed, the school expelled the offending student.⁶⁷³

Soper exemplifies the type of response Title IX intends in appropriate situations. However, such an extensive response is not always required. The standard neither requires school administrators to expel every student accused of misconduct nor allows victims to choose the remedy.⁶⁷⁴

Although it is not required by *Davis*, a proactive approach to preventing sexual harassment by creating a policy of grievance procedure would offer children the protection they deserve and potentially protect school districts from liability.⁶⁷⁵ If a student utilizes the grievance procedure, and the school responds reasonably and timely to the allegations of sexual harassment, the school and district are likely to escape liability under Title IX.⁶⁷⁶ When the school knows that its responses to the harassment are inadequate, Title IX does require the school to take further reasonable action in light of the circumstances to avoid liability.⁶⁷⁷

The deliberate-indifference standard works hand-in-hand with the actual-notice standard. Requiring a school district to have actual notice of instances of sexual harassment is undoubtedly likely to have the effect of forcing students to complain repeatedly about sexual harassment, even when faced with inaction on the part of the school district.⁶⁷⁸ The

⁶⁷² *Id.*

⁶⁷³ *Id.*

⁶⁷⁴ *Vance*, 231 F.3d at 261.

⁶⁷⁵ See e.g., *Furr*, supra note 39, at 1602.

⁶⁷⁶ Accord *Snelling*, 2001 WL 276975, *5.

⁶⁷⁷ *Vance*, 231 F.3d at 262; *Doe v. E. Haven Bd. of Educ.*, 430 F. Supp. 2d 54.

⁶⁷⁸ *Safier*, supra note 839, at 1324 (citing *Adusumilli*, 191 F.3d at 455).

deliberate-indifference standard mandates concrete action against sexual harassment in every case.⁶⁷⁹ The standard is not likely to tolerate a school's use of the same ineffective methods to no acknowledged avail.⁶⁸⁰

⁶⁷⁹ See, e.g., *Montgomery*, 109 F. Supp.2d at 1095; *Phassen v. Merrill Community School District*, 668 F.3d 356 (2012).

⁶⁸⁰ *Vance*, 231 F. 3d at 262.

CHAPTER 4

FINDINGS AND CONCLUSIONS

One of the goals of this research study was to determine how the federal courts have interpreted the *Davis* decision regarding school district liability for student-on-student sexual harassment. Since *Davis*, a number of federal cases decided have addressed the ramifications of its decision. Taken together, these cases give some direction on how the courts may determine school administrator's liability for student-on-student sexual harassment.

A school district can be found liable for student-on-student sexual harassment under Title IX of the Education Amendments of 1972 if the school district has actual knowledge of the harassment and responds with deliberate indifference to the sexual harassment that is determined to be so severe, pervasive, and objectively offensive that it effectively denies its victim of an educational opportunity. Since the Supreme Court decision in *Davis v. Monroe County Bd. of Educ.*, many lower court decisions have teased out the circumstances that would trigger liability based upon the three-prong test in *Davis*.

The case law decided after *Davis* demonstrates that actual knowledge is likely to be assigned to a school district when an individual with authority to take corrective action has been notified of the sexual harassment. In most cases analyzed, this individual is the principal.

Post-*Davis* cases have also decided that once the individual has this notice, he/she is obligated to respond in a manner that is not clearly unreasonable in light of the known

circumstances. A reasonable response from that individual with the authority to take corrective action can range from a lecture to contacting the police. It is also important for school administrators to recognize whether their intervention to the harassment has proven ineffective. If the harassment is ineffective, the school is obligated to utilize another method to avoid new liability.

Regarding the requirement that the harassment be severe, pervasive, and objectively offensive, cases after *Davis* confirm that simple teasing does not usually rise to this level. Neither are one-time occurrences likely to rise to the level of actionable harassment, unless that one-time occurrence results in mental or physical abuse or hospitalization. These types of incidents are likely to constitute “severe, pervasive, and objectively offensive” harassment.

The cases analyzed also inform school administrators that it is not necessary to show physical exclusion to demonstrate that a student has been denied an educational opportunity. In the cases analyzed, being deprived an educational opportunity means more than missing a day or two of school. This is also the case with the severity requirement; simple acts of teasing or bothering are not be considered sexual harassment that denies a student access to educational opportunities. For a student to prevail, he/she must show that sexual harassment has at least undermined and detracted from his/her educational experience to the extent that he/she has been effectively denied equal access to educational opportunities.

Some scholars contend that the *Davis* standard affords little protection to the victims of student-on-student sexual harassment and does not enact Title IX’s purposes. Some

argue that the Supreme Court seems to be more concerned with the financial health of recipients of federal funds than compensating victims under a law designed to end sex discrimination in education. Others argue, “The Court, while noble in its intentions, has misplaced responsibility, which should lie with the person who is doing the harassing and not the school.”⁶⁸¹ Most importantly, the standards in *Davis* do nothing to address how schools can (and should try to) eliminate sexual harassment in the first place. This is important for the school district not only to avoid liability but, more importantly, to ensure that all students receive an equal education.

It was also the goal of this research study to analyze federal court cases and recommend to school administrators what they can do to prevent and address student-on-student sexual harassment. In light of the case law reviewed and analyzed, it is this researcher’s recommendation that all school districts utilize the following guidelines to avoid liability for student-on student harassment. All districts should:

1. Understand the requirements under Title IX related to sexual harassment.
2. Implement procedural requirements pertaining to sexual harassment.
3. Institute steps to prevent sexual harassment.⁶⁸²

⁶⁸¹ Justin Wieland, *Peer-on-Peer Hate Crime and Hate-Motivated Incidents Involving Children in California’s Public Schools: Contemporary Issues in Prevalence, Response and Prevention*, 11 UC Davis J. Juv. L. & Pol’y, Summer 2007, at 235, 259.

⁶⁸² U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 19* (2001).

Understanding Requirements under Title IX Related to Sexual Harassment

Title IX protects students from sexual harassment in a school's education programs and activities.⁶⁸³ This includes the academic, educational, extracurricular, athletic, and other programs of the school.⁶⁸⁴ These programs can take place in a school's facilities, on a school bus, at an activity sponsored by the school at another location, or elsewhere.⁶⁸⁵

If a school knows or reasonably should know about student-on-student sexual harassment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effect on the victim.⁶⁸⁶ Schools also are required, as recipients of Title IX federal funds, to publish a notice of nondiscrimination and to adopt and publish grievance procedures.⁶⁸⁷ School districts should also provide training that teaches all employees to whom they should report harassment and employees with the authority to address harassment how to respond properly.⁶⁸⁸ It is recommended by the OCR that training for employees include practical information on how to identify and report sexual harassment.⁶⁸⁹

School officials need to recognize that they might have an obligation to respond to student-on-student sexual harassment that initially occurs off school grounds and not during an education program or activity.⁶⁹⁰ In fact, it is irrelevant where the conduct occurred if

⁶⁸³ *Id.*

⁶⁸⁴ *Id.*

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.*

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.*

⁶⁸⁹ *Id.*

⁶⁹⁰ Effective Implementation of the Institutional Response Misconduct under Title IX and Related Guidance. http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf last visited April 28, 2015.

the student files a complaint with the school.⁶⁹¹ Once the school receives the complaint, it must process the complaint in accordance with its established procedures.⁶⁹² It will also be important for the school to ensure that the student who was assaulted off campus is protected from further sexual harassment or retaliation from the perpetrator and his or her peers.⁶⁹³

School administrators need to be aware that a complaint can be filed under the school's grievance procedure by harassed students or on their behalf by parents or a third party. This complaint would trigger the school to investigate promptly the incident and then take appropriate steps to resolve the situation.⁶⁹⁴ When criminal conduct is involved, school personnel must determine whether appropriate law enforcement or other authorities should be notified.⁶⁹⁵

Due to the nature of the complaint, school administrators should contact parents of students under 18 for consent before beginning an investigation.⁶⁹⁶ However, if the complainant requests that the victim remain confidential, the school should take all reasonable steps to investigate and respond to the complaint, trying to comply with the request for confidentiality.⁶⁹⁷ If the person who made the complaint insists that his/her identity remain confidential and not disclosed to the alleged perpetrator, the school should

⁶⁹¹ *Id.*

⁶⁹² *Id.*

⁶⁹³ U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 19* (2001).

⁶⁹⁴ Lou Rosen, *School Discipline Practices: A Manual for School Administrators*, School Justice Institute, 1992, pg. 67.

⁶⁹⁵ U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 19* (2001).

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.*

inform the perpetrator that his/her ability to respond may be limited.⁶⁹⁸ This would also be a good time to inform the perpetrator that Title IX prohibits retaliation and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.⁶⁹⁹

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment.⁷⁰⁰ These policy actions, combined with education and training programs, can help ensure that all students and employees recognize the nature of sexual harassment.⁷⁰¹

Implementation of Procedural Requirements Pertaining to Sexual Harassment

Any school that receives federal financial assistance must comply with the procedural requirements outlined in the Title IX. Specifically, a recipient must:

- Disseminate a notice of nondiscrimination;
- Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and
- Adopt and publish grievance procedures that provide for prompt and equitable resolution of student and employee sex discrimination complaints.⁷⁰²

⁶⁹⁸ *Id.*

⁶⁹⁹ *Id.*

⁷⁰⁰ Lou Rosen, *School Discipline Practices: A Manual for School Administrators*, School Justice Institute, 1992, pg. 67.

⁷⁰¹ *Id.*

⁷⁰² U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 19* (2001).

These requirements apply to all forms of sexual harassment and are important for preventing and effectively responding to sex discrimination.⁷⁰³ The OCR advises schools to review their current policies and procedures on sexual harassment to make sure those policies comply with the requirements.⁷⁰⁴ If deficiencies are found, it is the responsibility of the school district to implement the changes as needed.

Notice of Nondiscrimination

Title IX regulations make it mandatory that school districts each publish a notice of nondiscrimination.⁷⁰⁵ In this notice, it must be stated that the school does not discriminate on the basis of sex in its education programs and activities.⁷⁰⁶ The notice must state that questions regarding Title IX should be directed to the school's Title IX coordinator or to OCR. The Title IX coordinator's contact information should also be included in the notice. The notice must be widely distributed to all constituents. The OCR recommends that the notice be posted on school websites and at multiple locations throughout the school.⁷⁰⁷ The notice should be available and easily accessible on an ongoing basis.⁷⁰⁸

Title IX does not require school districts to adopt a policy specifically prohibiting sexual harassment or sexual violence.⁷⁰⁹ However, it is important for school districts to

⁷⁰³ *Id.*

⁷⁰⁴ *Id.*

⁷⁰⁵ *Id.*

⁷⁰⁶ Lou Rosen, *School Discipline Practices: A Manual for School Administrators*, School Justice Institute, 1992, pg. 67.

⁷⁰⁷ *Id.*

⁷⁰⁸ Lou Rosen, *School Discipline Practices: A Manual for School Administrators*, School Justice Institute, 1992, pg. 67.

⁷⁰⁹ *Id.*

know that a general policy prohibiting sex discrimination is not considered effective if students are unaware of what kind of behavior constitutes sexual harassment and that such behavior is prohibited.⁷¹⁰ To address this, the OCR recommends that the school district's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.⁷¹¹

Title IX Coordinator

Under Title IX, school districts are required to notify all students and employees of the name and contact information of each person designated to coordinate the district's compliance with Title IX.⁷¹² The coordinator's responsibilities should include overseeing Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.⁷¹³ Once a coordinator is named, the school district's duty is to make sure that the coordinator has adequate training on what constitutes sexual harassment and that he/she understands how the recipient's grievance procedures operate.⁷¹⁴

⁷¹⁰ Effective Implementation of the Institutional Response Misconduct under Title IX and Related Guidance. http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf last visited April 28, 2015.

⁷¹¹ U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 19 (2001).

⁷¹² Lou Rosen, *School Discipline Practices: A Manual for School Administrators*, School Justice Institute, 1992, pg. 67.

⁷¹³ Effective Implementation of the Institutional Response Misconduct under Title IX and Related Guidance. http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf last visited April 28, 2015.

⁷¹⁴ *Id.*

Grievance Procedures

Title IX regulations also require school districts to create and publish grievance procedures.⁷¹⁵ The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.⁷¹⁶

Grievance procedures can include informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints.⁷¹⁷ However, the OCR has warned school districts that it is not acceptable for a student who complains of harassment to be required to work out the problem directly with the harasser without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator).⁷¹⁸ School districts must also notify complainants that they have the right to end the informal process at any time and begin the formal stage of the complaint process.

Steps to Prevent Sexual Harassment

It is recommended that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available.⁷¹⁹ Schools might want to consider putting these education programs in their (a) orientation programs for new students, faculty, staff, and employees; (b) training for students who serve as

⁷¹⁵ U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 19 (2001).

⁷¹⁶ Effective Implementation of the Institutional Response Misconduct under Title IX and Related Guidance. http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf last visited April 28, 2015.

⁷¹⁷ *Id.*

⁷¹⁸ U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 19 (2001).

⁷¹⁹ *Id.*

advisors in residence halls; (c) training for student athletes and coaches; and (d) school assemblies and back-to-school nights.⁷²⁰ No matter what program a school chooses, it is important for there to be a discussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.⁷²¹

The education program that a school district uses should include information encouraging students to report incidents of sexual violence to the appropriate school official.⁷²² Schools should be aware that victims or third parties may be afraid to report an incident if they themselves have violated a school rule, such as using alcohol or drugs.⁷²³ For this reason, schools should consider whether their disciplinary policies are a deterrent for victims or other students to report of sexual violence offenses.⁷²⁴ The OCR recommends that schools let students know that their safety is first and foremost, that any other rule violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.⁷²⁵

It is also recommended that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators.⁷²⁶ It is also a good idea for school districts to include this information in

⁷²⁰ *Id.*

⁷²¹ Effective Implementation of the Institutional Response Misconduct under Title IX and Related Guidance. http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf last visited April 28, 2015.

⁷²² *Id.*

⁷²³ *Id.*

⁷²⁴ *Id.*

⁷²⁵ U.S. Department of Education Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* 19 (2001).

⁷²⁶ *Id.*

their employee handbook and any handbooks that student athletes and members of student activity groups receive.⁷²⁷ The information in these materials should let students know where and to whom they should go to if they are victims of sexual violence.⁷²⁸ These materials also should tell students and school employees what to do if they learn of an incident of sexual violence.⁷²⁹

Conclusion

Davis makes clear that peer sexual harassment is clearly sexual discrimination under Title IX and is actionable for monetary damages if school officials are knowingly indifferent to the harassment. The Supreme Court states that schools must not “clearly unreasonably” respond to students’ allegations. However, if schools decide to discipline only students who engage in this type of behavior, the problem of peer sexual harassment will never be resolved. Schools must do more than just respond to allegations; they must also attack the source of the problem. They must educate the entire school community concerning sexual harassment in order to eliminate the myths, assumptions, biases, stereotypes, and misconduct. Through proper education and effective policy, schools can successfully curb cases of sexual harassment among students. This can allow them to effectuate their goal of providing an equal education to all of their students.

⁷²⁷ *Id.*

⁷²⁸ Effective Implementation of the Institutional Response Misconduct under Title IX and Related Guidance. http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf last visited April 28, 2015.

⁷²⁹ *Id.*

DEFINITION OF TERMS

Agent: A person who is authorized to act for another (the agent's principal) through employment or by contract or apparent authority. The importance is that the agent can bind the principal by contract or create liability if he/she causes injury while in the scope of the agency. Who is an agent and what his/her authority is are often difficult and crucial factual issues.

Allegation: An unsupported assertion made, especially in a legal proceeding, by a party who expects to prove it.

Appeal: Timely resort by an unsuccessful party in a lawsuit or administrative proceeding to an appropriate superior court empowered to review a final decision on the grounds that it was based upon an erroneous application of law.

Appellant: The party who appeals to a higher court from the decision of a lower tribunal.

Appellee: One against whom an appeal is taken.

Assault: An unlawful threat or attempt to do bodily injury to another; the act of injuring or an instance of unlawfully threatening or attempting to injure another.

Battery: The unlawful and unwanted touching or striking of one person by another, with the intention of bringing about a harmful or offensive contact.

Cause of action: A claim sufficient to demand judicial attention; the facts that give rise to right of action.

Case law: The law as established by decisions of courts, especially appellate courts in published opinions.

Certiorari: A request that a higher court hear arguments that a lower court ruled improperly on some or all issues in a lawsuit. The higher court does not have to honor the request and therefore frequently “denies cert.” This is different from an appeal, which must at least be heard by the higher court, even though the court may ultimately rule against the person who filed the appeal.

Compensatory damages: Compensation for losses that can readily be proven to have occurred and for which the injured party has the right to be compensated.

Complaint: A formal statement initiating a lawsuit by specifying the facts and legal grounds for the relief sought; a formal charge, made under oath, of the commission of a crime or other such offense.

Damages: Money required to be paid as compensation for an injury or wrong.

Deliberate indifference: Ignoring a situation known to exist.

Dissenting opinion: An opinion that disagrees with the court’s disposition of the case.

En banc: By the full court.

Finding: A conclusion or decision upon a question of fact reached as a result of a judicial examination or investigation by a court, jury, or referee.

Holding: A judge’s binding decree upon a particular issue of law in a case.

Jurisdiction: A range of authority or control, especially to interpret and apply the law.

Liability: A party’s legal obligation, duty, or responsibility.

Litigation: A civil action of an adversary nature.

Majority opinion: The opinion joined by a majority of the court (generally known simply as “the opinion”).

Opinion: A court’s formal, usually written statement explaining its reasons for its decision in a case; an attorney’s formal, usually written statement giving an assessment of how the law should be or is likely to be applied in a particular situation; a piece of testimony that is not usually admissible when given by a layperson, as in contrast to an opinion given by an expert witness.

Petitioner: One who presents a petition to a court, officer, or legislative body; a plaintiff.

Plaintiff: The party bringing suit in a court of law by the filing of the complaint.

Remand: The appellate court’s return of a case to a lower court for further proceedings there.

Remedy: The means by which a right is enforced.

Right of action: The legal right to sue.

Sexual harassment: Inappropriate behavior of a sexual nature, such as repeated sexual advances or offensive remarks, that occurs usually in a workplace, school, or other institutional setting, especially by a person in authority with respect to a subordinate or a student.

Suit or lawsuit: A proceeding in a court of law brought by one party against another, especially a civil action.